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THE  
FEDERAL REPORTER.  
VOLUME 158

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CASES ARGUED AND DETERMINED  
IN THE  
CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION.

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## JUDGES

OF THE

### UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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<sup>1</sup> Resigned January 31, 1908.

<sup>2</sup> Appointed February 1, 1908.

<sup>3</sup> Died March 15, 1908.

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<sup>4</sup> Resignation accepted April 3, 1903, to take effect on qualification of successor.



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# CASES

## ARGUED AND DETERMINED

IN THE

### UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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**SHANBERG v. FIDELITY & CASUALTY CO. OF NEW YORK.**

(Circuit Court of Appeals, Eighth Circuit. November 4, 1907.)

No. 2,509.

**1. COURTS—JURISDICTION OF FEDERAL COURTS—DISTRICT OF SUIT.**

The provisions of section 1 of the federal judiciary act of March 3, 1875, c. 137, 18 Stat. 470 as amended by Act March 3, 1887, c. 373, 24 Stat. 552 and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], restricting the districts in which suit may be brought where jurisdiction is founded only on diversity of citizenship to those of which either the plaintiff or defendant is a resident, may be waived by the parties, and where, after the removal of a cause, the plaintiff appears and pleads and goes to trial without objection or motion to remand, the fact that neither party is a resident of the district does not deprive the court of jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 148.

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

**2. INSURANCE—ACCIDENT INSURANCE—WHAT CONSTITUTES ACCIDENT.**

A policy insuring against disability or death "resulting directly and independently of all other causes from bodily injuries sustained through external violent and accidental means" does not render the insurer liable for the death of the insured from rupture of the heart, the walls of which had been weakened by what is known as "fatty degeneration," the immediate inciting cause of the rupture being either over exertion in assisting to carry a burden, or deep breathing following such exertion, neither of which was accidental.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Insurance, §§ 1177, 1178.

Accident insurance, risks and causes of loss, see note to *National Accident Society v. Dolph*, 38 C. C. A. 3.]

In Error to the Circuit Court of the United States for the Western District of Missouri.

For opinion below, see 143 Fed. 651.

J. C. Rosenberger (I. J. Ringolsky, on the brief), for plaintiff in error.

J. H. Harkless (Charles S. Crysler and Clifford Histed, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This was an action to recover upon an accident insurance policy. The action was originally brought in the state court, and removed by the defendant to the Circuit Court of the United States for the Western District of Missouri. The defendant answered in the case, the plaintiff filed her reply thereto, and the case proceeded to trial before the court and a jury. At the conclusion of the evidence, the court directed the jury to return a verdict in favor of the defendant.

While numerous errors are assigned in the record, two, only, are relied upon here: First, the court erred in entertaining jurisdiction of the case, because it affirmatively appears from the record that neither plaintiff nor defendant was, at the time the suit was brought and tried, a citizen of the state or district in which the suit was brought, the plaintiff in error being a citizen and resident of the state of Kansas, and the defendant in error being a citizen and resident of the state of New York, therefore the case was not one which could be removed into the Circuit Court; second, that the court erred in instructing the jury to return a verdict for the defendant.

The question of jurisdiction was not raised in the court below. No objection whatever to its jurisdiction was made in that court; plaintiff voluntarily appeared, filed a reply, and proceeded in the trial without objection, the question of jurisdiction being now raised for the first time in the brief of plaintiff in error filed in this court. It is insisted that the case of *Ex parte Wisner*, 203 U. S. 449,<sup>1</sup> is controlling in this case, and fully sustains the contention of the plaintiff. It must be conceded that there is a statement found in the opinion of the court in that case which tends to give color to this contention, but, to determine what was really decided, we must look at the case then before the court. In that case, Wisner, a citizen of the state of Michigan, commenced an action in the state court in the state of Missouri against Beardsley, a citizen of the state of Louisiana. Beardsley filed his petition to remove the case from the state court into the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, on the ground of diversity of citizenship, together with the bond required in such cases; an order of removal was thereupon entered by the state court; and a transcript of the record was filed in the Circuit Court. Wisner moved to remand on the ground that the Circuit Court had not acquired jurisdiction by the removal. The motion was heard and denied. Wisner then applied to the Supreme Court for leave to file a petition for mandamus, which was granted, and rules entered returnable upon a day fixed, and the case submitted on the returns to the rules. The Supreme Court held that the motion to remand to the state court should have been sustained on the ground that the Circuit Court had no jurisdiction to proceed. It will thus be seen that the Wisner Case differs materially from the case at bar, in that in that case the plaintiff took advantage of the first opportunity to raise the question of jurisdiction by presenting his motion to remand upon

<sup>1</sup> 27 Sup. Ct. 150, 51 L. Ed. 264.

that ground, whereas, in this case the plaintiff not only failed to ask that the case be remanded, but voluntarily filed her reply and proceeded to trial, thus bringing the case more nearly within the principle announced by the Supreme Court in the case of *Central Trust Company v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98. In the case last cited, the Central Trust Company, a corporation created by and existing under the laws of the state of New York, filed a bill in equity in the Circuit Court of the United States for the Western District of Virginia against the Virginia, Tennessee & Carolina Steel & Iron Company, a corporation created by and existing under the laws of the state of New Jersey. The defendant company entered a general appearance, and joined with the complainant in its prayer for the appointment of a receiver, without objection to the jurisdiction. Thereafter the Circuit Court dismissed the bill on the ground that under the act of March 3, 1887, c. 373, 24 Stat. 552, as amended by the Act of August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], it was without jurisdiction of the cause. The Supreme Court reversed the decree dismissing the bill, holding that exemptions from being sued out of the district of its domicile is a privilege which a corporation may waive, and which is waived by pleading to the merits; and, further, that the fact that neither the plaintiff nor the defendant resides in the district in which the suit is brought does not prevent the operation of the waiver. See, also, *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Bank v. Morgan*, 132 U. S. 141, 10 Sup. Ct. 37, 33 L. Ed. 282; *St. Louis & San Francisco Railway Company v. McBride*, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659; *Southern Express Company v. Todd*, 56 Fed. 104, 5 C. C. A. 432; *Memphis Savings Bank et al. v. Houchens*, 115 Fed. 96, 52 C. C. A. 176, and cases cited in note on page 192; *Shaw v. Quincy Mining Company*, 145 U. S. 444, 12 Sup. Ct. 935, 36 L. Ed. 768; *Southern Pacific Company v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942. In the two cases last cited, the right of a corporation to avail itself of the exempting clause of the acts of 1887-88 was maintained, yet in both cases the defendants appeared specially and set up the right of exemption. If the plaintiff in this case had, upon its removal from the state court, filed a motion to remand on the ground that the Circuit Court was without jurisdiction, the case would clearly come within the rule announced in the *Wisner Case*, but, not having done so, by pleading to the merits and voluntarily submitting herself to the jurisdiction of the Circuit Court, we think the objection to the jurisdiction now raised in this court for the first time comes too late.

The second assignment of error relates to the action of the court in directing a verdict for the defendant. It appears from the record that P. Shanberg, the husband of the plaintiff, who lived in Kansas City, Kan., on the 22d of March, 1904, applied for and obtained from the defendant's agent in Kansas City, Mo., an accident policy. The provisions of the policy, so far as they are material here, are as follows:

"The Fidelity and Casualty Company of New York (herein called the company), in consideration of the premises, and of the statements in the schedule of warranties hereinafter contained, which statements the assured makes on

the acceptance of this policy and warrants to be true, does hereby insure the person named and described in said schedule (and herein called the assured) for the period of one year from noon, standard time, of the day this contract is dated, (1) against disability or death resulting directly and independently of all other causes, from bodily injuries sustained through external, violent and accidental means. \* \* \* If death shall result within ninety days from said injuries, the company will pay the beneficiary hereinafter named, if surviving, five thousand dollars."

The policy also insures against disability from certain illnesses therein specified, and then provides:

"This insurance does not cover disability from disease or illness resulting from voluntary or unnecessary exposure to contagion or infection; nor any illness or illnesses other than those specified in this policy; nor any illness complicated with or resulting from a disease not specifically covered by this policy; nor any illness occasioned by or resulting from a surgical operation; nor any disease contracted within fifteen days from noon of the day this policy is issued."

It is further shown by the record that at the time of his death, which occurred January 30, 1905, the assured was the owner of two buildings in Kansas City, Kan.; that the distance between the two buildings was about three city blocks; that on the morning of the 30th of January he and the witness, Higgins, carried a cellar door, 3 feet 4 inches in width by 6 feet 9 inches in length, and weighing about 86 pounds, from one of these buildings to the other. The witness, Higgins, testified that upon arriving at their destination, and just as they had set the door down, the assured turned to him and said: "Shorty, I am tired." He then turned his head back, and a few seconds afterwards his head drew back with a quick jerky motion, his lips turned blue, he grabbed the door with both hands and fell forward on his face from the door; that witness attempted to pick him up, but found he was dead. This witness further testified that the weather was cold, with some snow on the ground; that during the time they were engaged in carrying the door from one building to the other the assured did not at any time slip or stumble; that the door did not strike the assured at any time, nor the assured strike the door; that on that morning, up to the time he died, he had suffered no wrench, slip, injury, or fall. The autopsy disclosed that the assured was suffering from what is known to the medical profession as "fatty heart" or "fatty degeneration of the heart," and that the heart was ruptured. Dr. Hailey, who conducted the examination, testified that the walls of the heart of the assured were thin and it was a feeble heart, the muscular structure being thin and degenerated, what was known as "fatty degeneration of the heart," and that straining, holding the breath, filling the chest with air, as is done by making powerful exertion, could, under the facts as disclosed by this case, cause the rupture of the heart.

The policy is one of indemnity against disability or death, resulting directly, and independently of all other causes, from bodily injuries sustained through external, violent, and accidental means, and also against disability from certain illnesses therein specified. The disease from which the assured was suffering at the time of his death was not enumerated in the policy, and, as we view the case, there was no acci-

dent in the means through which the bodily injury was effected. It would not help the matter to call the injury itself—that is, the rupture of the heart—an accident. That was the result, and not the means through which it was effected. Carrying the door, or, after putting it down, the act of filling his lungs with air by drawing a long breath, was the means by which the injury was caused. Both were done by the assured voluntarily, and in an ordinary way with no unforeseen, accidental, or involuntary movement of the body whatever. There was no stumbling, slipping, or falling; there was nothing accidental in his movements, any more than there would be in walking on the street, or passing down the steps of his house, during each of which he might have filled his lungs by drawing a long breath, and ruptured his heart. The policy does not purport to be a contract of indemnity against death or injury by all means. The cause of death must in all cases, where it is sought to recover under the provisions above quoted, result directly, and independently of all other causes, from bodily injury sustained through external, violent, and accidental means, or the event is without the scope of the contract. The degree of violence or force is not material. Had the assured, while assisting in carrying the door, lost his balance and fallen and struck upon some unforeseen object, or slipped on the ice, his death might be said to have resulted from violent or accidental means, and, assuming that there was no want of due diligence on his part, would doubtless be covered by the policy. But from the facts as disclosed by the record in this case, we do not think it can be said that the rupture of the assured's heart, and which caused his death, was in any sense the result of an accident. He engaged in carrying this door for his own convenience; he encountered no obstacle in doing so; he accomplished just what he intended to, in the way he intended to, and in the free exercise of his choice. No accident of any kind interfered with his movements, or for an instant relaxed his self-control.

Even assuming that the walls of the heart gave way under the strain to which the assured had voluntarily put it, under circumstances free from all peril or necessity, we are of opinion that the case would not come within the provisions of the policy, and therefore that the Circuit Court rightly instructed the jury to return a verdict for the defendant.

Judgment affirmed.

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McPHEE & MCGINNITY CO. v. UNION PAC. R. CO. et al.

SAYRE NEWTON LUMBER CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. November 27, 1907.)

Nos. 2,644, 2,645.

1. COURTS—FEDERAL COURT JURISDICTION—PARTY MAY WAIVE VENUE OF SUIT.

The right of a party to suit in the district of the residence of either the plaintiff or the defendant is a personal privilege which he may waive by a trial, demurrer, answer, or a general appearance without making the objection.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 810, 815.

Of right as to district in which suit may be brought, see note to *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 192.]



2. **FRANCHISE—LICENSE—CERTAIN RIGHTS WHICH CONSTITUTE RESPECTIVELY.**

A right or privilege which is essential to the performance of the general function or purpose of the grantee, and which can be given by the sovereignty alone, such as a right or privilege of a corporation to operate a commercial railroad, a street railroad, city waterworks, gasworks, and to collect tolls therefor, is a franchise.

A right or privilege not essential to the general function or purpose of the grantee, and of such a nature that a private party might grant a like right or privilege over his property, such as a revocable permission to occupy or use a portion of some public ground, highway, or street, is a license, and not a franchise.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Franchise, § 1.

For other definitions, see Words and Phrases, vol. 3, pp. 2929-2942; vol. 5, pp. 4133-4141; vol. 8, pp. 7706, 7766.]

3. **CONSTITUTIONAL LAW—CONSTITUTION—CONSTRUCTION BY FIRST LEGISLATIVE BODY PERSUASIVE.**

The interpretation given to a Constitution by the first legislative body which acts thereunder is a contemporary construction, which should be treated with great deference.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 14, 15.]

4. **SAME—SENSIBLE CONSTRUCTION PREFERRED TO IMPRACTICABLE OR UNREASONABLE ONE.**

A rational practicable interpretation of a Constitution or statute should be preferred to one which makes it impracticable or unreasonable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 9-11.]

5. **MUNICIPAL CORPORATIONS—ARTICLE XX OF CONSTITUTION OF COLORADO—CHARTER OF DENVER—POWER OF CITY COUNCIL TO GRANT REVOCABLE RIGHT OF WAY OVER STREET TO RAILROAD COMPANY.**

Article 20 of the Constitution of Colorado prohibited the city of Denver from granting any franchise relating to any street, alley, or public place, without an approving vote of the qualified taxpaying electors of the municipality.

The charter of Denver adopted pursuant to this article empowered its council to grant a revocable license or permit at any time to any street, alley, or public place in that city.

The council of the municipality granted by ordinance to the Union Pacific Railroad Company, a corporation empowered by the laws of a state to construct, maintain, and operate a railroad into and through the city, a revocable permission to lay, maintain, and operate certain spur railroad tracks upon Blake street in that city for the distance of eight blocks to enable those who should own or occupy warehouses and other business houses to be constructed upon that street to transport their commodities to and from these houses in cars. The ordinance provided that this permission was revocable at any time by the city, and that if it revoked it or any part of it the city should pay back to the railroad company such part of the amount which that company had expended, not exceeding \$67,000, in paving and sewerage the part of Blake street to which the revocation should pertain. *Held:*

The privilege thus granted was a revocable license and not a franchise. The council of Denver was not prohibited from granting it by article 20 of the Constitution of Colorado, and it was empowered to do so by section 269 of the charter of Denver, and the license was valid.

6. **SAME—ORDINANCE—WHERE DIVISIBLE, VALID PART MAY STAND THOUGH VOID PART FALLS.**

When a part of a divisible ordinance or statute is within, and another part is without, the power of the body which enacts it, the former is valid and may be enforced, although the latter is void, unless it appears from a consideration of the entire ordinance or statute that it would not have been enacted without the part which is void.

This license was to a railroad company, its successors and assigns. If the grant to the successors and assigns was void, that to the railroad company was still valid.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 36, Municipal Corporations, §§ 248-251.]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Colorado.

Henry F. May (John S. Macbeth, on the brief), for appellants.

Clayton C. Dorsey and William V. Hodges (John N. Baldwin and H. A. Lindsley, on the brief), for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. These are appeals from decrees which dismissed bills in equity brought by the appellants, who were owners of property abutting upon Blake street, between Nineteenth street and Twenty-Seventh street, in the city of Denver, to enjoin the Union Pacific Railroad Company, a corporation, from constructing railroad tracks and operating engines and cars upon that portion of the street, and to prohibit the city of Denver from permitting the railroad company to do so under an ordinance of that municipality which by its terms granted the company such permission.

The main question in the case is whether or not the city council of Denver had the power under the Constitution of the state of Colorado and the charter of the city to make this grant without the approving vote of a majority of the qualified taxpaying electors of the city. Counsel for the appellants contend that it had no such power, and while in their bill they averred that the ordinance was void (1) because it authorized the acceptance of a loan by the city contrary to certain provisions of the charter, (2) because it was not referred to the city attorney for his opinion before its passage, (3) because it was not legally advertised and delayed after its introduction and before its passage, (4) because it deprived the board of public works of its right to award the contract for the paving and sewerage of the portion of the street on which the tracks were permitted, and of its right and power to have this part of the street paved and sewered by day labor, and of its right to assess the cost thereof upon the property benefited, (5) because the title of the ordinance discloses but one subject while it treats of two, and for other reasons, yet they have waived all these objections in this court, because, if they are well founded, the city council could, and undoubtedly would, remove them by the passage of another ordinance, and they stand here upon the proposition that the grant to the railroad company was beyond the powers of the city council, and upon that alone, and they concede that, if the council had the power to make the grant, the appellants are precluded from injunctive relief, and that their only remedies are actions at law for the damages they suffer.

Counsel for the respondents first contend that the court below was without jurisdiction of the case of McPhee & McGinnity Company, because that company was a corporation of the state of Nevada, and

the Union Pacific Railroad Company was a corporation of the state of Utah, so that the suit was not brought in the district of the residence of the plaintiff or of all the defendants (Act March 3, 1875, c. 137, § 1, 18 Stat. 470 [1 U. S. Comp. St. 508]), and they cite *Greeley v. Lowe*, 155 U. S. 58, 68, 15 Sup. Ct. 24, 39 L. Ed. 69, and *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, in support of their position. But the diversity of citizenship and the amount in controversy conferred jurisdiction upon the court below, subject to the right of the respondents to a determination of their controversy in the district of the residence of the plaintiff or of the defendants. This right, however, was not, like diversity of citizenship, an indispensable prerequisite to the jurisdiction of the court, but a mere personal privilege which they might waive, and which by interposing general demurrers to the bill, which were sustained before they suggested this objection, they did waive. *Texas & Pacific Ry. Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829; *Martin v. B. & O. R. R. Co.*, 151 U. S. 673, 678, 14 Sup. Ct. 533, 38 L. Ed. 311; *Interior Cons. & Imp. Co. v. Gibney*, 160 U. S. 217, 219, 16 Sup. Ct. 272, 40 L. Ed. 401; *Toland v. Sprague*, 12 Pet. 300, 330, 9 L. Ed. 1093; *Ex parte Schollenberger*, 96 U. S. 369, 378, 24 L. Ed. 853; *Charlotte National Bank v. Morgan*, 132 U. S. 141, 145, 10 Sup. Ct. 37, 33 L. Ed. 282; *St. L. & S. F. Ry. Co. v. McBride*, 141 U. S. 127, 130, 11 Sup. Ct. 982, 35 L. Ed. 659; *Southern Express Co. v. Todd*, 56 Fed. 104, 109, 5 C. C. A. 432, 437; *Van Doren v. Pennsylvania R. Co.*, 93 Fed. 260, 35 C. C. A. 282; *Hoover & Allen Co. v. Columbia Straw Paper Co.* (C. C.) 68 Fed. 945; *Scott v. Hoover* (C. C.) 99 Fed. 247, 249; *Platt v. Massachusetts Real Estate Co.* (C. C.) 103 Fed. 705, 706; *U. S. Fidelity & Guaranty Co. v. Board of Com'rs*, 145 Fed. 144, 146, 76 C. C. A. 114, 116; *Shanberg v. Fidelity & Casualty Co.* (C. C. A.) 158 Fed. 1, filed November 4, 1907.

After discussion of this question of jurisdiction, counsel argue that the decree below should be affirmed, (a) because the tracks have been laid and a reversal would be ineffectual, (b) because the usurpation of a franchise may be remedied by an action under chapter 27, § 289, of the Civil Code of Colorado (Mills' Ann. Code), or by the writ of quo warranto only, (c) because the appellants are entitled to no injunctive relief even if the passage of the ordinance was ultra vires of the city council, and (d) because the city council was vested with the requisite authority to grant the permission in controversy and the railroad company has the right to construct and operate its railroad thereunder upon the portion of the street in controversy. As the decision of the main question in favor of the respondents will render the other legal issues they urge upon our consideration immaterial, and counsel for the appellants waive the other grounds for relief they pleaded, we will first consider the issue of law which that question presents.

On March 18, 1901, the Legislature of Colorado passed an act to submit to the qualified voters of the state an amendment to its Constitution whereby the inhabitants of the city of Denver were authorized to frame and adopt a charter for that city, and at the next general election that amendment was adopted by the electors of the state, and it is

now numbered and designated "Article 20, City and County of Denver." Sess. Laws Colo. 1901, pp. 97-102, c. 46. On March 29, 1904, the electors of Denver adopted a charter for that city pursuant to this amendment. The amendment contained this inhibition:

"No franchise relating to any street, alley or public place of the said city and county shall be granted except upon the vote of the qualified taxpaying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise."

The charter contained these provisions:

"Sec. 265. No franchise relating to any street, alley or public place of the city and county shall be granted except upon the vote of the qualified taxpaying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by the treasurer) of such submission by the applicant for said franchise."

"Sec. 269. The council may grant a license or permit at any time, in or to any street, alley or public place, provided such license or permit shall be revocable at any time, and such right to revoke shall be expressly reserved in every license or permit which may be granted hereunder."

In May, 1906, the Union Pacific Railroad Company sought to obtain at an election the right and privilege to lay tracks and to operate a railroad upon Blake street in front of the appellants' property, but its request was defeated by a majority vote of the qualified taxpaying electors of the city of Denver. In February, 1907, the city council of Denver passed, and its mayor approved, an ordinance by the terms of which the city and county of Denver granted to the railroad company, its successors and assigns, "a license and permit to construct, lay, maintain and operate certain railroad tracks" upon the part of Blake street which has been described, in the manner specified in the ordinance, in consideration that the company would pay the cost, not exceeding \$67,000, of paving this part of the street and of constructing a storm sewer and catch-basins therein. Section 8 of this ordinance provided that "said license and permit shall be revocable by the council at any time, and such right to revoke is hereby expressly reserved," and that whenever this license, or any part of it, should be revoked, the amount of money paid by the railroad company for the paving and sewerage of that part of the street to which such revocation should apply should be paid back to the company without interest, and the company should remove its tracks from and restore that part of the street to a good and serviceable condition. This railroad company had an established line of railroad through the city of Denver, and the tracks upon Blake street authorized by the ordinance were spur tracks from its main track for the benefit of parties who expected to build warehouses on vacant property abutting upon that street. The ordinance granted permission to the company to lay a track upon each side of the part of Blake street under consideration, and to lay four cross-over tracks to connect these side tracks, and provided that the company should not run engines or trains upon any of these tracks, except between 6 in the evening and 6 in the morning, without the written permission of the fire and police board. It is upon this state of the case that the question arises, did article 20 of the Constitu-

tion prohibit the grant of this revocable permission to the railroad company to use a portion of this street for railroad purposes? In other words, is a revocable permission to lay and operate a railroad track on a part of a street, granted to a company authorized by the state to maintain and operate a railroad to and through the city of Denver, a franchise, the grant of which, without the approving vote of the electors of that city, is forbidden by this article?

A franchise is a right or privilege granted by the sovereignty to one or more parties to do some act or acts which they could not perform without this grant from the sovereign power. *Bank of Augusta v. Earle*, 13 Pet. 595, 10 L. Ed. 274; *D. & S. Ry. Co. v. Denver City Ry. Co.*, 2 Colo. 673, 682. Familiar illustrations are the right to be a corporation, to hold property, to sue and be sued as such, the right to build a bridge or to operate a ferry over a public stream and to collect tolls therefor, the right to construct and operate on and in the streets of a city a street railway, waterworks, gasworks, electric light works, to supply the city and its inhabitants with transportation, water, gas, and electric lights respectively, and to take tolls therefor. In this country the title of every lawful franchise is deraigned from the nation or the state, and the city of Denver had no power to grant any franchise which the Constitution and the laws of the state of Colorado had not authorized it to give.

It is not, however, every privilege or permission granted by state or city to occupy or to use public rivers, highways, or streets that rises to the dignity of a franchise. A privilege granted by a city to a private party to occupy or use a portion of a public street temporarily for the construction of a building upon an abutting lot, for a cab stand, an apple stand, or for any similar commercial purpose is a license and not a franchise. The exact line of demarcation between franchises and licenses may not be clearly drawn, but their general characters and limits are so well known and so clearly established that it is not difficult to assign many rights granted to the class to which they belong.

A right or privilege which is essential to the performance of the general function or purpose of the grantee, and which is and can be granted by the sovereignty alone, such as the right or privilege of a corporation to operate an ordinary or commercial railroad, a street railroad, city waterworks or gasworks, and to collect tolls therefor, is a franchise. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 659, 6 Sup. Ct. 252, 29 L. Ed. 516; *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9, 19 Sup. Ct. 77, 43 L. Ed. 341; *Denver v. City Cable Co.*, 22 Colo. 565, 45 Pac. 439; *Donahue v. Morgan*, 24 Colo. 389, 390, 400, 50 Pac. 1038; *Thomas v. Grand Junction*, 13 Colo. App. 80, 81, 65 Pac. 665; *City of Denver v. Denver Union Water Co. (Colo.)* 91 Pac. 918, 919.

A right or privilege not essential to the general function or purpose of the grantee, and of such a nature that a private party might grant a like right or privilege upon his property, such as a temporary or revocable permission to occupy or use a portion of some public ground, highway, or street, is a license and not a franchise. A privi-

lege of the latter character, such as a permission to lay and operate a railroad across or for a short distance upon a public street, is a grant of an easement or right of way. An easement or right of way is not necessarily a creation of or a grant by the sovereignty. A private citizen may confer it over his own land, and the permission by a city to exercise such a privilege on one of its streets is of even less efficacy than such a private grant, because it is subject to the rights of the abutting owners, while the private owner's grant confers the perfect right of way over his property.

The Union Pacific Railroad Company was a corporation of the state of Utah to which the privilege to construct, maintain, and operate a railroad with the necessary switches, spurs, and terminal facilities into and through the city of Denver had been granted by the states of Utah and Colorado. Const. Colo. art. 15, § 4; Mills' Ann. St. §§ 599, 602; Sess. Laws Colo. 1901, p. 126, c. 53, § 1. That right was indispensable to the function and purpose of the corporation. No one but the sovereignty could grant it, and it was therefore a franchise. The city of Denver never had the power to grant or to refuse it, and it could not by any act or omission on its part prohibit or prevent the company from exercising this right. Its power was limited to the regulation and control of the streets of the city, subject to the general franchise of the corporation to operate its railroad into and through the city.

The privilege which is the subject of this litigation is limited and local, and it was not indispensable to the general object or to the performance of the main function of the Union Pacific Company. It could maintain and operate its railroad into and through the city of Denver as well without as with the right to operate its spur tracks upon Blake street, and this privilege seems to be a license rather than a franchise.

Counsel for the appellants invoke the rules that the obvious and common signification of the terms of the Constitution should be preferred to a hidden or extraordinary meaning; that a grant of power to a city should be strictly construed, and that if its existence is doubtful it should be denied. The soundness of these canons of interpretation is not denied, but the common, obvious meaning of "franchise" does not seem to be a permission by a city to use a portion of a street for railroad purposes granted to a railroad corporation empowered by the state to construct and operate its railroad into and through the city, and there is no doubt that under its general power to regulate and control the streets and the location of railroad tracks thereon the city council had plenary power to grant the permission here under consideration, unless it was forbidden so to do without a vote of the taxpaying electors by article 20 of the Constitution. The question, therefore, still recurs, is a revocable permission granted by a municipality to a railroad company empowered by a state to construct and operate its railroad into and through the city, to lay its tracks and operate its railroad along a few blocks upon a street of a city, a franchise, or a license within the meaning of this article of the Constitution, and upon the true answer to that question the entire issue turns.

Counsel for the appellants contend that the permit should be held to be a franchise, because the evil at which the constitutional inhibition was leveled was the grant of such easements or such rights of way upon the streets of the city. But there is nothing in the Constitution, in the charter, in the record, or within our knowledge of the history of the city of Denver, which indicates that the evil this clause was adopted to remedy was the grant of rights of way to ordinary railroad companies to operate their roads across or for short distances upon the streets of the city, rather than of the general privilege commonly called a "franchise," frequently granted by cities to street railway companies, water, gas, electric light, telephone, and other public utility corporations, to place and operate their rails, poles, and pipes upon or along the streets of a city and to take tolls therefor. So far as judicial notice informs, the exercise of the power to grant these general privileges without the approving vote of the electors, rather than the exercise of the authority to grant revocable rights of way to ordinary railroads upon small parts of the streets of a city, was the prime evil at which the Constitution was leveled, and that because there was more danger of a disregard of the public interests from the former than from the latter, because the framers of the constitutional amendment used the word "franchise" in this prohibition, the ordinary signification of which includes the former, but not the latter privileges, and failed to insert "license," "permission," "easement," or "right of way," and because the charter, which was framed by the representatives of and adopted by the people for whom that twentieth article of the Constitution was prepared and adopted, expressly confers upon the council of the city the power to grant the latter. Article 20 of the Constitution, and the charter of the city, were adopted in pursuance of a single plan for the sole benefit of the people of Denver. The article and charter were drawn, and their adoption was procured, the former from the electors of the state and the latter from the electors of the city by the representatives of the people of the city of Denver. As they were secured by the representatives of the same people in the execution of the same scheme, they should be read and construed together, and the provision of section 269 of the charter that the council may grant revocable licenses to use any street, alley, or public place is persuasive evidence that the people and their representatives never intended, by the prohibition of the grant of a franchise relating to any street, alley, or public place without a vote of the electors, to forbid the city council to grant licenses or permissions to use small portions of the streets of the city for railroad or other commercial purposes. The construction given to a Constitution by the first legislative body which acts thereunder is a contemporary interpretation of it which should be treated with great deference. *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727, 733, 5 Sup. Ct. 739, 28 L. Ed. 1137; *People ex rel. Livesay v. Wright*, 6 Colo. 92, 97.

The fact is repeatedly urged upon our attention that the railroad company tried and failed to get permission to lay and operate its tracks upon this street by a vote of the taxpaying electors. This circumstance, however, does not appear to determine the legal question wheth-

er or not the revocable permission subsequently obtained from the council was a prohibited franchise. It may be that counsel for the railroad company advised an election out of abundance of caution to avoid, if possible, litigation of the character now under consideration, and if, as seems to be contended, the action of the company establishes the fact that its counsel were of the opinion at the time of the election that the privilege under consideration was a franchise, they appear to be now of the opposite view, and their earlier opinion is no better evidence that their later opinion is wrong than their later opinion is that their earlier one was erroneous.

The next argument in support of the position of the appellants is that, by the legislation of the state and by the decisions of the Supreme Court of the United States and of the Supreme Court of Colorado, the settled meaning of the word "franchise" had come to include a revocable permission granted to an ordinary railroad company to lay its tracks and operate its railroad across, or for a short distance upon, a street in a city, before article 20 was framed or adopted, and they cite Sess. Laws Colo. 1889, p. 129, § 12, Sess. Laws 1893, p. 141, c. 78, § 10, Sess. Laws 1903, p. 158, c. 78, § 1, Sess. Laws 1891, p. 390, § 1, and the authorities from the Supreme Courts of the United States and of Colorado, which will be next considered. This legislation, these authorities, and many others have been carefully examined in vain to find any declaration of the Legislature of Colorado, or any decision of any court, to this effect. The grants called "franchises," in the opinions cited by appellants' counsel, were grants to public utility corporations of general rights to use the streets to provide the people of the municipalities with such utilities and to take tolls therefor. Not one of them applies that term to the mere consent of a city to the laying by an ordinary railroad company, incorporated by the state, of its tracks and the operation of its railroad over short parts of the streets of a municipality.

In *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 659, 6 Sup. Ct. 252, 29 L. Ed. 516, the grant which the Supreme Court considered was of the exclusive right to supply gas to the city of New Orleans and its inhabitants through pipes and mains laid in its streets on condition that the grantee company should render the service ordinarily required of such corporations, and it was of this right that the Supreme Court said:

"The right to dig up the streets or other public ways of New Orleans and place therein pipes and mains for the distribution of gas for public and private use is a franchise, the privilege of exercising which could only be granted by the state or by the municipal government of that city acting under legislative authority."

In *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 9, 19 Sup. Ct. 77, 43 L. Ed. 341, the Supreme Court was considering the grant to a corporation of the right to lay and to maintain and operate in the streets of a city, for 20 years, water mains and pipes to supply the city and its inhabitants with water and to take tolls therefor, in consideration that the corporation rendered the public service commonly performed by such water companies; and the court remarked that the



grant of such a right was the grant of a franchise. and that after the performance of the service it was a contract.

In *Denver v. City Cable Ry. Co.*, 22 Colo. 565, 45 Pac. 439, the right which the Supreme Court of that state termed a "franchise" was the general right granted by the city of Denver pursuant to legislative authority, to a street railway company to lay its tracks and to transport passengers on the streets of Denver and to take tolls for the carriage.

In *Donahue v. Morgan*, 24 Colo. 389, 400, 50 Pac. 1038, the franchise of which the court spoke was the right granted by the city of South Pueblo to a private corporation to lay and to maintain, for 20 years, in the streets of that city water mains and pipes, and to supply the city and its inhabitants with water and to take tolls therefor.

In *Thomas v. Grand Junction*, 13 Colo. App. 80, 81, 65 Pac. 665, the right which the court termed a "franchise" was the general right to construct and operate for 21 years a system of waterworks to supply the city and its inhabitants with water and to take tolls therefor, and to lay and maintain mains and pipes in the streets of the city for this purpose.

In *City of Denver v. Denver Union Water Co.* (Colo.) 91 Pac. 918, 919, the franchise which the Supreme Court of Colorado was considering was the general right granted by that city to a private corporation to lay its pipes and mains in the streets of the city, to maintain them, and to supply the city and its inhabitants with water and to take tolls therefor for 20 years.

These are the authorities upon which counsel for the appellants chiefly rely. The brief review of them in which we have indulged discloses the fact that the question whether or not a grant by a city of the right of way to an ordinary railroad company over a portion of one of its streets is a franchise or a license was neither considered nor decided by the courts which rendered the opinions in these cases.

On the other hand, wherever the question has been raised and directly decided, the conclusion of the courts is uniform that such a privilege is a license, and not a franchise.

In *Denver S. F. R. Co. v. Domke*, 11 Colo. 247, 250, 251, 17 Pac. 777, 778, the railroad company was the purchaser at a foreclosure sale of all the rights and privileges of the Denver Circle Railroad Company. The latter company was organized as a corporation under the laws of Colorado, and by virtue of that incorporation received from the state the right to construct and operate a railroad between any designated points therein. The city of Denver by ordinance granted to it the right to lay its rails and to operate its trains along Willow Lane and Clark street in that city, and the questions were whether or not the city had the authority to permit the use of its streets for this purpose, and whether or not the rights of the circle company had vested in the purchaser at the foreclosure sale. The Supreme Court said:

"The Legislature has delegated the exclusive control of the streets to the municipal authorities, subject only to its own paramount dominion. We think the authority of the city council to permit the construction and operation of an ordinary railroad through the street rests upon clearly implied if not express legislative sanction. This question is practically *res adjudicata*. 'It was within the contemplation of legislation that they (ordinary railroads) might

enter and pass through the city. *Railroad Co. v. Nestor*, supra; *Railroad Co. v. Mollandin*, 4 Colo. 154.' \* \* \* The ordinance before us granting a right of way to the circle road is therefore not invalid for the want of legislative authority in the premises. So far as this objection is concerned, the ordinance constitutes a valid license from the proper authorities to use a portion of the streets designated, and the circle company was not a mere trespasser ab initio. \* \* \* And it is equally clear that the Denver & Santa Fé Company, through the purchase at the receiver's sale, succeeded to the rights and interests of the circle company under the ordinance. The former company is therefore the owner of the franchise, together with the license in question."

Throughout the opinion in this case the court calls the general right derived directly from the state to lay and operate the railroad a "franchise," and the permission granted by the city to lay and operate the tracks upon the portions of its streets a "license." In many other opinions of the Supreme Court of Colorado a privilege granted by a city to an ordinary railroad company to lay and operate its railroad across or along the streets of a city is termed a "permit," a "license," an "easement," or a "right of way," but never a "franchise." *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403, 405, 415, 419, 420, 423, 15 Pac. 714; *Jackson v. Kiel*, 13 Colo. 378, 381, 22 Pac. 504, 6 L. R. A. 254, 16 Am. St. Rep. 207; *Jackson v. Ackroyd*, 15 Colo. 583, 26 Pac. 132; *People v. McMurray*, 27 Colo. 277, 281, 61 Pac. 226.

In *Chicago City Ry. Co. v. People ex rel. Allen C. Story*, 73 Ill. 541, 547, a railway company was empowered by its charter which it derived from the state to construct and maintain a railroad in a certain part of the city of Chicago over and along such streets as the common council of the city might authorize it to use. The city council by ordinance granted to it the right to construct, maintain, and operate a railway upon Indiana avenue from 22d street to the limits of the city within a certain time, and the company completed the railroad a part of the distance, but failed to finish it the entire length of the line, within the time specified. The city waived this failure, but the abutting owners insisted that the right granted by the city was a franchise, the conditions of which it could not waive, and that it was void. The court conceded that if the right was a franchise their claim was well founded, but held that it was a mere license, and hence that both the grant and the waiver were valid and in force. It said:

"But in the case at bar the grant in the ordinance is not a franchise, but a mere license, a permission to construct a railway in a certain street within a limited period. A franchise, according to the definition given by Blackstone, is a royal privilege, or branch of the king's prerogative, subsisting in the hands of the subject, and, being derived from the crown, must arise from the King's grant. 2 Blackstone, 17. Corporate franchises in the American states emanate from the government, or the sovereign power, owe their existence to a grant, or, as at common law, to prescription, which presupposes a grant, and are vested in individuals or a body politic. The grant or license given by the ordinance comes within no definition of a franchise. \* \* \* The license granted by the ordinance is no more a franchise than would be a grant of the right of way by a private citizen to the company to construct its road over his lands, and it is as competent for the city as for a private owner to extend the time of performance, or to amend, modify, or annul the contract by mutual agreement."

In *Belington & N. R. Co. v. Town of Alston*, 54 W. Va. 597, 46 S. E. 612, chapter 29, at page 82, of the Acts of that state for 1901,

provided that no franchise should be granted by the council of any city, town, or village incorporated under the laws of the state unless an application for it was filed with the proper clerk and notice of the application was published for 30 days before the grant was made. The common council of Alston had granted to the Belington & Northern Railroad Company, a right of way over certain streets in the absence of the previous filing and notice of the application, and the first question in the case was whether or not the grant of this right to use the streets was a franchise. The Supreme Court of Appeals of that state held that it was not, and said:

"An action to test the authority of a railroad company to use a public street does not involve a franchise. *Parlin v. Mills*, 11 Ill. App. 396; *Mills v. Parlin*, 106 Ill. 60. Assent by a town to use of its streets by a railroad company is no more a franchise than the grant of a right of way through his lands by a landowner. *C. C. R. Co. v. People, etc.*, 73 Ill. 541. It is an easement in corporeal property, and not a franchise. 3 Elliott on R. Roads, § 632. \* \* \* Instead of being a franchise, its right of way through the streets is an easement, and the council's assent thereto is a license or grant thereof. Hence the act referred to does not govern or have any application to the plaintiff's rights acquired from the council. No notice thereof was necessary, and the orders of the council complained of are valid."

The Supreme Court of Nebraska decided, after careful and exhaustive consideration and discussion, that a grant by a city to a corporation, which had authority from a state to maintain and operate a street railroad, of the right to lay and use its tracks on certain streets of the city, was not a franchise, but a license. *Lincoln St. Ry. Co. v. City of Lincoln*, 61 Neb. 109, 111, 129, 131, 84 N. W. 802.

In *Parlin v. Mills*, 11 Ill. App. 396, the city of Canton had granted to the defendants by ordinance the right to lay and operate a railroad on Fifth street in that city from the Chicago, Burlington & Quincy Railroad to the plow and machine shop of the grantees. An abutting owner secured a decree which enjoined the grantees from operating any railroad under this ordinance, and an appeal was taken to a court which had no jurisdiction to review cases which involved franchises, and the respondent objected to a consideration of the case upon that ground; but the court said:

"We are of the opinion that this point is not well taken. The suit is merely to enjoin the unauthorized use of the street, and not the determination of any question of title to or right of property in a franchise." Page 402.

To the same effect are *Richards v. People*, 100 Ill. 423, 425; *Mills v. Parlin*, 106 Ill. 60, 63.

In his work on Street Railway Law, at section 10, Booth says a franchise is a privilege conferred by sovereignty upon natural or artificial persons to exercise powers which they could not lawfully assume except in pursuance of such a grant. "But" he adds, "where a company is incorporated by the Legislature, which confers upon it specific power to construct, maintain, and operate a railway in a city, subject, however, to the consent of the city, and in such manner and upon such conditions as the city may impose, and the latter, by ordinance, grants the privilege of constructing and operating the railroad upon a certain street, the grant by the municipality is held to be a mere license, and not a franchise."

In *Nellis on Street Surface Railroads*, the author says, at page 55:

"The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value; such as the franchises to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. There are certain other privileges, too, which are merely licenses, and not franchises, as where a corporation has a specific power to construct, maintain, and operate a railroad in a city, subject, however, to the consent of the city, and in such manner and upon such conditions as the city may impose. If the city, by ordinance, grants the privilege of constructing and operating the railroad upon a certain street, the grant by the municipality is a mere license, and not a franchise."

To the same effect are authorities almost without number wherein these municipal grants to companies incorporated under state laws to use specific streets or parts of streets for their corporate purposes are assumed to be, and are called, "licenses," "permits," "rights of way," and "easements," but never "franchises." *Barber Asphalt Paving Co. v. City of Denver*, 72 Fed. 336, 337, 19 C. C. A. 139; *Metropolitan City Ry. Co. v. Chicago West Division Ry. Co.*, 87 Ill. 317, 322; *Lincoln Street Ry. Co. v. City of Lincoln*, 61 Neb. 109, 126, 84 N. W. 802, 807; *Crowder v. Town of Sullivan*, 128 Ind. 486, 28 N. E. 94, 13 L. R. A. 647; *People ex rel. v. Ft. Wayne & E. Ry. Co.*, 92 Mich. 522, 52 N. W. 1010, 16 L. R. A. 752; *Hayes v. Michigan Central R. R. Co.*, 111 U. S. 228, 229, 4 Sup. Ct. 369, 28 L. Ed. 410; *East Alabama Ry. Co. v. Doe*, 114 U. S. 340, 5 Sup. Ct. 869, 29 L. Ed. 136; *Mayor of Knoxville v. Africa*, 77 Fed. 501, 507, 23 C. C. A. 252, 258; *Detroit Citizens' Street Ry. Co. v. City of Detroit*, 64 Fed. 628, 633, 643, 12 C. C. A. 365, 370, 380; *City of Detroit v. Detroit City Ry. Co. (C. C.)* 56 Fed. 867, 874; *Linden Land Co. v. Milwaukee Elec. Ry. & Light Co.*, 107 Wis. 493, 83 N. W. 851.

In the light of these authorities, there is no escape from the conclusion that by the consensus of judicial opinion at the time article 20 was framed and adopted, and ever since, a grant by a municipality to an ordinary railroad company incorporated under and empowered to operate by the laws of a state of the right or privilege of laying, maintaining, and operating its railway across or upon certain streets, or parts of streets, of a city, was and is the grant of a license, and not of a franchise.

There is a canon of construction which cogently argues that it was in this sense, in the sense which excludes such a grant or privilege, that the word "franchise" was intended to be used, and was used, in the prohibitory clause of this article. It is that a rational, sensible, and practical interpretation of a Constitution, statute, or contract should be preferred to one which is unreasonable, absurd, or impracticable. *U. S. v. Ninety-Nine Diamonds*, 139 Fed. 961, 965, 72 C. C. A. 9, 13, 2 L. R. A. (N. S.) 185; *Stevens v. Nave-McCord Mer. Co.*, 150 Fed. 71, 75, 80 C. C. A. 25, 29; *American Bonding Co. v. Pueblo Investment Co.*, 150 Fed. 17, 27, 80 C. C. A. 97, 107. The city of Denver is a large and growing metropolis. Many lines of railroad bear to it and carry from it numberless articles of commerce. As this city

increases in wealth, population, and business, new warehouses, new industrial plants, new business buildings of various kinds, will necessarily be constructed upon streets and alleys not now reached by existing railroad tracks, and the wise, economical, and successful handling of this commerce will demand that railroads be extended from their present lines across and along portions of its streets so that cars may be drawn to the sites of these buildings, to be there loaded and unloaded with various articles of commerce. The increasing business of the railroads will demand more extensive yards and terminal facilities and more railroad tracks. If every permission to lay and operate a railroad track across or upon any part of a street or alley were a franchise, then, before any permission to lay and to maintain it could be obtained, the cost of a submission to a vote of the taxpaying electors of a request for it would be required by article 20, to be deposited with the city treasurer, and a vote of the electors upon the proposition would be indispensable to the grant of the permission. A construction which would require this course of proceeding would make the prohibition of article 20 unreasonable, impractical, and contrary to the public policy of every prosperous city, because it would seriously retard the growth and gravely impair the ability of such a city to transact the commercial business of the country about it. It was not, it could not have been, the intention of the framers of this constitutional provision, or of the electors who adopted it, to place such a handicap upon the city of Denver, for whose benefit this amendment was adopted. The sum of the whole matter is that the common, obvious signification of the word "franchise," the rational, practical interpretation of the clause in which it appears, the contemporary construction of that clause by the representatives of the people and by the people themselves for whose benefit article 20 was framed and enacted, and the uniform current of judicial opinion, lead alike to the conclusion which the court below reached, and which this court now advisedly affirms, that a revocable permission granted by the city council of Denver to an ordinary railroad company to lay its tracks and operate its railroad across or upon parts of the streets or alleys of that city was never intended to be, and never was, prohibited by this amendment to the Constitution of Colorado.

But counsel for the appellants further contend that this license was beyond the powers of the city council, because, though revocable by its terms, it was so incumbered by conditions that it will never be recalled. The answer is that the authority of the city to grant licenses of this character was not limited by the charter to those which would be revoked in fact within a limited time, or at any time, but to those which the city would have the power to revoke, and that, while the prophetic vision to see when this license will be recalled has not been given, neither has the power to foresee that it will not be revoked been granted to the court, so that its judgment may not be founded upon either prophecy.

Again, the power conferred upon the city council by section 269 of the charter to grant licenses of this character was not limited to the granting of licenses unconditionally revocable, but it extended by

its terms to the granting of all revocable licenses, those revocable upon conditions as well as those revocable without conditions. Moreover, there is no impossible or impracticable condition imposed upon the recall of this license. It is doubtful whether or not its revocation is subject to any condition whatever, so doubtful that, if the alleged condition would render the license void, it would be the duty of the courts to hold that it might be revoked unconditionally. The performance of the alleged condition is neither impossible nor impracticable. It is that the city, upon the recall of the license, or any part of it, shall repay to the railroad company the amount it has expended, not exceeding \$67,000 in paving and sewerage the part of the street which the revocation affects. Sixty-seven thousand dollars is not a large amount of money for a city of the wealth and population of Denver to provide and to pay, and the terms of the ordinance are such that it may revoke and pay in installments, and at times to be chosen and specified by the city itself. If this be a condition, it is neither impracticable nor burdensome, and the result is that the charter empowered the city council to grant revocable licenses to any street, alley, or public place in the municipality. This license is revocable, and its grant was within the powers of the council.

The suggestion that the license was unauthorized because the permitted tracks were not for public, but for private, use, cannot prevail. In a sense every spur track to a private warehouse, manufacturing or trading establishment, is for the private use of those who own and conduct the business therein. But in a larger sense, and in the true sense, every such railroad track is for the public use and for the public benefit, because it enables the public to exchange its commodities for those of the parties who conduct their business upon the track in a more facile and economical way. It reduces the prices of the articles carried to the consumers, and it increases commerce.

The grant is to the railroad company, its successors and assigns, and counsel insist that every license must be personal and unassignable, and that, as this is not so, it is unauthorized and void. But the city council had power to grant this license to the Union Pacific Railroad Company, and, if it was without authority to confer it upon its successors and assigns, the result is that the latter portion of the grant falls and the former stands. The grant to the successors and assigns was for their benefit, and not for the benefit of the city, or of the appellants, and the latter cannot object if the former waive or fail to enforce this portion of the ordinance. When a part of a divisible grant, license, or contract is within, and another part is without the power of one or more of the parties to it, the former is valid and may be enforced, and the latter void and may be renounced, unless it appears from a consideration of the entire grant, license, or contract that it would not have been made independently of the part which is void. *Illinois Trust & Savings Bank v. City of Arkansas City*, 76 Fed. 271, 280, 22 C. C. A. 171, 179, 34 L. R. A. 518; *Oregon Steam Navigation Co. v. Winsor*, 20 Wall. 64, 70, 22 L. Ed. 315; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362, 395, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Western Union Tel. Co. v. Burlington & S. W. Ry. Co.* (C. C.)

11 Fed. 1, 4, and cases cited in note page 12; *Saginaw Gas Light Co. v. City of Saginaw* (C. C.) 28 Fed. 529, 540; 2 *Abbott on Municipal Corporations*, p. 1379. This court is not called upon at this time to consider or decide what rights the successors or assigns of the railroad company, if there ever are such, will acquire under this grant, for the license is still in the original licensee, and it is valid while the railroad company holds it, whether it may become void or remain valid when some possible future attempt to assign it shall be made.

The reasons urged with force and ability by counsel for the appellants why the grant of the right of way under consideration should be held to be unauthorized and void have now been discussed and considered, and our conclusion is that the word "franchise" does not include within its true signification a revocable permission granted by a city to a company, incorporated and empowered to perform its corporate functions by a state, to use for its purposes certain streets or parts of streets in the municipality, that such a permission is a license and not a franchise, that the permission granted by the city council of Denver to the *Union Pacific Railroad Company* to lay tracks and to operate engines and cars upon Blake street in that city for the distance of eight blocks was a revocable license and not a franchise, that the council was not forbidden to grant it without the approving vote of the qualified taxpaying electors of the city by article 20 of the Constitution of Colorado, but that it was empowered to make the grant by section 269 of the charter of the city, and the decree below is accordingly affirmed.

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UNITED STATES v. UTE COAL & COKE CO. et al.

(Circuit Court of Appeals, Eighth Circuit, December 27, 1907.)

No. 2,622.

1. TROVER AND CONVERSION—ACTION FOR TRESPASS AND CONVERSION IDENTICAL WITH ACTION FOR CONVERSION WHERE NO DAMAGE TO LAND CLAIMED.

A cause of action for trespass upon land, and for the taking from it asportation and conversion of coal, timber, or other personal property, wherein the only damage alleged is the loss of the value of the personal property converted, is the same in legal effect as a cause of action for the conversion of the personal property.

2. WRIT OF ERROR—REVIEW—ERROR MUST BE PROVED.

He who alleges an error in the trial of a cause must establish it by the record or it will be disregarded.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3670.]

3. TROVER AND CONVERSION—PERSONAL PROPERTY—MEASURE OF DAMAGES.

One who unintentionally, and in the honest belief that he is lawfully exercising a right he has, enters upon the property of another, and removes his ore, his coal, his timber, or any other valuable appurtenant to his land, is liable in damages for the value of the ore, timber, or other thing in its original place, and for no more.

But one who willfully and intentionally takes ore, timber, or other property of another, and appropriates it to his own use, must respond to the owner for the full value of the property at the time he converts it, with-

out deduction for the labor bestowed or expense incurred in removing and preparing it for market.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 263, 264.]

4. SAME—PRESUMPTION OF INTENTION TO CONVERT.

There is a legal presumption that one who takes or converts to his own use the property of another intends so to do, and a jury may lawfully infer that such a wrongdoer had knowledge of the right and title of the owner of the property which he appropriated, and that he intended to convert it to his own use from his reckless disregard of the owner's right and title, unless the presumption is overcome by evidence of his innocence and good faith.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, § 215.]

5. WRIT OF ERROR—REVIEW—PRESUMPTION OF PREJUDICE.

The presumption is that error produces prejudice, and it is only when it is clear beyond doubt that none resulted, or could have resulted, from an erroneous ruling that the judgment may be lawfully affirmed notwithstanding.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4038-4046.]

6. TROVER AND CONVERSION—ONE WHO DISPOSES OF PROPERTY WHICH HE KNOWS WAS WRONGFULLY TAKEN BY ANOTHER IS GUILTY OF IT.

The wrongful taking of coal or ore from a mine, or timber from a forest, does not divest the title of the owner, and whoever obtains and disposes of it with knowledge that it was wrongfully taken is liable to the owner for its conversion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, § 173.]

Phillips, District Judge, dissenting.

(Syllabus by the Court.)

In Error to the District Court of the United States for the District of Colorado.

Earl M. Cranston (Ernest Knaebel and Ralph Hartzell, on the brief), for plaintiff in error.

L. F. Twitchell (Wilson & McCloskey and Frank C. Goudy, on the brief), for defendants in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. In June, 1902, the United States brought this action against the Ute Coal & Coke Company, a corporation, Lewis C. Jakway, and Frank W. Stubbs, as individuals, and as co-partners as Stubbs & Jakway, and Charles A. Mendenhall, Chauncey W. Howser, and Herbert J. Ross for trespass upon certain public lands, and for conversion of coal taken therefrom between January 1, 1897, and October 22, 1901. There were two counts in the complaint, one for entering upon the land, extracting therefrom, carrying away, and converting 210,030 tons of coal of the value of \$630,090, and the other for the taking and conversion of 210,030 tons of coal of the value of \$630,090. No damage to the land other than the conversion of the coal was alleged, and the proof was that both counts were for the conversion of the same coal. One of the alleged errors in the trial is



that the court refused to submit the cause of action set forth in the first count to the jury, and confined their attention to that pleaded in the second count. But there was no error here because the two counts stated the same cause of action. The gist of the cause of action set forth in each was the conversion of the coal, and the only damage claimed in either was the loss of the value of the coal. The averment of trespass upon the land in the first count was mere inducement to the actual cause of action—the conversion—and proof of the title to the land, of the trespass, and of the taking was admissible without averments to prove the plaintiff's title to the coal and its conversion. The cause of action for trespass upon land, and for the taking from it and conversion of coal, timber, or other personal property wherein the only damage alleged is the loss of the value of the personal property converted is the same in legal effect as a cause of action for the conversion of the personal property. *Stone v. United States*, 167 U. S. 178, 182, 17 Sup. Ct. 778, 42 L. Ed. 127; *Peyton v. Desmond*, 63 C. C. A. 651, 656, 657, 129 Fed. 1, 6, 7.

The defendants the coal company, Jakway & Stubbs as individuals and as copartners, interposed three defenses: (1) A general denial; (2) that on April 5, 1897, the defendant Mendenhall filed an application in the proper land office to purchase this land under the stone and timber acts (Act June 3, 1878, 20 Stat. 89, c. 151; Act Aug. 4, 1892, 27 Stat. 348, c. 375 [U. S. Comp. St. 1901, p. 1547]); that on January 18, 1898, he made his proof and entry, and obtained his final receiver's receipt for his payment for the land, and remained in possession of it until May 31, 1901; and (3) that on May 31, 1901, Mendenhall's entry was canceled, and Blanche R. Braidon and Cyrus G. Graden applied to purchase the land as chiefly valuable for coal, and contests between them and others over the entry of it have since been pending in the Land Department of the United States. In addition to these defenses the coal company pleaded that the United States obtained a judgment against it on October 24, 1895, for \$156.60 for the taking from this land and the conversion of coal between July, 1892, and February 12, 1894. Demurrers were interposed to each of these defenses except the general denial, but there is no record of any ruling upon them. It is assigned as error that the court below reinstated these defenses after demurrers had been sustained to them, but although there is an order in the record that the defenses be reinstated there is no evidence that they had been stricken down or out by any order or decision, and hence no proof of any error here. The burden is on the party who alleges an error to establish it by the record.

The plaintiff replied to these several defenses that it was true that Mendenhall applied for, purchased, and entered the land under the timber and stone acts, but that the land was chiefly valuable for coal; that he knew that fact, and made his application and entry to defraud the plaintiff out of coal land worth \$20 an acre by paying \$2.50 an acre for it, its price under the timber and stone acts; that the Land Department subsequently so adjudged, and for that reason canceled his entry on May 31, 1901; and that Stubbs and Jakway and the coal company knew that this land was chiefly valuable for coal before and

at the time that Mendenhall applied to purchase it, and instigated him to make his application and entry to enable them to obtain the coal from the lands by the fraudulent method pleaded. The reply contained other averments and denials which are irrelevant to the issues of law that it will be necessary to determine in this case. During the trial the plaintiff dismissed the action as against defendants Mendenhall, Howser, and Ross so that their interest in the matter no longer exists.

During the examination of Mendenhall, a witness for the defendant, after the plaintiff had rested its case in chief and before the witness had been cross-examined, the court announced that it would not submit to the jury the question whether or not the defendants were liable to the higher measure of damages recoverable for an intentional conversion of personal property, unless something very controlling, that it had overlooked, could be suggested to change its view, and thereupon directed the case to proceed upon that theory; and at the close of the trial it charged the jury that the defendants were not knowingly trespassing on land which they had no right at all to enter, and that the only amount the plaintiff could recover was the difference between the value of the coal on the cars at the mouth of the mine, and the cost of mining it and putting it there. To this and many other rulings exceptions were taken, and the jury returned a verdict against the coal company and in favor of the other defendants. One who unintentionally, and in the honest belief that he is lawfully exercising a right he has, enters upon the property of another, and removes his ore, his coal, his timber, or any other valuable appurtenant to his real estate, is liable in damages for the value of the ore, coal, timber, or other personal property in its original place, and for no more. But one who willfully and intentionally takes ore, timber, or other property of another, and appropriates it to his own use, must respond to the owner for the full value of the property taken at the time of its conversion without any deduction for the labor bestowed or expense incurred in removing and preparing it for market. There is a legal presumption that one who takes or converts to his own use the property of another intends so to do, and a jury may lawfully infer from such taking and conversion and the wrongdoer's reckless disregard of the owner's right and title that he had knowledge of that right and title, and intended to appropriate his property to his own use in the absence of persuasive evidence of his innocence and good faith. *Woodenware Company v. United States*, 106 U. S. 432, 1 Sup. Ct. Rep. 398, 27 L. Ed. 230; *Durant Min. Co. v. Percy Consol. Min. Co.*, 35 C. C. A. 252, 253, 93 Fed. 166, 167; *United States v. Homestake Min. Co.*, 54 C. C. A. 303, 304, 117 Fed. 481, 482; *Golden Reward Mining Co. v. Buxton Min. Co.*, 38 C. C. A. 228, 237, 97 Fed. 413, 422. If there was no substantial evidence that the defendants knew that the coal which they appropriated belonged to the United States, or that they intended to convert this property to their own use which would have sustained a verdict to that effect, the court below rightly withdrew that issue from the jury. If there was evidence which would have supported such a finding, the issue of knowledge or of intent should have been submitted to the jury for their determination. Whether or not there was

such evidence may be discovered only by an examination of the record. The record discloses that there was substantial evidence at the trial of these facts: From the year 1892 to October 22, 1901, Jakway was the active general manager of the coal company and directed all its operations, and during the same time he was a member of the firm of Stubbs & Jakway, and the corporation and the firm had their offices together, so that the knowledge and intent of Jakway were the knowledge and intent of the corporation and of the firm. Between January 1, 1897, and October 22, 1901, the coal company caused many thousand tons of coal to be taken from the government land here under consideration, and sold the larger part of it to Stubbs & Jakway and the remainder to other parties. All this coal, and perhaps some coal from other sources was shipped out from the mine at a station called Hesperus. The amount shipped by the company from that station during this time was about 41,000 tons. Of this amount more than 21,000 tons were shipped to Stubbs & Jakway who were dealers in coal and who bought this coal of the corporation at the mouth of the mine. Neither Jakway, nor the corporation, nor the firm kept any separate account of the coal which they obtained from the government land, but they confused it with whatever they shipped at Hesperus from other sources so that they could not tell at the trial what part of these shipments was the property of the United States.

The coal which is the subject of this litigation was taken from lot 6 of section 12, from the northeast quarter of the northwest quarter of section 13, which adjoins lot 6 on the south, and from lot 8 of section 13, which adjoins the northeast quarter of the northwest quarter on the west. This land was formerly within the Fort Lewis Military Reservation, the north line of which ran along the north line of lot 6 about 400 feet north of the section line between sections 12 and 13, and the coal company owned lot 3 which adjoins lot 6 on the north. It had tunnel No. 2 on lot 3 through which it obtained some coal, before the taking and conversion charged in this case. Most of the coal here in controversy, if not all, was taken out through tunnel No. 3, which extended southwesterly away from the land of the coal company into the northeast quarter of the northwest quarter and lot 8 of section 13 from a portal on the south side of lot 6 within about 60 feet of the section line. The portal of tunnel No. 1, through which the company had extracted the coal on account of which the judgment was obtained against it by the plaintiff in 1895, was a few feet south of the section line and a short distance southeast of the mouth of tunnel No. 2. In the year 1892 tunnels Nos. 1 and 2 were opened, and in February or March of that year Charles W. Gibbs, a civil engineer, located and superintended the construction for the Rio Grande Southern Railway Company of a spur track of about two miles in length from its railroad to the tippie and other buildings of the coal company, which, with the exception of one boarding house, were located upon the military reservation near and probably a little south of the section line. Gibbs found the corners of the military reservation and ran out its north line along the north side of lot 6. In this way he found that the portal of tunnel No. 1 was from 200 to 500 feet south of the north line of the reservation, and he told Jakway that the tun-

nel was on the military reservation and how he knew that fact, but Jakway gave him to understand that the tunnel was located and they did not desire to throw away the work. Notwithstanding this knowledge, the coal company, by Jakway's direction took the coal out of the government land through this tunnel from June, 1892, to February, 1894, for which the former judgment was rendered.

Joseph A. Coppinger was the man in charge of the mine on the ground from 1892 until January 1, 1895, under Jakway, who lived at Durango about 14 miles distant. Mendenhall was the brother-in-law of Jakway, and was employed by the coal company at the mine, sometimes as a clerk and sometimes as superintendent, from 1893 until 1897, and as lessee of the mine from 1897 to June 1, 1900, under a lease, whereby the company furnished its tipple, its other buildings, its track, its engine, machinery, and tools, paid the men, took all the coal and gave him the difference, which amounted to from 5 to 10 cents a ton, between the cost to it of putting the coal on the cars and \$1.25 per ton for lump coal and 60 cents per ton for slack. Howser worked for the coal company at the mine most of the time from 1891 to 1904, sometimes as miner, sometimes as pit boss, and from June, 1900, until after October, 1901, as lessee under the same terms that Mendenhall acted in that capacity. Coppinger testified that from 1892 until 1897 the coal company continuously mined coal from the government land through tunnel No. 2 and from the autumn of 1897 until October 22, 1901, through tunnel No. 3 and that he estimated that it took out 40,000 tons through the latter tunnel. He further testified, and this part of his testimony was not contradicted, that in March, 1892, when Gibbs made his survey for the spur track, the latter took him and Jakway upon the land and showed them where the north line of the reservation ran, and that he was locating their premises far down on the reservation, that he had a pile of stones and a flag upon the line and that Jakway told Gibbs to go ahead with the work, that in February, 1894, Jakway told him that Keyes, the government inspector, and Dennison, the government surveyor, had arrived to survey the mine to ascertain how much coal they had taken from the reservation for the purpose of proving the amount in the action then pending therefor between the government and the coal company, and Jakway proposed to blow up tunnel No. 1, and said that the company could afford to make another tunnel much better than it could to allow the government to discover the amount of coal it had taken from the reservation, that about July, 1894, they had engaged a Mr. Tripp to survey the mine and the work in it for the coal company, and Coppinger told Jakway that according to Tripp's map the tipple, all the buildings, except one boarding house and nearly all the inside work of the coal company were upon the reservation, and Jakway told him to keep quiet about it and to tell the boys to do so. This witness further testified that when Dennison surveyed the mine in February or March, 1894, to determine the amount of coal for which the company was liable in the former suit, he asked one Brown to show him the northwest corner of the reservation, and Brown showed him the corner where the section line crossed the west line of the reservation which was about 400 feet south of the northwest corner of the reservation, and

Dennison based his survey on that mistake, and thus excluded from his estimate all the coal which had been taken from lot 6; that he told Jakway that the government surveyor had made this mistake, and had based his quantity of coal taken upon it, and Jakway had told him to say nothing about it, and to tell the boys in the office to keep quiet about it. Coppinger was undoubtedly a witness hostile to Jakway, but there is no evidence that Gibbs was, and Jakway denied none of the statements of either of these witnesses. It may be that he testified nothing concerning them because the court had held, before he was called to the stand, that it would not permit a recovery of the higher measure of damages, that the only question it would try was what coal was taken from the land and who took it, and that Jakway's knowledge and intention were immaterial. But the evidence of Jakway's knowledge and intent which has been recited was a part of the testimony at the trial, it was not contradicted, it cannot be ignored, and as it stands in this record it is near to conclusive proof that Jakway knew where the north line of the reservation was all the time after 1892, that he knew that tunnels 1 and 3, most of the land from which coal was extracted through them, the tipple, and all the buildings about the mine, but one, were within the limits of the old reservation.

About the 1st of January, 1895, Coppinger was discharged, and his brother filed a coal declaratory statement upon the lands in 1895 or 1896, and Jakway paid him \$500 to relinquish his claim under it. On April 5, 1897, Mendenhall filed his application to purchase this land under the timber and stone acts, he obtained his final receipt thereunder on January 18, 1898, and his entry was canceled, because the lands were chiefly valuable for coal, on May 31, 1901. The plaintiff offered to prove that between January 1, 1894, and January 1, 1895, the coal company extracted from these lands and shipped to Stubbs & Jakway more than 45,000 tons of coal, that Mendenhall was the bookkeeper at the mine and Howser was the pit boss, that the coal company continued to mine and remove coal from these lands uninterruptedly from that time until October 22, 1901, but this evidence was rejected. There were two important issues upon which the proffered testimony was relevant and material: (1) Did Mendenhall know that this land was chiefly valuable for coal, and seek to defraud the government of it by purchasing it under the timber and stone acts; and (2) did Jakway know that the coal which the coal company and Stubbs & Jakway were obtaining was the property of the plaintiff, and that Mendenhall's application for and entry of the land were fraudulent? The evidence here offered was competent and persuasive upon both these issues, and hence it was error to reject it.

Mendenhall and Howser both testify that they supposed that the portal of tunnel No. 3 and the workings through it were upon the coal company's land, but Jakway did not testify that he thought so, and if he had, the evidence that he knew they were not would still have been in the case. They testified that Jakway was not in tunnel No. 3 more than once a year, but with his knowledge of the location of tunnel No. 2, of the tipple, and of the north line of lot 6, once was enough for him to learn that tunnel No. 3 and the excavations within it were upon the land of the United States. Moreover, he lived only 14 miles

distant, he actively managed and directed the operations at the mine, paid their cost with the checks of the coal company, directed the disposition of the coal through Mendenhall and Howser, the nominal lessees of the company, during all the time from January, 1897, until an injunction was issued in 1901. The record contains persuasive evidence that coal was taken from the land of the government here continuously from January, 1897, until the injunction issued in October, 1901, that it was taken out of tunnel No. 1 until tunnel No. 3 was opened in the winter of 1897-98, that from October, 1897, until January, 1899, the coal company extracted it at the rate of about 28 cars a day during three or four days in each week, and Mendenhall, the nominal lessee, was the bookkeeper and familiar with this fact while he was attempting to purchase this land under the timber and stone acts. In June, 1900, he turned his lease from the coal company over to Howser, and the latter acted as lessee and operator until the injunction was served in October, 1901. Was the evidence which has now been recited sufficient to sustain a finding by the jury that Jakway knew that the coal which his company and his firm obtained from these lands was the property of the United States, or that he intended that they should appropriate its coal to their use.

The legal presumption that one who takes and appropriates to his own use or to that of his principal the property of another intends so to do; the uncontradicted testimony of Gibbs that he surveyed the north line of the reservation and told Jakway that the portal of tunnel No. 2 and the sites of the buildings for the mine were far down on the reservation; the undisputed evidence of Coppinger that in February or March, 1894, when Keyes and Dennison were about to survey the prior trespass Jakway proposed to blow up tunnel No. 2, and said that the company could afford to make another tunnel better than it could to let them discover the amount of coal taken from the reservation; that he told Jakway of the mistake upon which Dennison based his survey, whereby all the coal extracted from lot 6 was excluded from his estimate, and Jakway told him to keep quiet about it; that in July, 1894, when the company caused Tripp to survey the mine, Coppinger told Jakway that according to Tripp's map their tippie, all their buildings, except one boarding house, and nearly all their inside workings were upon the reservation, and Jakway told him to keep still about it; the judgment against the coal company in 1895 for the conversion of coal taken from these lands; Jakway's continuous taking of the coal therefrom after that judgment in the name of the coal company for it and for his firm; the persuasive evidence which the continuous extraction and sale of large quantities of coal from these lands from 1892 until 1902 presents that they were chiefly valuable for coal, and that Jakway, Mendenhall, and Howser knew it when Mendenhall made and was pressing his application to purchase them under the timber and stone acts; the simulated leases whereby the coal company furnished all the means, the tippie, engine, tracks, tools, and paid the men and the expenses of operating the mine, and took or directed the shipment of all the coal while Mendenhall and Howser acted as lessees for the difference between specified prices for the coal, and the company's expense in mining it; Jakway's confusion of this coal with oth-

er coal so that he cannot tell how much came from this or other lands—compel an affirmative answer to this question. These facts were substantial and persuasive evidence that Jakway knew that this coal was the property of the government, and that he intended to appropriate it to the use of the coal company and of Stubbs & Jakway. His knowledge and intention were the knowledge and intention of the corporation and of the firm, and the court should have submitted the question to the jury whether or not they were liable for the value of any of this coal at the time and the place where they converted it.

Counsel for Jakway, and for the firm of Stubbs & Jakway, contend that if there was error in the rulings which have been considered it was not prejudicial to the plaintiff, because the jury found that these defendants never converted any of the coal, and were not liable for any damages whatever, and that since error without prejudice is no ground for reversal the judgment should not be disturbed on account of these errors. But the court in announcing its conclusion during the trial that it would not submit to the jury the plaintiff's claim for the higher measure of damages declared that it would hear no further evidence except relative to the amount of coal taken from the government land through tunnel No. 3 and relative to the parties who took and who did not take it, and in its charge to the jury it followed this ruling, and instructed them that the plaintiff could recover of those defendants who took or directed the taking of the coal from the land and from them only. This ruling was prejudicial to the plaintiff, because even if Stubbs and Jakway and the members of that firm were innocent purchasers of the coal of the plaintiff which they bought from the coal company, yet, if the latter was an intentional trespasser, the former were liable for the value of the coal at the time they bought it. *Woodenware Company v. U. S.*, 106 U. S. 432, 435, 1 Sup. Ct. 398, 27 L. Ed. 230; *Pine River Logging Company v. U. S.*, 186 U. S. 279, 293, 295, 22 Sup. Ct. 920, 46 L. Ed. 1164; *Potter v. U. S.*, 58 C. C. A. 231, 235, 236, 122 Fed. 49, 54. And if Stubbs and Jakway and the members of that firm had notice or knowledge, before they bought and paid for this coal, that it had been intentionally wrongfully taken from the plaintiff by the coal company, they were liable for its value when and where they disposed of it. The wrongful taking of coal or ore from a mine or of timber from a forest does not divest the title of the owner, and the rule caveat emptor applies to all purchasers of it.

The court instructed the jury to return a verdict in favor of Stubbs probably upon its theory that no one was liable in this action who did not take or direct the taking of some of the coal from the plaintiff's land. This charge was erroneous, because Stubbs was liable for the plaintiff's coal which the coal company intentionally wrongfully took and sold or delivered to Stubbs and Jakway, whether or not Stubbs knew it was so taken. The fact is that the question whether the coal company took and sold the plaintiff's coal intentionally, wrongfully or innocently, underlay not only the measure of damages for which the coal company was liable, but it also absolutely conditioned the liability of Stubbs and Jakway and the members of that firm if they were innocent purchasers, and the erroneous failure to submit that issue to the jury is fatal to the entire judgment. While Stubbs may not

have been liable for any of plaintiff's coal which was not received and disposed of by his firm, he may be liable for that because he was a member of the partnership, and until the question of his liability as such member is determined by a trial without prejudicial error, a judgment in his favor cannot be sustained.

It is by no means certain that the reception of the rejected evidence of the continuous taking of large amounts of coal from the plaintiff's lands between 1893 and 1897, with the knowledge of Jakway, Mendenhall, and Howser, and correct rulings upon the issue of Jakway's alleged knowledge and intent and the damages which, if they existed, this knowledge and intent entailed upon Stubbs and Jakway and the members of that firm, would not have resulted in a verdict against them for the amount of the coal which they received from the coal company. The presumption is that error produces prejudice, and it is only when it is clear beyond doubt that none resulted, or could have resulted, from an erroneous ruling, that the judgment may be lawfully affirmed notwithstanding. *Deery v. Cray*, 5 Wall. 795, 807, 808, 18 L. Ed. 653; *Armour & Co. v. Russell*, 75 C. C. A. 416, 417, 144 Fed. 614, 615, 6 L. R. A. (N. S.) 602. It is not clear that no prejudice resulted from the refusal of the court to submit to the jury the question of the wrongful intent of Jakway and the coal company, because if that intent existed it necessarily charged Stubbs and Jakway, whether innocent or guilty of wrongful intent, with at least the value of the plaintiff's coal which they bought of the coal company at the time they purchased it.

There was no error in the refusal of the court to permit the plaintiff to amend its complaint, which had been filed in 1902, in the midst of the trial in October, 1906, so as to allege the conversion of coal between May 24, 1894, and January 18, 1897. The disposition of that motion was discretionary with the court below, and it is only reviewable here for an abuse of discretion and there was none.

There are many other alleged errors. Sixty are specified in the assignment, and it would be a useless labor to review more of them here because many, if not all, that have not been mentioned, are baseless, many of the questions which they present may not arise again, and enough has been said to extract the chief vice of the trial, and probably to insure one according to the course of the common law. The judgment below is reversed, and the case is remanded to the court below, with instructions to grant a new trial.

PHILIPS, District Judge. I dissent from the conclusion reached in the foregoing opinion in reversing the judgment as to the defendants other than the Ute Coal & Coke Company, for the reason that the verdict of not guilty as to them of the act of simple trespass is inclusive of the allegation of willful or malicious trespass. If they did not take, carry away, or appropriate the coal, as found by the jury, in my humble judgment, it requires too much of refinement for practical application to say that they participated in an act of wantonly or willfully taking, carrying away, or appropriating the same coal.



## WILLIAMS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. November 25, 1907.)

No. 2,497.

## 1. INTERNAL REVENUE—"CASKS."

The term "cask" is generally understood to be a receptacle for liquids, either larger or smaller than the usual barrel, and, as employed in the statute respecting the manufacture and sale of spirituous liquors, pertaining to wholesale dealers, has a well-recognized import as a vessel containing not less than 20, 10, or 5 gallons wine measure, as provided by Rev. St. §§ 3287, 3323, 3244 [U. S. Comp. St. 1901, pp. 2130, 2167, 2096].

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 1001.]

## 2. SAME—SALE OF SPIRITS—RECORDS—OMISSION—INDICTMENT.

Rev. St. § 3244 [U. S. Comp. St. 1901, p. 2096], defines a wholesale liquor dealer to be a person who sells or offers for sale foreign or domestic distilled spirits or wines in quantities not less than five wine gallons at a time. *Held* that, where an indictment charged defendant as a wholesale liquor dealer with sending out two casks of distilled spirits without making the required entries in his record book, required to be kept by section 3318 [page 2164] the indictment sufficiently charged that the casks contained each not less than five wine gallons.

## 3. SAME—ELEMENTS OF OFFENSE.

Rev. St. § 3318 [U. S. Comp. St. 1901, p. 2164], requires every wholesale liquor dealer at the time of sending out any spirits to enter in his record book the day when and the name and place of business of the person or firm to whom such spirits are to be sent, the quantity and kind or quality of such spirits, the number of gallons, the name of the distiller, and the serial number of the package. *Held* that, the gist of the offense being the sending out of any spirits without complying with the section, the quantity sent out was not an essential element thereof, so that an indictment charging that defendant, a wholesale liquor dealer, sent out of his stock two casks of distilled spirits, without making the required record entries, was not fatally defective in failing to specify the quantity shipped.

## 4. SAME—DESIGNATION OF CONSIGNEE AND DESTINATION.

The indictment was also not objectionable for failure to specify the name of the consignee or the place where the casks were sent; such specifications being mere matters of evidence of which defendant could have secured information by demanding a bill of particulars.

## 5. CRIMINAL LAW—RIGHT OF REVIEW—OBJECTIONS.

Where, in a prosecution for violating the internal revenue law, defendant admitted that he was a wholesale liquor dealer, and did not object at the trial to parol evidence of such fact, he could not object on writ of error that the court erred in not requiring proof of such fact by the certificate in the district revenue collector's office.

## 6. INTERNAL REVENUE—CRIMINAL PROSECUTIONS.—INSTRUCTIONS.

Accused was indicted for willfully and unlawfully refusing and neglecting to make in his record book, kept as a wholesale liquor dealer, any entry or entries concerning two particular casks of spirits at the time they were sent out. The court charged that if defendant failed or neglected to provide a book in such form as prescribed by the Commissioner of Internal Revenue, and sold as a wholesale liquor dealer any kind of distilled spirits, and at the time of sending out of his stock and possession any of such spirits, and before the same were removed from his premises, to enter in such book the date when and the name and place of business of the person or firm to whom such spirits were to be sent, the kind and quantity of such spirits, he was guilty as charged. In another paragraph the court stated that if defendant in good faith went to the deputy revenue collector for the district and requested instruction as to the keeping of his records, and was instructed to keep them on a sheet of paper until he could

procure the prescribed form book, and he in good faith relied on such instructions and so kept his record, he was not guilty. *Held*, that accused by the latter instruction received the full benefit of his claim of good faith, and could not complain of any contradiction in such instructions.

7. CRIMINAL LAW—WRITTEN INSTRUCTIONS—WAIVER.

Where the parties by their interlocution invited the court to deliver oral instructions without objection or exception thereto at the time, defendant waived his right to written instructions, under St. 1893, Okl. § 5196, providing that all instructions given shall be in writing, unless waived by both parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2125.]

8. INTERNAL REVENUE—CRIMINAL PROSECUTIONS—BURDEN OF PROOF.

Since a plea of not guilty puts in issue every fact essential to constitute the offense charged, and the benefit of reasonable doubt in favor of accused extends to every matter offered in evidence for as well as against him, an instruction, in a prosecution of a wholesale liquor dealer for violating the internal revenue law in failing to make proper records of sales, that it was incumbent on defendant to show that he made the entries in a book prescribed by the internal revenue department, or that he made them on a sheet of paper, etc., was erroneous.

9. CRIMINAL LAW—REVIEW—PREJUDICE—PRESUMPTION.

When error is apparent in the record, it is presumptively injurious to the party against whom it has been committed, unless it appears beyond doubt that it did not and could not prejudice his rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3090-3099.]

10. SAME—NECESSITY OF EXCEPTIONS.

Where accused received a severe punishment, it was the province of the appellate court to correct an error in an instruction as to the burden of proof, prejudicial to accused, though a sufficient exception was not saved thereto.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, § 2668.]

In Error to the Supreme Court of the Territory of Oklahoma.

For opinion below, see 87 Pac. 647.

Buckner & Buckner, for plaintiff in error.

John Embry, U. S. Atty., and Louie E. McKnight, Asst. U. S. Atty.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff in error (hereinafter designated the defendant) was indicted in the District Court for Pawnee county, Okl. Ter., under section 3318, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2164], as a wholesale liquor dealer for failure to make the required entries in a book of two casks of spirituous liquors sold and sent out of his possession on the 6th day of November, 1903. On trial to a jury he was convicted, and sentenced to imprisonment for 1½ years in the federal penitentiary at Leavenworth, Kan., and to pay a fine of \$100 and the costs. On appeal to the Supreme Court of the territory the judgment was affirmed.

The sufficiency of the indictment was challenged both by demurrer and motion in arrest of judgment. We do not deem it necessary or important to consider many of the objections raised. The principal

objection is that the indictment is wanting in specification, descriptive of the quality and kind of liquors sold and sent out, and to whom sent. The charge in this respect is that:

"On the 6th day of November, 1903, the said Matt Williams, as said wholesale liquor dealer as aforesaid, did then and there send out of his stock and possession certain distilled spirits, to wit, two casks of distilled spirits, and did willfully and unlawfully refuse and neglect to make in the said book any entry or entries whatsoever (said book having been described in the preceding part of the indictment) concerning said casks of spirits respectively at the respective time of so sending the same out of his stock and possession, and before the same were removed respectively from his premises."

Said section of the statute requires every wholesale liquor dealer to provide a book, to be prepared and kept in such form as may be prescribed by the Commissioner of Internal Revenue, and shall, on the same day on which he receives any foreign or domestic spirits, and before he draws off any part thereof, enter in such book, etc. It further declares that:

"Every such \* \* \* wholesale dealer shall, at the time of sending out of his stock or possession any spirits, and before the same are removed from his premises, enter in like manner in the said book the day when and the name and place of business of the person or firm to whom such spirits are to be sent, the quantity and kind or quality of such spirits, the number of gallons, \* \* \* the name of the distiller and the serial number of the package. Every such book shall be at all times kept in some public place on the premises of such \* \* \* wholesale dealer for inspection, and any revenue officer may examine it and take an abstract therefrom."

The penalty provided for neglect in the above requirements is a fine of not less than \$100 nor more than \$5,000, and imprisonment not less than three months nor more than three years.

It will be observed from the foregoing statute that, whenever such wholesale dealer sends out "any spirits," he is required to make the specified entry in the designated book. The charge in the indictment is that the defendant sent out, etc., certain casks of spirits, to wit, two casks of distilled spirits. The term "cask" is generally understood to be a receptacle for liquids. It may be less or larger than the usual barrel. As employed in the statute respecting the manufacture and sale of spirituous liquors, pertaining to wholesale dealers, a cask has a well-recognized import. In section 3287 [page 2130], touching the duty of distillers, it is said:

"All distilled spirits shall be drawn from the receiving-cisterns into casks, each of not less capacity than twenty gallons wine measure."

Section 3295 [page 2135], respecting the gauging, stamping, and branding of spirits removed from warehouses, the language is, "Whenever an order is received from the collector for the removal from any distillery warehouse of any cask of distilled spirits," evidently having reference to casks containing not less than 20 gallons wine measure. Section 3319 [page 2165], declares that it shall be unlawful for any rectifier, etc., or wholesale or retail liquor dealer, to purchase or receive any distilled spirits in quantities greater than twenty gallons from any person other than an authorized rectifier of distilled spirits, distiller, or wholesale liquor dealer. Section 3323 [page 2167] provides that all distilled spirits drawn from any cask or package and placed in any

other cask or package containing not less than ten gallons, and intended for sale, shall be again inspected and gauged. Section 3324 [page 2168] provides for the effacement of stamps and brands from empty casks. Section 3325 [page 2169] provides that whenever any person knowingly purchases or sells, with inspection marks thereon, any cask or package, after the same has been used for distilled spirits, he shall forfeit and pay, etc. Section 3244 [page 2096] defines a wholesale liquor dealer to be a "person who sells or offers for sale foreign or domestic distilled spirits or wines, in quantities of not less than five wine gallons at the same time." The indictment having alleged that at the time in question the defendant was a wholesale liquor dealer, it was tantamount to a direct averment that the casks contained each not less than 5 wine gallons of spirituous liquors. The statute in question makes it an offense for such wholesale dealer to send out of his stock or possession any spirits without making the required notation in the manner prescribed. As he is only authorized to deal as a wholesaler, the law assumes he did not sell or send out in casks containing less than five wine gallons. The statute interdicts and penalizes the sending out of any spirits without complying with said requirements. The quantity, whether 5 or 50 gallons, neither qualifies nor designates the offense; the implication, however, being that he does not send out in casks containing less than 5 wine gallons. It is not essential to specify in the indictment the name of the person to whom, or the place where, the casks were sent. That was mere matter of evidence, and not of the substance of the offense. Of all men the defendant knew to whom and where he had sent the casks; and, if he desired information from the prosecution, he could have protected himself against surprise at the trial by demanding in advance a bill of particulars. The indictment was sufficient. *Ledbetter v. United States*, 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162; *Pounds v. United States*, 171 U. S. 35, 18 Sup. Ct. 729, 43 L. Ed. 62.

The contention is made on behalf of the defendant that the court erred in admitting parol testimony to prove that the defendant was a wholesale liquor dealer; that the best, if not the only, evidence of the fact, is the certificate from the proper district revenue collector's office, commonly called a "license." It is sufficient to say of this that parol evidence was admitted without objection on the part of the defendant. Indeed, he admitted on the trial that he was a wholesale liquor dealer. As he was exercising the office of such dealer, the presumption is that he was acting rightfully. His license was in his own possession, if one had been issued. If he had no license, he was wrongfully engaged in the wholesale liquor business, and he knew it. He could only show this by developing the fact that he was amenable to indictment and punishment for a graver offense. Why should the government be required to produce the record showing that the defendant was licensed as a wholesale liquor dealer when oral proof of the fact was admitted *nem con*? The offense with which the defendant was charged is that he "did willfully and unlawfully refuse and neglect to make in the said book any entry or entries whatsoever, concerning said casks of spirits" at the time the same were sent out.

The defendant's testimony, which in some important particulars is not without corroboration, was that he was engaged in this business between three and four months; that he was unfamiliar with the requirements of the statute respecting the manner of keeping the book; that before beginning business he inquired of the deputy revenue collector of the district about obtaining the book and how to keep it; that said deputy informed him that he could get one from a house in Cincinnati; that he was advised by this officer that he could keep memoranda of liquors received and sent out, in an informal way, on slips or sheets of paper, and he could enter the same formally in the book when obtained; that he went to Cincinnati and tried to obtain the book at a wholesale house, but failed; that he made entries on pieces of paper in the manner directed, intending to transfer them into the book when obtained. His testimony further tended to show that he bought some of the liquors from a house represented by one Fechtler, who seems to have instigated this prosecution against the defendant because of his bankruptcy, whereby loss came to his house. Fechtler visited the defendant after he began business, and advised him about how to make out his reports to the district collector; and the defendant testified that he kept memoranda of liquors received and sent out on slips or sheets of paper as directed, which he turned over to said Fechtler, who made out therefrom the reports to said collector, which reports were received and he was advised were satisfactory. Those memoranda were not returned to the defendant.

In its charge the court, in paragraph 6, instructed the jury, in substance, that if they found from the evidence beyond a reasonable doubt that the defendant was a wholesale liquor dealer at the time mentioned in the indictment, that he failed or neglected to provide a book in such form as prescribed by the Commissioner of Internal Revenue, and that he sold as a wholesale liquor dealer any kind of distilled spirits and at the time of sending out of his stock and possession any of said spirits and before the same were removed from his premises to enter in said book the day when and the name and place of business of the person or firm to whom such spirits were to be sent, the kind and quantity of such spirits, he was guilty as charged in the indictment, and the jury should so find. Then in paragraph 8½ the court further instructed the jury to the effect that if they believed from the evidence that the defendant in good faith went to Howard, the deputy revenue collector for the district in which he was about to begin the wholesale liquor business, and requested of him instruction as to the manner in which he should keep his records, and said Howard instructed him to keep them on a sheet of paper until he could procure the prescribed formbook, and that he in good faith relied upon such instructions and did keep his records on a sheet of paper as the law requires, the jury should find him not guilty. Viewed in their relation to each other, the defendant is in no position to complain of any seeming contradiction in said instructions, as it must be conceded he obtained in the latter declaration the full benefit of his claim of good faith. As indicating that the jury did not understand that the sixth instruction precluded them from considering the memoranda entries made on sheets or slips of paper, after retiring to con-

sider of their verdict, they returned into court and made inquiry of the judge as to whether or not they could consider "the other papers as from other sources, the larger pieces of paper." Whereat the judge repeated to them the substance of his former charge as above indicated, with perhaps more fullness and perspicuity. Had the court observed the letter of the statute of the territory, which requires all instructions to be given in writing, it would doubtless have avoided the confusion and some contradiction that ensued by the court suffering interruptions of the respective counsel and engaging in some extended colloquy with them in the presence of the jury, injecting into the case some inconsiderate language and misdirection. After restating the substance of its first charge respecting the requirements of the statute and the effect of the claimed good faith on the part of the defendant, the court said:

"The court instructs the jury that it is incumbent upon the defendant to show that he made these entries in a book prescribed by the internal revenue department, and to show that he made these entries as the law requires, upon a sheet of paper, and that those were preserved and open for the inspection," etc.

It is assigned for error that the foregoing instructions were given orally; whereas, the statute of the Territory of Oklahoma (section 5196, St. 1893) declares that:

"All instructions given shall be in writing, unless waived by both parties, and shall be filed and become a part of the record in the case."

There is contrariety of view in the courts of California and Alabama in applying similar statutes, as to whether or not the failure to object and except at the time of the giving of oral instructions constitutes a waiver or is reversible error. See *People v. Beeler*, 6 Cal. 246; *People v. Payne*, 8 Cal. 341; *People v. Sanford*, 43 Cal. 35, contra; *Abbott v. City of Mobile*, 119 Ala. 595, 24 South. 565.

Suffice it to say that we incline to the generally accepted rule that under circumstances like these in the record before us, where the parties by their interlocution invite the court to deliver oral instructions, without objection or exception thereto at the time, they should be held to have waived the right to written instructions. The office of such timely objection is the spirit of fair play, to accord to the court a *locus poenitentiae* to correct the error then and there. This is in the interest of the advancement of justice to avoid new trials and the prolonging of litigation. The court, however, in our judgment, committed a radical error in charging the jury that:

"It is incumbent upon the defendant to show that he made these entries in a book prescribed by the internal revenue department, or to show that he made these entries as the law requires, upon a sheet of paper," etc.

It is the settled law in criminal procedure that the burden of proof never shifts from the prosecutor to the defendant. It remains throughout with the government. The plea of not guilty is unlike a special plea in civil actions, which, admitting the case averred, seeks to establish substantive grounds of defense. It is a plea that puts in contestation every fact essential to constitute the offense charged. And the benefit of a reasonable doubt in favor of the accused extends to every

matter offered in evidence for as well as against him. *Glover v. United States*, 147 Fed. 426, 77 C. C. A. 450; 1 *Greenleaf's Evidence*, § 74, note; *State v. Wingo*, 66 Mo. 181, 27 Am. Rep. 329; *Commonwealth v. McKie*, 1 Gray (Mass.) 61, 65, 61 Am. Dec. 410. It is the rule of law of this jurisdiction, often repeated, that, when error is apparent in the record, it was presumptively injurious to the party against whom it was committed, "unless it appears beyond doubt that the error did not and could not prejudice the rights of the party." *Vicksburg R. R. Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299; *National Biscuit Company v. Nolan*, 138 Fed. 9, 70 C. C. A. 436; *State v. Russell*, 90 Iowa, 569, 58 N. W. 915, 28 L. R. A. 195; *People v. N. Y. C. Railway*, 29 N. Y. 430; *State v. Cooper*, 45 Mo. 64.

Without discussing the question suggested as to whether or not there was sufficient exception saved to this instruction, it is sufficient to say that in a criminal case where a plain error is committed in a matter vital to the defendant, especially in a case like this, where the defendant received the severe punishment of one year and six months in the penitentiary in addition to the fine, it is the province of the appellate court to correct it. *Wiborg v. United States*, 163 U. S. 633, 656, 16 Sup. Ct. 1127, 41 L. Ed. 289; *Clyatt v. United States*, 197 U. S. 207, 221, 222, 25 Sup. Ct. 429, 49 L. Ed. 726.

It results that the judgment of the District Court and the judgment of the Supreme Court of the territory of Oklahoma are reversed, and the cause is remanded to the said District Court with directions to grant a new trial.

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### BEECH CREEK R. CO. et al. v. OLANTA COAL MINING CO.

(Circuit Court of Appeals, Third Circuit. December 6, 1907.)

No. 33.

#### 1. RAILROADS—COMPELLING SWITCH CONNECTION—PROCEDURE.

The primary purpose of Act Pa. May 5, 1832 (P. L. 501), and its supplements, which provide that if the owner of land, mills, coal mines, or other real estate in the vicinity of any railroad, and not more than three miles distant therefrom, shall desire to make a railroad thereto "over any intervening lands," he shall institute a proceeding therefor, and the necessity of the proposed connection and the damages sustained by the intervening owner shall be determined by a jury of six men, is to provide an adverse proceeding by which a siding may be laid over private property, and it does not provide a means of enforcing a right to a switch connection by one whose property is adjacent and contiguous to the railway with which the connection is sought, in which no third party has any interest.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 118.]

#### 2. SAME—RIGHT OF MINE OWNER TO CONNECT SWITCHES—ENFORCEMENT IN EQUITY.

In Pennsylvania, where by statute every railroad company is made a common carrier and its railroad a public highway, every such company is in duty bound to permit mill owners, mine owners, and others to construct on their land adjoining its railroad suitable switches for the use of their business, and connect the same with the company's tracks, subject to reasonable regulations, and to receive and deliver from and to such switches cars and freight on equal terms with other shippers, and such duty may be enforced by a court of equity by a mandatory injunction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 118.]

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 144 Fed. 150.

M. E. Olmsted, for appellants.

D. L. Krebs, for appellee.

Before DALLAS and GRAY, Circuit Judges, and HOLLAND, District Judge.

HOLLAND, District Judge. This is a bill of complaint filed by the Olanta Coal Mining Company to compel the New York Central & Hudson River Railroad Company, lessee of the Beech Creek Railroad Company, to construct a siding at its coal mines to connect with the company's road; the coal company offering "to pay all expenses in connection with putting in the siding." The request, accompanied by this offer of payment, was refused. The prayer for relief is that the railroad company "shall proceed without further delay forthwith to construct such siding and switching connections, and to give and grant to your orator the same facilities for shipping and transporting its product to market as are furnished to other miners and shippers of bituminous coal on its lines." The Circuit Court entered a decree directing the railroad company to place in position and construct a switching or siding connection to connect with the proposed siding of the coal company in plaintiff's bill and shown by plaintiff's draft offered in evidence with the main track of the railroad company, the cost price of switching frogs, labor and expense of putting them in place by defendants to be paid by the plaintiff. From this decree the railroad company took this appeal.

Eighteen of the 47 assignments of error are to the failure of the court to find certain facts, and 21 to the failure of the court to find certain conclusions of law. The remaining 8 assignments are to the alleged errors arising out of the decree of the court. While the assignments of error are numerous, the only questions necessary to consider are: (1) whether the appellee is required to proceed in accordance with the provisions of the Pennsylvania act of May 5, 1832 (P. L. 501), and its supplements, whereby a jury of six disinterested and judicious men, resident in the county, shall pass upon the necessity for such siding and fix upon the mode, manner, or point of connection with appellants' railroads. (2) Can this bill be maintained for the determination of these questions and enforcing any right the appellee may have?

The bill filed alleges in the fourth paragraph that the appellee's "territory is adjacent and contiguous to said railroad," etc. This is not denied by appellants' answer. An examination of the record shows that the correctness of this allegation in the bill was conceded in the production of the evidence; and it is fair to assume that such is the fact. Could the appellee then have proceeded under the Pennsylvania act of May 5, 1832, and its supplements? It is the owner of mining property lying contiguous to the railroad, and no lands intervene over which it would be necessary to lay the proposed siding. Could it have alleged the necessary jurisdictional facts in a petition to the court of



common pleas of the county to entitle it to proceed under the act in question, the first section of which is as follows:

"That if any owner or owners of land, mills, quarries, coal mines, lime kilns, or other real estate, in the vicinity of any railroad, canal or slack water navigation, made or to be made by any company, or by the state of Pennsylvania, and not more than three miles distant therefrom, shall desire to make a railroad thereto over any intervening lands, he or they, their engineers, agents and artists, may enter upon any lands, and survey and mark such route as he or they shall think proper to adopt, doing no damage to the property explored, and thereupon may present a petition to the court of common pleas of the county in which said intervening land is situated, setting forth his or their desire to be allowed to construct and finish a railroad, in and upon the said route, and the beginning, courses and distances thereof, and place of intersection of the main railroad, canal or slack water navigation, which shall be filed and entered of record in the said court, whereupon the said court shall appoint six disinterested and judicious men, resident in the said county, who shall view the said marked and proposed route for a railroad, and examine the same, and if they or any four of them shall deem the same necessary and useful for public or private purposes, they shall report in writing to the subsequent term of said court, what damages will be sustained by the owner or owners of the said intervening land, by the opening, constructing, completing and using the said railroad, and the report of the said viewers and appraisers shall be filed of record in the said court, and if not appealed from, be liable to be confirmed or rejected by the said court, as to right and justice shall appertain, and if either of the parties shall be dissatisfied with said report, he or they may appeal therefrom to the said court of common pleas within twenty days after such report has been filed in the prothonotary's office, and not after; and after such appeal, either party may put the cause at issue, in the form approved of by the court, and the said issue shall be placed first on the trial list of the next regular term of the said court, and be there tried and determined by the court and jury, and the verdict so rendered, and judgment thereon, shall be final and conclusive, without further appeal or writ of error, and it shall be the duty of the said viewers and jury, to take into consideration the advantages which may be derived by the owner or owners of land, passed by the said railroad, when making up their record or forming their verdict."

The supplement of March 28, 1840 (P. L. 196), provides that if the parties interested cannot agree upon the mode, manner, or point of connection with such railroad, the same shall be determined by the jury appointed, and provides for appeal or writ of error upon all questions; and the supplement of February 17, 1871 (P. L. 56), provides that the appeal to court from the report of the viewers shall extend, not only to the assessment of damages, but also to the question of the necessity for the proposed lateral railway or siding, and the act of April 14, 1893 (P. L. 15), limits the length of any such lateral road to five miles. In all cases where the act of 1832 is applicable the questions to be determined by the jury are (1) the necessity for the lateral railway; (2) the mode, manner, and point of connection; and (3) the amount of damages to the intervening property owner or owners, all of which questions can be reviewed on appeal if either of the parties interested be dissatisfied with the finding of the jury. It is evident that the purpose of this legislation was to provide a proceeding by which the owners of mines, mills, quarries, lime kilns, and such like industrial establishments could secure shipping facilities by the construction of switches and lateral railways over any intervening land between such owners of mines, etc., and the railway desired to be

reached. It no doubt frequently happened that the owner of mines, mills, or quarries was prevented from constructing a siding because of the objections raised and persisted in by other parties, owners of land lying between him and the railroad; and there was no way of securing the right of way over this private property except by agreement, and the assent of the intervening property owners could not always be secured. If private property was to be thus taken, it was necessary that some means should be provided for this purpose, and the mode of procedure was afforded by the act referred to and its supplements, and this procedure was expressly confined to the cases which require the taking of intervening private property to reach the railroad. The appellee, being the owner of mines lying adjacent to the right of way of the railroad company, could not allege the necessary jurisdictional facts, to wit, the ownership of mines in the vicinity of appellants' railway, and the desire to construct a siding over intervening land, to bring the case within the terms of the act. It is urged, however, that because the supplement of 1840 requires the jury to pass upon the question of the mode, manner, or point of construction under the act, therefore the railroad company in all cases is entitled to a jury to determine this question. This conclusion we do not think follows. The primary purpose of the act is to provide an adverse proceeding to lay a siding over private property when the necessity of such a siding is made to appear to the satisfaction of a jury. The private property owner is entitled to damages resulting from the taking of his land. This must be assessed by the jury; and, in order that the assessment may be justly made, the mode, manner, and point of connection must be ascertained as this necessarily affects the question of damages, and is only required to be determined by a jury when necessary to enable them to assess damages to the intervening property owner. So that we conclude that the proceeding was not intended to provide a means of enforcing a right to switch connection by one whose property lay adjacent and contiguous to the railway with which a connection is sought, nor is there any necessity for such a proceeding where there are no third parties whose interests are involved. The shipper and the railroad are the only parties interested in the connection, and their relative rights and duties can be adjusted without the intervention of a jury. That the appellee has a right to such connection we think is undoubted. The learned circuit judge, in passing upon this question, has treated the matter so fully in an opinion that we adopt the following:

"Passing by the many irrelevant matters and proofs in the voluminous record, we address ourselves to the gist of the bill, which, in substance, is to compel the railroad to permit switch connections with its line to enable complainant to ship its coal to market. The latter is a coal-mining corporation, chartered July 9, 1903, and by its charter is authorized to carry on the business of mining, shipping and selling of coal, and the manufacturing, shipping, and selling of coke and other products of coal.' Its mining property of some 610 acres contains approximately 550 acres of coal, in which are several different veins. The property adjoins the right of way of the railroad. It has no other outlet for its coal save said road. The Beech Creek Railroad Company was chartered under the provisions of the general railroad act of Pennsylvania of April 5, 1868 (P. L. 62), and its supplements. It leased its property to the New York Central Railroad Company by a long-term lease.

It is conceded that all its duties and obligations rest on its lessee, the New York Company. By virtue of the Constitution of Pennsylvania, article 17, § 1. which provides, 'All railroads and canals shall be public highways, and all railroad and canal companies shall be common carriers,' and the general railroad law of February 19, 1849 (P. L. 86), which provides, 'Upon the completion of any railroad authorized as aforesaid, the same shall be esteemed a public highway for the conveyance of passengers and the transportation of freight'—the Beech Creek Railroad is a public highway, and is chargeable with the duties and obligations of a common carrier. Such is the view of the highest courts of that state. In *Railroad Company v. Colwell*, 39 Pa. 339, 80 Am. Dec. 526, it is said: 'Though the corporation in respect to its capital is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold land was conferred that these objects might be worked out.' And this accords with the general federal view. 'The question,' says the Supreme Court of the United States in *Cherokee Nation v. Southern Kan. R. R. Co.*, 135 U. S. 657, 10 Sup. Ct. 965, 34 L. Ed. 295, 'is no longer an open one as to whether a railroad is a public highway established primarily for the convenience of the people and to subserve public ends.' Its road then being a public highway and it a common carrier, its duty, generally stated, is to receive from any person for carriage and transportation such freight as the carrier holds itself out as willing to carry and the party sending offers to pay freight upon. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 12 L. Ed. 465; *Southern Express Company v. St. Louis*, 5 Myers Fed. Dec. § 1511, 10 Fed. 210. Now, in mining, coal is carried from the mines in small cars, and delivered to and carried by railroad companies in car load lots. To do this requires sidings on which the railroads' cars may be conveniently handled and filled. Such a connection the complainant asks, and is willing to bear the expense of making. Whatever may be the rights of shippers and the obligations of railroads in other jurisdictions, the general right of the adjoining property holders in Pennsylvania to such connections with a railroad chartered by that state has been decided by the highest court of that state in the case of the *Pittsburgh & Lake Erie R. R. Co. v. Robinson*, 95 Pa. 428. There Robinson was the owner of a manufacturing site adjoining the railroad, and the question was the value of the land of which the railroad was condemning a part. It was held that the property owner had a right to switch connection with the railroad, and that this right was an element in determining the value of his land, and the proposition 'that the defendant company is a common carrier, that its railroad is a public highway, that the plaintiffs have a right in law to construct on their land, adjoining said railroad, a suitable switch for the uses of their business, and connect the same with the tracks of the defendant company, subject to the general rules of said company regulating such connections; and that the defendant company is bound to receive and deliver to and from such switch or siding cars and freight for the said plaintiffs to and from such points, on the line of defendant's railroad, as may be designated by plaintiffs, and on equal terms with all other individuals or transportation companies,' was held a proper definition of his rights in that regard. In considering this proposition the court said: 'We are also of the opinion that the plaintiff's third point should have been affirmed. It is conceded that, under our acts of assembly, the owner of mills and manufactories may of right connect their private sidings with the railroads in their vicinity, and though as counsel for the defendant in error says, it does not follow that such owner may ever avail themselves of such right, nevertheless the fact that such a right exists in them may largely advance the market value of their several properties. Certainly privileges which may be used to facilitate transportation to and from large factories must have some effect upon their values.' Under this construction thus placed upon its own laws by the court of highest resort of Pennsylvania, the right of a mine operator to proper and reasonable switch connections is clear unless there is something in the facts and circumstances of the particular case warranting a refusal of this right. We find none here. The complainant offers to bear the entire expense of the connection and siding. It is willing that the connection be made in the mode and at the point the respondent prefers."

The conclusion here reached is in accord with a proper notion of the obligation laid upon a railroad company in this regard, and is fully sustained by the authorities cited. The objection so strenuously urged at the argument, that the point where it is intended to connect the proposed siding "is unsafe and unfit for such connection," can be obviated by the parties selecting a point of connection where these elements of danger do not exist. It appears that the coal company "is willing that the connection shall be made in the mode and at the point the respondents prefer."

As all railroads are charged with the duty and obligation of transporting the freight offered along its line, and as this transportation of freight usually requires the use of sidings, the Supreme Court of Pennsylvania has held, in the case of *Pittsburgh & Lake Erie Railroad v. Robinson*, 95 Pa. 426, that a railroad company is a common carrier, and that its railroad is a public highway, and in duty bound to permit mill owners, mine owners, and others to construct on their land adjoining said railroad suitable switches for the use of their business, and to connect the same with the tracks of the company, subject to the general rules of the company regulating such connections, and that the railroad company is thereafter bound to receive and deliver to and from said switch or siding cars and freight for the parties so offering them on equal terms with all other individuals or transportation companies. Mr. Justice Gordon, in that case, said: "It being conceded that under the Pennsylvania acts of assembly the owners of mills and manufactories may of right connect their private sidings with the railroad in their vicinity," it follows that in case the railroad refuses to permit such connections when necessary some remedy must be found by which the rights of shippers can be enforced. Common carriers and public service corporations in general owe certain duties to the public. Individuals are entitled to enforce these obligations in so far as they are themselves concerned; and, when the legal remedies are inadequate, equity will grant its relief. Accordingly mandatory injunctions may be awarded to compel a common carrier to transport freight or to furnish transportation facilities. *Pomeroy's Equity Remedies*, § 633. In *Wells, Fargo & Co. v. Northern Pacific Railroad Co.* (C. C.) 23 Fed. 469, a bill was maintained to compel a railroad to furnish facilities to an express company, and, in the case of *Butchers' & Drovers' Stockyard Co. v. Louisville & N. R. Co.*, 67 Fed. 35, 14 C. C. A. 290, the right to compel a railroad company to furnish facilities for loading and unloading live stock was held by Judge Taft to be enforceable by bill in the court of equity; and in *Ex parte Lennon*, 166 U. S. 556, 17 Sup. Ct. 661, 41 L. Ed. 1110, the Supreme Court held:

"That affirmative action may be required where the circumstances of the case demand it."

Numerous authorities are collected by Judge Evans of the District Court of Kentucky in *Wiemer v. Louisville Water Co.* (C. C.) 130 Fed. 251, in support of the proposition that a mandatory injunction is often resorted to in modern practice. They will be found on page 256 of 130 Fed. In this case the court compelled a water company to supply

water to one engaged in business after it had arbitrarily refused to do so upon his request.

Our conclusion is that the court below was right in adjudging the complainant to be entitled to such a connection as was claimed, and in awarding a mandatory injunction to compel the allowance of that right; but we think that the court below, in view of the importance of the matter to the public as well as to these parties, should be afforded an opportunity to further exercise its discretion respecting the question as to whether the point of connection proposed is one which, all things and especially the question of safety being considered, ought to be sanctioned.

Accordingly the decree of the Circuit Court is affirmed, but with leave to the defendants below to apply to that court to open the said decree for the purpose of further inquiry and determination touching the safety and convenience of the manner and point of connection proposed.

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### MANN v. GADDIE.

(Circuit Court of Appeals, Fifth Circuit. December 24, 1907.)

No. 1,619.

#### 1. RECEIVERS—APPOINTMENT WITHOUT NOTICE—STATUTES.

Civ. Code Ga. 1895, § 4904, providing that, under extraordinary circumstances, a receiver may be appointed without notice, is merely confirmatory of a principle of equity jurisdiction authorizing the appointment of a receiver without notice in cases of urgent emergency.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 54-60.]

#### 2. SAME.

A receiver may be appointed without notice if the defendant is beyond the jurisdiction of the court or cannot be found, or some urgent emergency is shown rendering interference before there is time to give notice necessary to prevent waste, destruction, or loss of the property, or in case notice will jeopardize the safety of the property over which the receivership is to be extended.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 54-60.]

#### 3. SAME—PARTNERSHIP—DISSOLUTION AND ACCOUNTING.

The rule that a receiver shall not be appointed without notice except in case of urgent necessity is applicable to a suit by one partner against another for an accounting and for dissolution of the firm.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 54-60.]

#### 4. SAME—GROUNDS.

Plaintiff, defendant, and two others formed a partnership for the purchase and sale of timber rights and lands; it being agreed that defendant and W. should secure options on timber and timber lands, and that plaintiff and the fourth member of the firm should secure purchasers therefor. Defendant and W. obtained options, escrow deeds, and leases, but plaintiff and his partner were unable to procure purchasers, whereupon defendant obtained a purchaser and denied plaintiff's right to participate in the profits of the transaction. Held insufficient to justify the appointment of a receiver without notice to take charge of such options, etc., in a suit by plaintiff for dissolution of the partnership and for an accounting; it appearing that defendant was solvent and willing to give a bond to secure plaintiff's interest in the profits, if any.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Receivers, §§ 54-60.]

## 5. APPEAL—RECEIVERS—APPOINTMENT—STAY.

Act March 3, 1891, c. 517, 26 Stat. 828, as amended by Act June 6, 1900, c. 803, 31 Stat. 660 [1 U. S. Comp. St. 1901, p. 550], allowing appeals from interlocutory orders appointing receivers, and providing that the proceedings in other respects shall not be stayed unless otherwise ordered by the court, or by the appellate court or a justice thereof, is sufficient to afford the defendant relief in a case where receivers are improperly appointed, whether with or without notice.

## 6. SAME—INTERLOCUTORY ORDERS—JURISDICTIONAL QUESTIONS.

No appeal lies from an order of a federal court refusing to dismiss a case for want of jurisdiction; defendant's objection to the jurisdiction being reviewable only after final decree.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, §§ 367, 417, 648.]

## 7. SAME—DISMISSAL OF BILL.

On appeal from an order appointing a receiver, the appellate court will render a final decree dismissing the bill if it appears that there is no equity therein, or that the court has no jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4575.]

## 8. COURTS—FEDERAL COURTS—DIVERSE CITIZENSHIP—ARRANGEMENT OF PARTIES.

In a suit in a federal court in which jurisdiction depends on citizenship, the court will arrange the parties as plaintiffs and defendants according to their interest, and, if such arrangement defeats the jurisdiction, the bill will be dismissed.

Appeal from Circuit Court of the United States for the Southern District of Georgia.

For opinions below, see 147 Fed. 955, 960.

Isaac Hardeman, Geo. S. Jones, and A. L. Miller (Miller & Jones, Hardeman & Jones, Haygood & Cutts, and W. A. Wooten, on the brief), for appellant.

John I. Hall and Olin J. Wimberly, for appellee.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is a suit brought by W. M. Gaddie, alleging that he is a citizen of North Carolina, against Frank R. Mann, Thomas J. Wooten, and C. M. Wise, all citizens of Georgia, the Citizens' Bank of McRae, a corporation under the laws of Georgia, and T. P. Trigg and W. E. White, partners composing the firm of Trigg & White, citizens of Virginia. The bill alleges the making of the following contract:

"Georgia, Telfair County:

"This agreement made and entered into, this 29th day of November, 1904, by and between Frank Mann, Thomas J. Wooten, W. M. Gaddie and C. M. Wise, whereby the said parties are offering for sale a tract of land on the Ocmulgee river (about 17,000 acres) and the said C. M. Wise is to have the sale of said property, and in case of a sale then all parties hereto to share equally in the net profits of said sale.

F. R. Mann.

"Thomas J. Wooten.

"W. M. Gaddie.

"C. M. Wise.

"Witness: A. J. Walker, J. P."

It is alleged that under this contract Mann and Wooten were to secure options on timber and timber lands, and that Wise and Gaddie were to secure purchasers therefor, the profits to be equally divided be-

tween the four; that Mann and Wooten secured the options, which, in some instances, consisted of escrow deeds and leases, and that these options, deeds, and leases were placed in the Citizens' Bank of McRae, which was to deliver them when the agreed purchase money was paid; that Gaddie and Mann were unable to find a purchaser, and that in 1906 Mann, in whose name the options were taken, secured a purchaser in Trigg & White, who paid \$5,000 in cash, and were ready to pay the balance of the purchase money, and that Mann had excluded and ignored Gaddie and Wise, and was denying that they had any interest in the profits. Gaddie, the complainant, therefore prayed for an injunction to prevent the consummation of the trade with Trigg & White and the delivery of the options, deeds, and leases by the bank, for the appointment of a receiver for the options, deeds, and leases, and for an accounting from Mann for his interest in the contract.

After the bill was filed, orders were made granting an injunction and appointing a receiver. From the interlocutory order appointing a receiver, this appeal is taken.

The 10 assignments of error may be condensed or grouped for the purpose of this decision:

First. The court erred in appointing a receiver and in granting the injunction, and in not accepting a bond tendered by Mann.

Second. The court erred in not dismissing the case for want of jurisdiction.

1. The bill was presented to the judge and indorsed "Filed" on June 29, 1906, and on the same day the judge made an order at chambers appointing J. A. Dunwoody "temporary" receiver, and ordered him to take possession of the property described in the bill and all moneys arising from the sale of any property described in the bill. An injunction was also issued as prayed for. The learned judge in appointing the receiver held that the case made by the bill was one of "urgency, and which, under the provisions of the Georgia Code, render proper the appointment of a receiver." No notice was given the defendants that an application would be made to appoint a receiver. The Georgia statute provides that:

"Under extraordinary circumstances a receiver may be appointed before and without notice to the trustee or other person having charge of the assets." Civ. Code Ga. 1895, § 4904.

We have had occasion heretofore to decide that this statute is only confirmatory of a principle of equity procedure and jurisdiction. *Joseph Dry Goods Co. v. Hecht*, 120 Fed. 760, 764, 57 C. C. A. 64. In the absence of this statute, under extraordinary circumstances, a court of equity may appoint a receiver without notice. The extraordinary circumstances referred to in the statute are the exceptional cases which sometimes occur, and which make it necessary that the court should have the power to act without notice to the defendant. A defendant may be beyond the jurisdiction of the court, or cannot be found, or some urgent emergency may be shown rendering interference, before there is time to give notice, necessary to prevent waste, destruction, or loss; or a case may arise in which notice itself would jeopard the safety of the property over which the receivership is extended. *Moritz*

v. Miller, 87 Ala. 331, 6 South. 269. The jurisdiction, without notice, should never be exercised except in cases of imperious necessity, when the complainant's right is clear and can be protected in no other way. This is the rule wherever equity is administered (Alderson on Receivers, § 121), and has been enjoined and enforced by repeated decisions of this court. *North American L. & T. Co. v. Watkins*, 109 Fed. 101, 48 C. C. A. 254; *Cabaniss v. Reco Mining Co.*, 116 Fed. 318, 54 C. C. A. 190; *Joseph Dry Goods Co. v. Hecht*, supra.

The rule is, of course, applied in receivership suits by one partner against another. *McCarthy v. Peake*, 18 How. Pr. 138.

Taking all the averments of the bill as true, no reason is shown for the appointment of a receiver without notice. We heartily indorse an observation of the Supreme Court of Ohio made in a case where the trial court had appointed a receiver without notice to the defendants:

"Under the circumstances of the case, the appointment of the receiver was an unwarranted exercise of judicial power, which it is the duty of this court to reverse and set aside." *Railway Co. v. Jewett*, 37 Ohio St. 649, 659.

2. Immediately after the making of the foregoing order appointing him receiver, Dunwoody demanded and received of the defendant Mann the option contracts described in the bill.

On July 17, 1906, Frank R. Mann, one of the defendants and the appellant in this court, filed a sworn motion in the court below, in which he alleged that the property in controversy consisted only of escrow deeds and options obtained by him for the purchase in fee simple of various tracts of land upon which there is a heavy growth of hardwood timber, and for options for long-term timber leases on other tracts of land; that all of these deeds and options were obtained from the owners of property by him and at his own expense, and that W. M. Gaddie had no right or interest in them; that some of the options had expired since the filing of complainant's bill; and that the others would soon expire, unless closed according to their terms; that, if the options were permitted to expire, it would result in the loss to him of many thousand dollars; that, if he is permitted to protect his rights in the options, he would be able to make a sale at a profit of several thousand dollars; that under the terms of the orders made by the court he was unable to take any steps to protect his rights and to prevent the options from expiring. He therefore moved the court that he be allowed to give a bond in such terms and upon such conditions as may be fixed by the court, to discharge any judgment or decree that may be recovered by the complainant against him, and that, upon the execution of the bond with such sureties as may be required by the order of the court, the temporary receiver heretofore appointed to take charge of the option contracts, and who now has the same in his possession, be directed to deliver them to this defendant. This motion by Mann to be allowed to give a bond came on to be heard on the 22d of September, 1906. At the same time the court heard the application for the appointment of a permanent receiver as prayed for in the bill, and for the granting of an injunction conformable to the prayer of the bill. The court on that day made a decree overruling and denying the motion of



Mann to be permitted to give a bond, and granted the application of the complainant for the appointment of a permanent receiver and the issuance of an injunction.

The claim of the complainant is that he is entitled as a partner to one-fourth of the net profits arising from the sale of certain lands on which the members of the partnership had obtained options. The complainant's claim is based on the written agreement between the partners made November 29, 1904, which is copied in the statement of the case. The complainant contends that the agreement was extended to additional lands—in all about 25,000 acres—and that Mann, through agents, had made a sale of part of these lands, and was endeavoring to deprive the complainant of his rightful share of the net profits. Mann's contention, as shown by the record, is to the effect that no sale was made within the time of the existence of the contract between himself, Gaddie, Wooten, and Wise, and that he now has the right to close the options and sell the lands, and that Gaddie will not be entitled to share in the net profits. The ultimate question to be decided when the case comes on for final decree on the merits is whether or not Gaddie is entitled to share in the net profits as claimed by him. On that question, we intimate no opinion, and refer to it only because it is necessary to do so in considering the assignments of error based on the decree refusing to permit Mann to give bond and appointing a receiver. The purpose of Gaddie's suit is to get a share of the profits arising from the sale of the land and the timber. The object of appointing the receiver is to protect him from loss. If it appear, therefore, that he is in no danger of loss because Mann is able to pay any decree he may obtain, a receiver should not be appointed. There is no ground for the appointment of a receiver where the facts show that, if the complainant obtains a decree, it can be collected—that he is in no danger of pecuniary loss. Alderson on Receivers, p. 640, § 448; Beach on Receivers, § 561.

The averments of the bill are directed towards Mann as the wrongdoer. The fear is that he will close the options, completing the purchase of the lands and timber, and make a sale of them, and not pay to the complainant his one-fourth of the net profits. The bill does not show Mann to be insolvent. It is alleged that the complainant "does not believe" that he owns property amounting to more than \$12,000, and that he has not sufficient means to be compelled to respond in damages. Mann makes oath that he is the owner in his own right of \$40,000 worth of property, and that he is amply solvent. In this affidavit he renews his offer to give bond for such an amount and upon such terms as may be required by the court. This evidence indicates that Mann is able to respond to any decree that Gaddie may obtain if he sustains his bill by proof. But, if this evidence was not sufficient to show his solvency, it must be remembered that he was in court offering to give a bond to secure the complainant in any sum for which he might obtain a decree.

In reversing an order appointing a receiver in a suit for the settlement of a partnership, the court said:

"It seems to me to be doing injustice to the defendant, in any case, to decide the whole of the disputed facts in favor of the plaintiff, in advance, without

proof to sustain his allegations, and especially unjust when the defendant proffers unquestioned security to the plaintiff against any possible loss." *Buchanan v. Comstock*, 57 Barb. (N. Y.) 568, 581.

In reversing the trial court for refusing a bond and appointing a receiver, the Supreme Court of Appeals of Virginia said:

"In such a case, where the claims are small in comparison with the property sought to be sequestered, and unascertained, and no notice of the application has been given the defendants, and an offer is made to secure those claims should they be subsequently established by the giving of any bond that may be required, it seems to me that it would be utterly at war with a sound judicial discretion to take the property from the hands of those who have been legally charged with its custody." *Va., T. & C. S. & I. Co. v. Wilder*, 88 Va. 942, 946, 14 S. E. 806.

In *Stillwell v. Savannah Grocery Co.*, 88 Ga. 100, 143, 13 S. E. 963, 970, *Bleckley, C. J.*, speaking for the court, said: "It may be asserted as a general proposition that a bond with good security is always a better form of protecting creditors likely to be injured by fraud than the appointment of a receiver for property perishable in its nature or expensive to keep. And in most cases the liability of a solvent party without bond and security would itself be preferable to an expensive receivership." In that case the court held, as expressed in the syllabus:

"It was certainly error to appoint a receiver unconditionally, without offering the purchaser the alternative of giving bond and security in lieu of surrendering the property to a receiver."

Alderson, in his recent work on Receivers, says:

"If a partner be given full and adequate security against loss, there is no ground for the appointment of a receiver, inasmuch as the very reason for such an appointment is removed." *Alderson on Receivers*, § 449.

This principle was indorsed by Judge Simonton in *Devereux v. Fleming* (C. C.) 47 Fed. 177, and in *Low v. Holmes*, 17 N. J. Eq. 148.

3. The act which allows appeals from interlocutory orders granting or continuing injunctions or appointing receivers provides:

"That the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof." Act March 3, 1891, c. 517, 26 Stat. 828, as amended by Act June 6, 1900, c. 803, 31 Stat. 660 [1 U. S. Comp. St. 1901, p. 550].

This provision of the act affords a defendant a remedy in cases where the enforcement of the order would be unjust, and where great injury would occur before the case could be heard on appeal. In this case the defendant, after taking the appeal, applied to this court for an order staying the decree of the court below, and such order was granted upon his giving bond as provided for by the statute. This statute will afford defendants relief, where receivers are improperly appointed, whether with or without notice.

4. A motion was made by the defendant Mann to dismiss the bill for want of jurisdiction. We find in the record, also, a plea to the jurisdiction of the court. There is no decree on either the motion or the plea. In the argument at the bar, it was assumed that the court had overruled these defenses. If that were true, and it so appeared in the record, no appeal could be taken from such orders. The court

having refused to dismiss the case for want of jurisdiction, the defendant objecting to the jurisdiction must wait till a final decree before he is allowed an appeal. 2 Foster's Fed. Prac. (3d Ed.) § 503. It is true that, on appeal from an order appointing a receiver, if it appear that there is no equity in the bill, or if it appear that the court has no jurisdiction of the case, the appellate court could and should make a final disposition of the case. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407, 41 L. Ed. 810. In *Arkansas Southeastern Railroad Co. v. Union Sawmill Co.* (May 30, 1907) 154 Fed. 304, 83 C. C. A. 224, we applied this rule where it appeared that a necessary party had been omitted, and that bringing such party into the case would defeat the jurisdiction of the court. That the omitted corporation was a necessary party in that case was shown by the contracts set up in the bill, and there was no dispute about its citizenship, for the purposes of jurisdiction, being the same as that of the complainant. In the case at bar the bill makes such allegations as show the jurisdiction of the court, and the evidence is contradictory as to the citizenship of the complainant. The controversy is whether he is a citizen of North Carolina or a citizen of Georgia, and the evidence on the point is in conflict. We are not satisfied that the parties have had full opportunity to present all the evidence they wish to offer on the question. The evidence presented has been by affidavit, affording no opportunity for cross-examination. Under the circumstances, we deem it not advisable to decide the question.

It is also urged that one of the defendants, Wise, should, on account of his interest, be arranged on the complainant's side of the case, and that, as Wise and the other defendants are citizens of the same state, this would defeat the jurisdiction of the court. It is true that this court would arrange the parties according to their interest as it appears from the record, and, when such arrangement defeats the jurisdiction, the bill would be dismissed. But the case has not been fully developed by a taking of all the evidence. We cannot tell how it may appear when the case is ready for hearing on the plea to the jurisdiction, and on the merits, if it should be heard on the merits in the court below. On this appeal, a want of jurisdiction not appearing on the face of the pleadings, and the evidence on questions relating to it being in conflict, and not having been taken on direct and cross-examination, we do not think it proper to decide the question.

The decree rendered September 22, 1906, appointing a receiver and granting an injunction, is reversed and the cause remanded, with instructions to tax all the costs and expenses incident to the receivership against the complainant, who moved for the appointment.

## GAMBLE v. CLEVELAND CLIFFS IRON CO.

(Circuit Court of Appeals, Sixth Circuit. January 8, 1908.)

No. 1,710.

## 1. BROKERS—CONTRACT FOR COMMISSIONS—EVIDENCE—QUESTION FOR JURY.

In an action by a broker to recover commissions on a sale of timber land, evidence *held* to require submission of the question as to the existence of the contract to pay for his services to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, §§ 128, 129.]

## 2. CORPORATIONS—REPRESENTATIONS BY AGENT.

Plaintiff offered certain timber lands to defendant at a certain price per acre net to the owner, plaintiff's commission to be 5 per cent. Defendant's president referred plaintiff's letter to R., who was defendant's land agent, and he refused plaintiff's offer at the price specified, but continued negotiations with him, and later a sale was consummated between the owner of the land and defendant's president. *Held*, that plaintiff was authorized to assume that R. had authority to contract with plaintiff to pay a commission in case of the consummation of the sale.

## 3. BROKERS—COMPENSATION—REVOCATION OF AUTHORITY.

The owner of certain timber land authorized plaintiff to offer the same for sale at \$2.75 per acre net. After plaintiff had offered the land to defendant, the owner's superintendent wrote defendant that they had decided to keep the lands out of the market until they had made a thorough examination of the lands, and, when that was finished, they would be glad to name defendant a price. Thereafter the matter was again taken up by a letter of one of the owner's officers to defendant's president, and subsequent negotiations resulted in a sale. *Held*, that the owner's letter withdrawing the lands from the market was but a temporary withdrawal for the purpose of examination only, and was not effective to deprive plaintiff of the right to commissions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 45.]

## 4. SAME—COMMISSIONS ON ADDITIONAL LAND.

Where the owner of certain timber land empowered plaintiff to sell the same at a specified price net, and gave plaintiff a plat of the land he was authorized to sell, plaintiff could not claim commissions on a sale of additional land not included in such plat.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

George Weadock, for plaintiff in error.

Wm. P. Belden, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This suit was brought to recover the sum of \$8,264.05, being a commission of 5 per cent. on \$165,282.07, the purchase price paid by the Cleveland Cliffs Iron Company to the Manistique Lumber Company for a tract of timber land in the Upper Peninsula of Michigan. At the conclusion of the testimony, upon motion, the court directed a verdict for the defendant. This action is assigned as error. In order to determine whether the court was right in thus withdrawing the case from the jury, it will be necessary to go into the facts. The court necessarily held that, upon the undisputed facts, there was no case in favor of the plaintiff; either that there was no contract for a commission on the sale made, or no sale made which

under the alleged contract entitled the plaintiff to a commission, or both. The two companies interested in the transactions in suit were the Cleveland Cliffs Iron Company and the Manistique Lumber Company. The former company was engaged in the mining, manufacturing, timber, and lumber business, the latter, for the most part, in the timber and lumber business. They operated in Michigan and adjoining states. Samuel Redfern was the land agent of the Cleveland Cliffs Iron Company, with an office at Negaunee, Mich., while John Millen, of Duluth, Minn., was the manager of the Manistique Lumber Company. William G. Mather was the president of the Cleveland Cliffs Iron Company, with an office in Cleveland, Ohio, while Alger, Smith & Co., of Detroit, were largely interested in the Manistique Lumber Company, Gen. Alger being the president. Henry Gamble, the plaintiff, lived in Grand Marais, Mich., and for some 35 years had been engaged, off and on, in the lumber business, buying and selling timber lands on commission. He was acquainted with the timber lands of the Manistique Lumber Company in the counties of Luce, Alger, and Schoolcraft, in the Upper Peninsula of Michigan, which aggregated about 60,000 acres, of which 30,000 acres were hardwood lands. In September, 1900, the plaintiff had a conversation with John Millen, the general manager of the Manistique Company, in which the latter gave him authority to offer the entire tract of timber land owned by that company for \$2.75 per acre net to the company. Gamble told Millen he thought he could sell the land to the Cleveland Cliffs Iron Company, and under the direction of Millen a plat of the land was made and given to Gamble on September 23, 1900. Gamble wrote from Grand Marais to the Cleveland Cliffs Iron Company, inquiring:

"Are you in the market for a tract of hardwood lands, about thirty thousand acres, adjoining and lying east of your recent purchase at Munising? If so let me hear from you."

On September 27, 1900, William G. Mather, the president of the defendant company, answered, acknowledging receipt of this letter, and saying that he had referred the same to "our Mr. Samuel Redfern, of Negaunee, Michigan, who will take the matter up with you, if it seems worth while." On October 4, 1900, Redfern wrote Gamble, stating the latter's letter of the 23d of September had been referred to him, and he would like to be informed of full particulars regarding this tract of 30,000 acres of hardwood lands east of Munising. On October 8, 1900, in answer to this letter, Gamble wrote Redfern, describing the location of the land, offering to send a plat if desired, and saying:

"It is considered a very good tract of hardwood, as good as there is in this part of the country. Some of it is better than others. The property is placed in my hands for sale at the price of \$2.75 per acre, net to the owner. My commission will be 5 per cent."

On October 17, 1900, Redfern wrote Gamble, saying:

"In reference to your offer of thirty thousand acre tract of land southwest of Grand Marais, as far as we can understand the location, will say we do not care to entertain an offer at any such price."

After receiving the last letter and obtaining a plat of the Manistique lands from Millen, Gamble proceeded to Negaunee, Mich. There he

met and had a conversation with Redfern. This talk is described by the participants and also by George C. Brown, who heard part of it and who seems to be a disinterested witness. Gamble testified:

"I introduced myself to Mr. Redfern, and told him that I had brought up the plat of that land I had written about, and I explained the matter to him. I explained that there was between 55,000 and 60,000 acres altogether on the plat, and a part of it was spruce, cedar, balsam, and hemlock, and they considered they had about 30,000 acres of hardwood. I said, 'I will tell you who owns the land.' In regard to the price I said: 'The price the owners gave me was \$2.75 per acre. Now, I will tell you who owns the land. The lands are owned by John Millen, of Duluth, and Alger, Smith & Co., of Detroit, who compose the Manistique Lumber Company. You can have all your correspondence direct with them; but, if you purchase the lands, you will have to pay my commission of 5 per cent. as I wrote you.' He said, 'If we purchase the lands, we will pay you the commission.'"

This statement was in no material respect changed on cross-examination. Brown testified that Gamble said:

"He would give them the man's name that owned this land. I just happened to hear that first. Then he went on, and said that Mr. Millen, of Duluth, and Alger, Smith & Co., of Detroit, was the firm of the Manistique Lumber Company and owners. That is what I heard him say first. He said, 'You can have all your own correspondence with these folks and make your own bargains or arrangements at the prices,' but he said, 'If you buy land, you will have to pay me my commission, 5 per cent. as I wrote to you.' He says, 'If we purchase the land, we will pay you 5 per cent. commission.'"

Redfern admits the conversation with Gamble in October, 1900. He states that Gamble presented a plat of the lands he was offering for sale, said it was a tract of generally good hardwood lands, but said some of them were not good. "He recommended that we should buy them, and referred me to John Millen, of Duluth, manager of the Manistique Lumber Company, and asked me to correspond with Mr. Millen about the land, and I told him I would have to refer the plat and the whole matter to Mr. Mather." Redfern says nothing was said by Gamble to him or by him to Gamble on the matter of a commission for his services, if the sale were made.

On November 10, 1900, Redfern wrote to Mather, the president of the company, inclosing the plat left him by Gamble, saying the latter had left a map which showed about 50,000 acres belonging to the Manistique Company, and "requests us to negotiate directly with the owners represented by Mr. Millen, their superintendent at Duluth, Minnesota, and that they will try to accommodate us as to price." On May 18, 1901, Redfern acting for the defendant company, wrote Millen, calling his attention to Gamble's offer of the preceding fall, asking to be informed of the price per acre, and stating, if it seemed to be a bargain for such a large purchase, they would give the matter their best consideration. In reply, Millen, as vice president of the Manistique Company, wrote Redfern on May 20, 1901, as follows:

"We are now looking over our hardwood lands in the vicinity of Grand Marais, and we have decided to keep them out of the market until we have a thorough examination made and know what we have on the lands. When that is finished, we will be very glad to name you price."

The record shows no resumption of the negotiations for the sale of the Manistique timber lands to the defendant company until the sum-

mer of 1902, when the presidents of these two companies, Mr. Mather and Gen. Alger, met at the laying of a cornerstone in Munising. Mr. Mather opened the resulting correspondence by a letter dated October 30, 1902, in which he called attention to the railroad and timber lands tributary to Grand Marais, and asked a proposition. It is unnecessary to go into the correspondence which ensued. There were provisions respecting the reservation of mineral rights, the cutting of certain timber, and the construction and use of certain railroads, which were agreed upon and inserted. The contract was really reached along in April, 1903, but executed the 1st of October of that year. By it 59,174.79 acres of land in Michigan was sold by the Manistique Company to the Cleveland Cliffs Iron Company for \$165,281.07. In reaching this result, a part of the land was classed as good land at \$5 an acre, and the balance as bad land at 50 cents an acre. The entire tract was sold for about \$2.79 an acre on an average. The price named by Millen to Gamble was \$2.75 an acre net.

The above are substantially the facts in the case, or, as it is not necessary to take so strong a position, there is evidence in the record tending to prove these facts, and since there is evidence tending to prove them, if they make a case for the plaintiff, the court erred in directing a verdict for the defendant.

And, first, as to the existence of the contract. The defendant contends that no contract for a commission was made. Gamble swears there was, and Brown supports him. Redfern swears there was not. Undoubtedly the Manistique Company in September, 1900, had a large tract of timberland for sale near the recent purchase of the Cleveland Cliffs Iron Company, at Munising. Millen, general manager of that company, gave Gamble authority to sell the land for \$2.75 per acre net to the company. Gamble told Millen he thought he could sell it to the Cleveland Cliffs Iron Company, and Millen had a plat of the land made and given him. Gamble opened the matter by writing the Cleveland Cliffs Iron Company, asking if it was in the market for a tract of hardwood lands of about 30,000 acres. Mather, the president of the company, acknowledged this letter, saying he had referred it to Redfern, of Negaunee, their land agent, and Redfern on October 4th wrote Gamble, asking for particulars. In answer, Gamble wrote Redfern, describing the location, offering to send a plat, stating the character of the timber, and then making this important statement:

"The property is placed in my hands for sale at the price of \$2.75 per acre net to the owner. My commission will be five per cent."

Here was the plain disclosure of the terms on which Gamble's services could be used. The land was for sale at \$2.75 per acre, net to the owner, and his commission would be 5 per cent. There was no concealment on Gamble's part of the commission he proposed to charge for his services. In answer to Gamble's letter of particulars, Redfern wrote, saying they did not care to entertain the offer "at any such price," and then Gamble went to Negaunee and had a conversation with Redfern. He took with him a plat of the land, which he gave to Redfern. He explained the amount of the land and the nature of the timber, named the price the owners had given him, \$2.75 per acre

net, disclosed the owners, stated that the Cleveland Cliffs Iron Company could have all its correspondence direct with them, but added:

"But, if you purchase the land, you will have to pay my commission of 5 per cent. as I wrote you."

And, according to Gamble, and Brown who corroborates him, Redfern answered:

"If we purchase the lands, we will pay you the commission."

It seems to us there is nothing unreasonable about Gamble's story of this transaction. He was an old timber man, who knew the character of the land, and that the Cleveland Cliffs Iron Company needed it. He got the outside price from Millen, and, after opening negotiations by letter, went to Negaunee to see Redfern, the land agent of the Cleveland Cliffs Iron Company. Of course, he went there, perhaps not for the purpose of immediately selling the land, but certainly of saying and doing whatever might judiciously lead to its ultimate sale. Before Gamble went to Negaunee, Redfern had written him, saying they did not care to entertain his offer, but Gamble took that statement cum grano salis, and went anyhow. Then he laid the matter fully before Redfern, gave him a plat of the land, told him the price, who the owners were, that his company could have all their correspondence direct with them, but reminded him that, if they purchased the land, they would have to pay his commission of 5 per cent. And Redfern accepted these terms. Now, we see nothing strange or unusual about this commission contract. Millen gave Gamble a price on the land, and Gamble brought the two parties to the subsequent purchase, the Manistique Company and the Cleveland Cliffs Iron Company, together. He could do nothing more. He was restricted as to the price, and it was wise to let the parties negotiate with one another as to any conditions or limitations which either might deem advisable.

It is claimed that Redfern had no authority to make this contract, but the correspondence was opened with Mather, the president of the company. He referred Gamble to Redfern; and, since all the parties knew what the matter under negotiation was, certainly Gamble had a right to believe that Redfern had authority to make a contract respecting a commission which was not only an incidental but a necessary thing at the opening of negotiations. Before Gamble went to Negaunee on October 8th, he wrote Redfern describing the land, stating it was placed in his hands for sale at the price of \$2.75 per acre, net to the owners, and said his commission would be 5 per cent. This statement was not only in Redfern's hands, but must have been in Mather's, before Gamble and Redfern met on October 19th, so that the jury might fairly assume that Redfern's negotiations were authorized by Mather upon the commission basis laid down by Gamble at the start.

But it is said these lands were withdrawn by Millen, superintendent of the Manistique Company, by his letter of May 20, 1901. This letter was susceptible of a different construction. All it says is:

"We have decided to keep them [the hardwood lands] out of the market until we have a thorough examination made and know what we have on the lands."



This is only a temporary withdrawal for the purpose of examination. The letter goes on to say:

"When that is finished, we will be very glad to name you price."

So, it is clear the so-called withdrawal was only for the purpose of more effectually preparing to negotiate. This conclusion is supported by the letter of Gen. Alger to Mr. Mather, on December 23, 1902, in which he says:

"Our superintendent, John Millen, is from Duluth and brings for our consideration the purchase of your 30,000 acres of hardwood lands in the Northern Peninsula."

This letter clearly ties the two so-called separate negotiations together, and shows that the negotiations begun with Millen at the suggestion of Gamble were carried on with Gen. Alger to whom Millen evidently reported. The negotiations between Alger and Mather were not separate and distinct from those started by Gamble. They were the natural outcome of what had happened before. By the summer of 1902 both companies had examined and considered the matter, and had naturally reached the point where they were ready to negotiate finally through their presidents.

It is said that the land sold to the Cleveland Cliffs Iron Company by the Manistique Company was not that described in the plat given Gamble by Millen. It may be that some land may have been included in that sale which was not covered by the original plat; but the sale was the sale by the Manistique Company of the land intended to be covered by that plat. The land offered by Gamble to Millen was the same land afterwards sold, for which he was to receive a commission of 5 per cent. It may be true additional land was sold. A trial will disclose that fact, and, if any such was sold, Gamble will not be entitled to commission on it. One of the questions for the jury to determine is the amount of the land sold which was covered by the original authority given Gamble.

In discussing the questions of fact which have suggested themselves to us, we are not to be taken as expressing our opinion about such questions one way or the other. We have gone far enough to reach the conclusion that the questions of fact involved in this case were of such doubtful solution as to require the verdict of a jury to decide them, and all our expressions of apparent opinion are to be limited by that end which we have held in view continuously.

The judgment is reversed, and the case remanded for a new trial.

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THE S. C. SCHENK.

(Circuit Court of Appeals, Sixth Circuit. December 17, 1907.)

No. 1,681.

1. TOWAGE—LOSS OF DAMAGE TO TOW—LIABILITY OF TUG.

That a tow line properly secured will not slip off of the tow posts of a tug is a reasonable presumption, and evidence of damages resulting to the tow from the slipping of the tow line, unexplained, makes a prima facie case of negligence against the tug.

## 2. SALVAGE—NATURE OF SERVICE—SALVAGE OR TOWAGE SERVICE.

It is the peril of the vessel saved and the circumstances under which the assistance was rendered which determines whether the service was a salvage service or not.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 1-12.]

## 3. SAME—NEGLIGENCE OF SALVING VESSEL—LIABILITY.

When a distinguishable injury has resulted from the negligence of one undertaking a salvage service, there may be not only forfeiture of all right to compensation, but an affirmative award of damages against the salving vessel, but there is no liability on the part of such vessel solely because the attempted service was ineffectual, no independent injury having been caused by the salvor, and if the service was rendered in good faith, without clear evidence of culpable negligence or willful misconduct.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, § 52.]

## 4. SAME—EVIDENCE CONSIDERED.

A steamer with two barges in tow on Lake Superior was driven to seek refuge from a gale in the harbor of Marquette. It was a dark night, with snow and rain and a wind blowing 75 miles an hour; and, in attempting to enter the harbor, a collision occurred between the two barges, with the result that the rear one was cast adrift, with one anchor disabled, half a mile from a shore on which she was being driven by the wind. The harbor tug Schenk, in response to signals from the steamer, came to her assistance, and at her request went in search of the barge, and, having found her, took a line and started with her for the harbor. After proceeding a short distance, the line slipped from the tow posts, and the barge again went adrift and was driven on shore; the tug being unable to render further assistance, owing to insufficient depth of water. It was shown that the line was fastened by a proper method, but the deck and tow posts were covered with thin ice, and there may have been some want of skill in making the fastening because of the inexperience of one of the line men, who was, however, the best obtainable, owing to a strike. It was conceded that, unless rescued, the barge would in any event have gone ashore, and the Schenk was the only tug available with sufficient power to render the service. *Held*, that the service was one of salvage, and not of towage, and that the negligence of the tug, if any was slight, and not such as to condemn her as the proximate cause of the loss of the barge.

Appeal from the District Court of the United States for the Eastern District of Michigan.

T. E. Tarsney, for appellants.

H. A. Kelley, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This is a libel against the tug Schenk by the owners of the barge Mary N. Bourke, which was cast away upon the beach of Lake Superior near Marquette, whereby great damage was sustained by the vessel and her cargo. In substance, the libel charges, that the wreck of the Bourke was due to the negligence of the tug while towing her into the harbor of Marquette. The facts necessary to be stated are these: The steamer Schoolcraft bound down Lake Superior, having in tow the barges Nester and Bourke, in the order named, was driven by stress of weather to seek refuge from a gale in the harbor of Marquette. When about one-half mile northeast of the southerly end of the breakwater, she sounded four blasts for a tug. She also slacked her speed, and undertook to shorten her tow lines to better control her tow in rounding the southerly end of the

breakwater, a measure necessary to get into the harbor. In doing this the Bourke and Nester collided, the Bourke sustaining some damage about her starboard bow, whereby she lost her green light and had her starboard anchor so jammed that it was rendered temporarily useless. To add to her distress, the tow post on the Nester, to which was attached the Bourke's tow line, gave way, and she was cast adrift within a half mile of the shore, with a gale of 75 miles per hour blowing her directly upon the beach and without any power of her own. About the time of this misadventure the steamer again blew for a tug. This was about 1 o'clock a. m. of the morning of April 26, 1902. The tug Schenk was a powerful harbor tug engaged in the business of assisting vessels into and out of Marquette harbor. Upon the night in question she was lying moored to an old ore dock well inside the harbor, with a low head of steam. She was notified by telephone from the life-saving station that there was a steamer with a tow off the harbor, and at once began to get up steam to go out. At or about the entrance to the harbor she passed the Schoolcraft, with the Nester in tow, coming into the harbor. Thinking that her help was needed by the Nester, and not hearing the orders from the deck of the Schoolcraft, she passed clear by the steamer and went to the Nester. Advised that her help was not needed, as the Nester had come around in the wake of her steamer and was entering the harbor, she went back to the Schoolcraft, then well up in the harbor. The master of the tug was then told from the deck of the steamer that her stern barge had broken adrift out in the lake, and requested that the tug go out to her assistance. This she did. The night was dark. There was snow, sleet, and rain. The green light of the Bourke having been lost in the collision with the Nester, there was great difficulty in finding her, as her red light was not visible. Neither did the Bourke use rockets or a torch to show her position. She had a high deck load of lumber, which helped to hide her cabin lights, and no masthead lights were burning. Finally the tug caught a glimpse of a cabin light, and ran in close enough to hail. Finding that the barge's long 1,200-foot tow line was dragging to windward, and realizing the danger of catching it in her propeller, she went around the stern of the Bourke, and came up to leeward, between her and the beach. A line was caught from the barge, and a tow line drawn aboard, which was made fast to her tow posts. The Bourke was then lying in the trough of the sea headed to the wind. The tug pulled her around, and was making for the harbor entrance, when the line slipped off the tow posts and the Bourke was again adrift. The tug drew 13 feet of water, and, on account of the shallowness of the water, deemed it dangerous again to go between the Bourke and the beach to get another line, even if time would permit, and returned to the harbor. Within a very few moments the Bourke ran on the beach; the men from the Schenk saying that they heard her strike while waiting to see if it was possible to again attempt her rescue before running for the harbor.

Two grounds have been urged for the condemnation of the Schenk: First, that the slipping of the line from the tow posts was due to a want of care and the proper degree of skill in fastening the line re-

quired under the circumstances; and, second, that it was wrongful negligence to abandon the Bourke after the slipping of the line without another attempt to get a line from her. The libel avers that the officers and crew of the tug "were careless and negligent and unskillful in that they did not place the tow line of the Bourke around or under the cleat or cavelle which crossed from one tow post of said tug to the other, and that by reason thereof said tow line slipped off the tow post and left the barge adrift." To support this they say that a tow line so fastened will not slip, and rely upon the fact of slipping to make a *prima facie* case against proper fastening. The libellant has also introduced certain admissions made by the master of the tug which tend to support this presumption—an admission made shortly after the event and upon the same night, and later repeated in evidence before the board of inspectors, that his linemen were inexperienced, and that the slipping of the Bourke's tow line had been due to this fact. That a tow line properly secured will not slip off of the tow posts is a reasonable presumption, and evidence of damages resulting from the slipping of the tow line, unexplained, makes a *prima facie* case of negligence. *The Quickstep*, 9 Wall. 665, 19 L. Ed. 767; *Cincinnati, etc., Ry. Co. v. South Fork Coal Co.*, 139 Fed. 528, 71 C. C. A. 316, 1 L. R. A. (N. S.) 533; *The Olympia*, 61 Fed. 120, 9 C. C. A. 393; *Memphis Electric Co. v. Letson*, 135 Fed. 969, 68 C. C. A. 453; *The Sweepstakes*, Fed. Cases, No. 13,687; *The Lyndhurst* (D. C.) 129 Fed. 843; *Burr v. Knickerbocker Steam Towing Co.*, 132 Fed. 248, 65 C. C. A. 554.

This *prima facie* case of negligence the defendants endeavor to meet, first, by the positive testimony of the master and the two linemen on the *Schenk*, that the line was fastened in the manner alleged in the libel to be the safe and proper mode; second, by evidence of very unusual conditions. The master of the *Schenk* says that he was standing with his two linemen on the aft side of the tow posts, between the two posts. "We passed the line between the two tow posts, one turn and a half around the port tow post. I fetched the loose end of the line on the outside of the port tow post. We then ran the line under the cavil on the port side, and turned it right back on the port side of the port tow post, and finished winding it around that tow post with a right-hand turn; the first turn and a half being put on with a left-hand turn. After this was done, which is the usual way, and about all that is ever done in doing towing, harbor work, we still further, for the sake of absolute safety, took a heaving line that way lying on deck and was very nearly new, and stopped the end of the tow line." He adds, however, that he only started the operation of "stopping" the end of the tow line and gave direction to the linemen how to secure it with the heaving line, when his attention was called forward. Cater, one of the linemen, a man who had had an experience of four or five years as a seaman, testified to the same mode of fastening and both Capt. Benson, the master, and Cater, as experts, as to the mode being that usually used on tugs. It is plain that if Cater and Benson were green hands that any fault due to them, or either of them, was not as to the method, but in some want of skill or care in making the fastening in the mode used. Now, there is no

contradiction of the evidence as to the mode of fastening, and none tending to show want of skill or care in fastening according to that approved method further than a bare inference of such want of care or skill as results from the fact of slipping and the partially explained opinion of the master that the slipping was attributable to the greenness of his linemen. But this was only an opinion, and the fact of his having one or more inexperienced hands was explained as due to a strike, which compelled him to take the best men he could get. There is no expert evidence that a line secured in the approved method will not slip under any conditions. Upon the contrary, the men on the tug say that the line slipped at a moment when the Bourke was on the crest of a wave and the tug in a trough, that the tow line was too short, enough line not having been played out to the tug, and that in such a position the top coils slipped up and off the tow post so loosening the other coils under the cleats as to enable them to slip. But if we assume that the tow line was of the length claimed by the Bourke, and that, even under such conditions as those just mentioned, a line should not slip if it had been properly and skillfully fastened by the method ordinarily used, is the mere fact that the line was not secured as skillfully as it might have been enough to condemn the Schenk under the conditions which existed? This involves the measure of skill and care due from the Schenk to the Bourke. The learned judge below, who has had much experience in admiralty causes, was of the opinion that the service of the Schenk was a salvage service, and not a mere towage contract, and that, in the absence of willful misconduct or gross negligence resulting in some affirmative injury to the Bourke, the tug should not be held responsible. The mere fact that the Schenk was a harbor tug engaged in the usual work of assisting vessels in and out of Marquette harbor does not determine the character of her service upon this occasion. It is true that, when the Schoolcraft was some half mile off the breakwater, she whistled for a tug. But before the Schenk came out her stern barge had gone adrift, and was helplessly drifting ashore. Under these conditions the Schenk, when along side, was requested by the Schoolcraft to go outside and assist a tow in dire distress. The storm was furious, the wind and sea extraordinarily high, and the Bourke steadily drifting on ashore, which was less than one-half mile distance. There was no anchorage ground, and her single remaining anchor, which was put down after her hawser slipped, dragged. Both the master of the Schoolcraft and of the Bourke agree in saying that without the aid of the Schenk she was inevitably bound to go ashore when the Schenk went to her aid. That the Schenk went to her rescue upon a call or request for help, there being no pretense of an effort to agree upon terms, does not exclude salvage under such conditions. The Rhodes, 82 Fed. 751, 27 C. C. A. 258.

It is the peril of the vessel saved and the circumstances under which assistance was rendered which determines whether the service was salvage service or not. Every condition was here present upon which an award for salvage would depend except success. The Rescue v. The George B. Roberts (D. C.) 64 Fed. 139; The City of Puebla (D. C.) 79 Fed. 982; The Reward, 1 Wm. Rob. 177; The Princess

Albia, 3 Wm. Rob. 138; *McConnachie v. Kerr* (D. C.) 9 Fed. 50, 53; *The Emily B. Souder*, 15 Blatch. 185, Fed. Cas. No. 4,458; *The J. C. Pfluger* (D. C.) 109 Fed. 93, 95; *The Flottbek*, 118 Fed. 954, 55 C. C. A. 448. In *McConnachie v. Kerr*, Brown, District Judge, said:

"A salvage service is a service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress of danger either present or to be reasonably apprehended. A towage service is one which is rendered for the mere purpose of expediting her voyage, without reference to any circumstances of danger."

But an actual contribution toward the saving of something is an essential to salvage, and here the effort of the Schenk was unsuccessful. This fact would deny her salvage. But does it follow because her attempt to assist in the salvation of the Bourke was not attended with success that she is to be condemned for her loss, even though her efforts were not guided by the best skill and her management not above criticism? A salvor comes under an obligation to use reasonable care for the protection of rescued property, and may lose all right to salvage award, or even render herself affirmatively liable for an independent injury sustained after a successful salvage service. *The Mulhouse*, 17 Fed. Cas. 962; *Serviss v. Ferguson*, 84 Fed. 202, 28 C. C. A. 327; *The Henry Steers, Jr.* (D. C.) 110 Fed. 578, 582; *The Bremen* (D. C.) 111 Fed. 228; *The Duke of Manchester*, 2 Wm. Rob. 471; *The Neptune*, 1 Wm. Rob. 297. No distinguishable injury is attributable to the Schenk. The Bourke was a lost vessel unless the Schenk could save her. She failed. The Bourke's loss is attributable to the Schenk only in the sense that her voluntary effort to help her was not efficient. That she went out with green linemen may be true; but she could do no better. Her going inefficiently equipped in that respect did not prevent the Bourke from getting a better service from some other source. The master of the *Schoolcraft*, her towing steamer, was helpless in the situation, and confesses that he could not have assisted her. There was no other tug in the harbor at all able to face such a sea and wind. That under such circumstances the master of the Schenk went to the rescue, although not properly manned in respect of skillful linemen, is not to be charged against the Schenk. *The Henry Steers, Jr.*, cited above; *The Dygden*, 1 Notes of Cases, 116. In the *Dygden* Case, cited above, the rescue was attempted by persons not having the knowledge of seamanship required when there were others ready to render the services having proper skill and equipment. In the opinion it was said:

"When persons offer their services to vessels in distress, and there are no other individuals on the spot capable of rendering more efficient assistance, this court must look with considerable indulgence at their efforts, because, being the only aid that can be procured, and offered in a state of great exigency, every allowance must be made if they are not possessed of adequate knowledge to perform the duty they have undertaken. But different considerations will apply to the conduct of individuals who assume the character of salvors, when there are persons competent to discharge those duties."

The aid of the Schenk was given under conditions of great emergency when no other aid was possible. There is no suggestion of bad faith or willful misconduct. The most that can be made out is that a

tow line slipped, which might have been fastened more securely. But this slipping was not due to neglect to adopt the usual method of making such a fastening, but to some want of skill or care in making the fastening as secure as it might have been. But the circumstances under which this fastening was made require that indulgence shall be exercised. Great haste was necessary. The night was black. The deck and tow posts were covered with thin ice. The tug was rolling and pitching. At least one of the linemen was green, and the master was called away by other duties before the fastening could be completed. There was no gross neglect. At most, the negligence in this matter was slight and not enough to condemn the Schenk as having proximately caused the loss of the Bourke.

When a distinguishable injury has resulted from the negligence of one undertaking a salvage service, there may be not only forfeiture of all right of salvage, but an affirmative award of damages against the salving vessel. This is as far as the reported cases seem to go. The *Henry Steers, Jr.* (D. C.) 110 Fed. 578, and cases there cited. But when, as here, liability is sought to be fastened upon a salving vessel solely because the attempted service was ineffectual, no independent injury having been caused by the salvor, there is no responsibility if the service was rendered in good faith, without clear evidence of culpable negligence or willful misconduct. The *Henry Steers, Jr.* (D. C.) 110 Fed. 578; *The Laura*, 14 Wall. 336, 20 L. Ed. 813; *The Infanta Maria Theresa*, 188 U. S. 283, 289, 23 Sup. Ct. 412, 47 L. Ed. 477.

Salvage service in the public interest should be encouraged. A decree against the Schenk, under the circumstances, would tend to discourage such efforts.

The decree of the court below will be affirmed.

NOTE.—The following is the opinion of Swan, District Judge, on hearing in the trial court:

SWAN, District Judge. In form and structure this is a libel for negligent towage. It impleads the tug "in a cause of damage civil and maritime" for alleged derelictions in the performance of a towage service which the tug undertook to render to the schooner *Mary N. Bourke* about 1 or 2 o'clock a. m. of April 26, 1902, near the entrance of the harbor of Marquette, Mich. There are eight specifications of fault charged against the tug upon which her liability is predicated for the damage occasioned to libelants as owners of the *Mary N. Bourke* by reason of the damage done to that vessel by the alleged misfeasance and nonfeasance of the *S. C. Schenck*. On the theory of the libel the fourth, sixth, seventh, and eighth specifications comprise the gravamen of the case pleaded. These are:

"Fourth. That by reason of the damage of said barge, *Mary N. Bourke*, as aforesaid, the costs and expenses necessarily incurred in the unloading of a portion of her said cargo, and in the employment of the said wrecking tug *Favorite*, her crew and outfit, and the service by her performed, and the re-leasing of said barge, and towing her into Bay City, and the making of general repairs occasioned by said stranding, the reshipment of said cargo in other vessels to its point of destination, the damage thereto, the deprivation of the profits and earnings of said barge, which would have otherwise accrued to these libelants. These libelants have sustained damage to the amount of \$15,000 and upwards."

"Sixth. These libelants charge as negligence and faults upon the part of said tug, her owners, and those navigating her and have her in charge, in addition to such negligence and faults as may appear upon the trial of the cause, of which these libelants pray the advantage as follows: (1) That the said tug

was not properly manned and equipped. (2) That the officers and crew of said tug were incompetent. (3) That the officers and crew of said tug were careless and negligent, in that they did not properly fasten the tow line of said tug. (4) That the officers and crew of said tug were careless and negligent, in that they fastened the tow line of said barge Bourke in an unskillful and unseamanship manner. (5) That the officers and crew of said barge were careless, negligent, and unskillful, in that they did not place the tow line of said barge Bourke around or under the cleat, or cavarel which crosses from one tow post of said tug to the other tow post, and that by reason thereof said tow line slipped off said tow post, and left the said barge Bourke adrift.

"Seventh. That the officers and crew were careless and negligent and violated their duty as to said barge Bourke, by abandoning the same, and in that they did not make any effort to get a line to or from her after the tow line had slipped from the said tug's tow post.

"Eighth. In that those on said tug who made said tow line fast thereon were inexperienced, and not competent to perform the duties which they undertook, under the order of the officers of said tug."

Condensed, the facts pleaded are briefly: The steamer Schoolcraft on a voyage from Duluth and Ashland for Tonawanda, N. Y., towing in the order named the barges George Nester and Mary N. Bourke, all said vessels being lumber laden, and tight, staunch, and strong, and well tackled, appointed and appareled, encountered "a severe northeast gale" about 9 p. m. of Friday, April 25, 1902, when about 35 miles northeast of the port of Marquette. "The gale increased in velocity, and the sea became heavy, whereupon the master of the said barge Schoolcraft, for the purpose of the safety of the said steamer and the said barges and their cargo and crew, headed towards the port of Marquette for shelter," and about 12:45 a. m. of April 26, 1902, when about one-half a mile from the end of the breakwater of Marquette Harbor, the Schoolcraft sounded her steam whistle as a signal for a tug to come out and take the barges into port. The tug S. C. Schenck came out, and was ordered by the master of the Schoolcraft "to go to the assistance of the barge Mary N. Bourke and to tow her into said harbor." Obedient to this order, the Schenck immediately proceeded to the Bourke. At or about the same time the Schoolcraft signaled, as aforesaid, the tow post of the Nester, to which was attached the Bourke's tow line, broke and gave way, thus leaving the Mary N. Bourke adrift, and at the mercy of the northeast gale, which drove her rapidly towards the reef on which she was ultimately cast and wrecked. The Schenck reached the Bourke and took her line, which, it is claimed, was new and of strength and length sufficient to hold that barge under then existing conditions. The libelants charge that through the fault and incompetency of the Schenck's crew the line was not properly made fast on the tug and slipped after the Schenck had gotten the Bourke under way and before entering the harbor; that thereby the Mary N. Bourke was left helplessly adrift and in a dangerous position by reason of the close proximity of the beach and the existence of the high seas and strong winds which then prevailed, and which was blowing and drifting said barge Bourke towards the beach. It is alleged that there "was ample time and the conditions of said wind and sea was such that the said tug could have come about and again taken the line \* \* \* and safely towed the barge into said harbor, and it was the duty of said barge to do the same." The tug thereupon returned to the harbor. Thereupon the Bourke dropped both anchors, which "partially held her for a time, but, the storm continuing, she soon dragged her anchors and went ashore, stem first, then swung around by reason of the force of the wind and the sea \* \* \* which continued to roll in from the northeast to such an extent and with such force that the said barge pounded on the bottom, breaking her keelson frames, beams, and planks, and strained and warped the said barge, doing great damage thereto, \* \* \* namely, the sum of ten thousand dollars." The total damages claimed for injury to the vessel, cost of repairs, unloading, and reshipment of cargo, and loss of profits and earnings of the barge are alleged to be "\$15,000 and upwards." The quotations in the foregoing summary of the libel are taken from that pleading.

The answer of the claimant corroborates the libel as to the severity of the storm prevailing before and after the Schoolcraft's signal for aid was sound-



ed, and pleads that "the night was intensely dark. An unusually severe gale from the northeast was blowing at the time, accompanied at intervals by squalls of snow and rain, rendering navigation very difficult and dangerous, and making it impossible to see any distance out." The master of the tug learned from the life saving station by telephone of the coming of the tow—about 2 a. m.—and at once prepared to go to its aid or call, and on hearing the Schoolcraft's signal of four blasts went forthwith. Learning from the Schoolcraft that the stern vessel of the tow (the Bourke) had broken adrift and asked to go to her assistance, the Schenck went out at once, and, after some search in the darkness, her crew discovered the cabin light of the Bourke—the only light she showed—her green light having been carried away. The Bourke's tow line was still out and trailing from her, making dangerous the approach of the tug to her aid. The Schenck was to windward of the Bourke when the latter was first seen, and this compelled her, in order to avoid getting afoul of the tow line, to go under the stern of the barge and attempt to get the line from the latter's lee side. Claimant alleges that the line given by the Bourke to the tug was too short, and that the tug's linesmen or deckhands called in vain for more line. The gale was increasing in fury, and both tug and barge were drifting before it towards the breakers to the S. S. W. of the breakwater. Because of the urgency of the conditions, and without waiting for more line which the tug called for, the crew carefully fastened the line furnished, and started. Averring that the line was made fast in a seamanlike manner, claimant alleges that, when the barge's bow rose on the crest of the wave, the stern of the tug remained in the trough of the sea, and the tow line by this cause was pulled loose and over the tow post. The tug was instantly stopped and backed to recover the schooner's line, but before this could be done the Bourke was in the breakers of the lee shore, and apparently aground, and "it was unsafe, and, in fact, impossible, for the tug in that gale and terrific sea and under the conditions of weather then prevailing to get near the Bourke in her stranded condition, and the Schenck was obliged to leave her there and proceed to shelter in the harbor." It also "denies that it or the tug was under any legal obligation to perform the service of attempting to rescue and save said schooner Mary N. Bourke," and denies that it was or could be responsible for any of the things in said libel, even if the same were true, and insists that the libel does not set up facts sufficient to constitute a cause of action against said tug which was without fault: that the stranding was caused wholly by the unusual weather conditions and the faults of the Bourke specified in the answer, viz., failure to show lights, incompetency of her watch, failure to give notice of her whereabouts, negligence in letting her tow line drag, failure to drop her anchors before coming to the tug, and the failure to give the tug enough line to permit the same to be fastened effectually on the tug's tow post. The proofs show that the storm was of extraordinary violence and the sea unusually heavy. The Bourke's master testified that the velocity of the wind was 65 miles per hour. The records of the Weather Bureau show that it reached 75 miles per hour. The Bourke's high deck load of lumber greatly increased her drift before the gale.

She had lost her green light in collision with the Nester—apparently largely occasioned by the tempestuous conditions—before the tug came out. Nothing was furnished to supply its place. In the heavy fall of sleet and snow and the darkness it was impossible to locate the Bourke without search. Her tow line, several hundred feet in length, was trailing from her bow and astern of her—a dangerous menace to the tug's approach and to be avoided with unusual care, as its entanglement in the screw of the tug meant the latter's disablement and almost certain wreck. The Schenck was the only tug at Marquette which could dare to venture out in the storm. There was no other tug there seaworthy, for the perils of that navigation. It also appears from the proofs of both parties that there was a strike then in force among the deckhands and firemen; that because of that the Schenck was deprived of the services of her usual crew, and could obtain only inexperienced men to fill their places. The Schenck was under no obligation to venture out that night—owed no duty to the Bourke unless one was cast upon her effort to rescue her. Had the Schenck declined to attempt it, stranding and wreck of the Bourke was inevitable. The master of the Schoolcraft admitted that his

steamer was powerless to save the helpless barge, and that the only hope the vessel had was from the tug. The master and mate of the Bourke made a like admission.

If in making the attempt to save the barge the tug was under the ordinary obligations of the towage contract, she was bound only to use ordinary care and skill in the service. While such care and skill is a relative term and varies with conditions, and while the tug would ordinarily be bound to provide a competent crew for the service she undertakes, and the slipping of a tow line in ordinary towage might, if causing injury to the tow, be prima facie evidence of negligence, it would be a harsh measure of responsibility to hold her liable (when competent linemen could not be procured) for the slipping of a line fastened under such unusual and dangerous conditions as then prevailed, or for giving up further attempt to rescue the vessel at the hazard of her own safety. The *Clematis*, Brown's Admiralty, 499. But the service which the *Schenck* was called upon to render was more than mere towage, although its performance would have involved the necessity of towing the barge, if reasonably possible, away from the lee shore. It had every element of a salvage service except that of success. All the conditions were present which would heighten the tug's reward had she succeeded. No decision has been cited from the American or English courts making an unsuccessful attempt to save property from an impending peril as cause of action against the persons or the property of the owner or master of the vessel which falls in the attempt. In the English courts the utmost liability entailed by the negligence of a salvor in the rescue of vessel or cargo is the diminution or denial of compensation. The *Yan Yean*, 5 *Aspinwall's Marine Cases*, 135; The *Cheerful*, 5 *Asp.* 525; *Kennedy's Law of Civil Salvage*, p. 36; The *Duke of Manchester*, 4 *Notes of Cases*, 580; The *Lockwood*, 9 *Jurist*, 1017. In the federal courts there are cases which affirm that the service of a tug under like conditions to those in evidence in this case are salvage services (The *Rescue v. Roberts* [D. C.] 64 Fed. 139; The *City of Puebla* [D. C.] 79 Fed. 982), and deny or reduce salvage for negligence or misconduct.

It is only culpable negligence proximately resulting in injury to the vessel that warrants action against one attempting to save her. The *Harry Steers, Jr.* (D. C.) 110 Fed. 587, 588. This case distinguishes between want of ordinary care and skill and culpable negligence, and fully reviews the authorities. It seems to be a fair conclusion from the authorities that it is only where a salvor has rescued the vessel from the primary peril to which she was exposed, and has deliberately or by gross negligence subjected her needlessly and recklessly to injury from a distinct and independent peril, that he loses the character of a salvor, and becomes affirmatively a wrongdoer. It is enough to protect the salvor that he has used reasonable care in his efforts, and a loss subsequently occurring cannot be visited upon him. It would be an extraordinary proposition that a tug attempting the rescue of a vessel in the very jaws of shipwreck should be held liable for even an error in the effort. The *Laura*, 14 *Wall.* 342-344, bottom of page.

Upon a careful consideration of all the facts, I am compelled to hold the libelants have failed to make a case against the tug, and that the loss was attributable solely to the conditions, and that the libel must be dismissed, with costs.

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PORTLAND GOLD MINING CO. v. STRATTON'S INDEPENDENCE,  
Limited, et al.

(Circuit Court of Appeals, Eighth Circuit. December 6, 1907.)

No. 2,649.

JUDGMENT—ESTOPPEL—ACTIONS OF TORT—EXONERATION OF IMMEDIATE ACTOR.

The general rule that one may not have the benefit of a judgment as an estoppel, unless he would have been bound by it had it been the other way, is subject to recognized and rational exceptions, one of which is that in actions of tort, such as trespass, if the defendant's responsibility is

necessarily dependent upon the culpability of another, who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of that judgment as an estoppel, even though he would not have been bound by it had it been the other way.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, § 1146.]  
(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Colorado.

Tyson S. Dines and Horace N. Hawkins (W. J. Chinn, Elmer E. Whitted and O. L. Dines, on the brief), for plaintiff in error.

Clayton C. Dorsey and William V. Hodges, for Stratton's Independence, Limited.

C. A. Gillette, for Thomas Burbridge.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This was an action by the Portland Gold Mining Company, a Wyoming corporation, against Stratton's Independence, Limited, an English corporation, J. W. Price, T. B. Burbridge, and others, whose presence in the litigation has become immaterial, to recover damages for a trespass to real property. Stratton's Independence and Burbridge answered separately, the answer of each being substantially a general denial, and Price, without answering, appeared at the trial, attended by counsel, and secured a verdict in his favor, as here stated. At the conclusion of all the evidence Stratton's Independence moved for a directed verdict, and the motion was sustained. The plaintiff then indicated that it would not ask a separate verdict against Price or Burbridge, and a motion for a directed verdict interposed by them was sustained. The trial thus resulted in a verdict and a judgment against the plaintiff, and it sued out this writ of error. The ruling on the motion of Stratton's Independence was excepted to at the time and error is assigned thereon now, but no exception was taken to the ruling on the motion of Price and Burbridge, and it is not questioned now.

The case made by the evidence was this: The plaintiff and Stratton's Independence were, respectively, the owners of adjoining mining properties. Stratton's Independence leased to Burbridge, for mining purposes, a portion of its mine far beneath the surface and adjacent to the line dividing the two properties. The lease in terms prohibited the lessee from extending his mining operations outside of the leased premises, required him to actively mine them, and reserved to the lessor the right to market the ore and to retain a substantial share of the proceeds as rental. Before any work was done, an arrangement was effected between Burbridge and Price whereby the latter had charge of the mining operations under the lease, and, if a trespass was committed, it was because these operations were extended outside of the leased premises and into the property of the plaintiff. But Stratton's Independence was not a participant in these operations, and was not responsible for such a trespass, unless it be that it marketed the

ore and retained part of the proceeds with knowledge of the place from which, and the circumstances in which, the ore was obtained, and thereby, in legal contemplation, adopted or ratified a wrongful act done by another partly for its benefit. See *Dempsey v. Chambers*, 154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. Rep. 249. Whatever ore was obtained by those operating under the lease was marketed, and the proceeds distributed, as if obtained from the leased premises. Whether or not there was any substantial evidence of an adoption or ratification by Stratton's Independence of a trespass by those operating under the lease was the subject of opposing contentions at the conclusion of the trial, and was ruled adversely to the plaintiff. The controversy is renewed here, but its consideration and determination will be both unnecessary and inappropriate, if for other reasons the judgment must be affirmed.

It is plain that the plaintiff's right, if any it had, to hold Stratton's Independence for a trespass was dependent, first, upon the commission of the trespass by those operating under the lease; and, second, upon its adoption or ratification of their act. They were the immediate actors, and, if guilty of a trespass, were personally responsible therefor, whether or not responsibility was also cast upon it. But, as it was not a participant in the mining operations, and, if responsible at all, became so only by adopting or ratifying their act, it follows that no responsibility was cast upon it unless personal responsibility also attached to them. As quite apposite, we quote from *New Orleans & Northeastern R. R. Co. v. Jopes*, 142 U. S. 18, 24, 27, 12 Sup. Ct. 109, 35 L. Ed. 919, a case in which it was sought to hold a railroad company for the act of its conductor in injuring a passenger:

"It would seem on general principles that, if the party who actually causes the injury is free from all civil and criminal liability therefor, his employer must also be entitled to like immunity. \* \* \* If the immediate actor is free from responsibility, because his act was lawful, can his employer, one taking no direct part in the transaction, be held responsible? \* \* \* The question carries its own answer, and it may be generally affirmed that if an act of an employé be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor."

Here the immediate actors were exonerated by the judgment in their favor, which is none the less effective as a final adjudication because resting upon a verdict directed with the plaintiff's virtual consent. *Nashville, etc., Co. v. United States*, 113 U. S. 261, 5 Sup. Ct. 460, 28 L. Ed. 971; *United States v. Parker*, 120 U. S. 89, 7 Sup. Ct. 454, 30 L. Ed. 601; *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U. S. 683, 691, 15 Sup. Ct. 733, 39 L. Ed. 859. Is Stratton's Independence entitled to the benefit of that adjudication? Its counsel insist that it is. The contention is not new, but in various relations has been often the subject of consideration and decision in the courts. The objections urged against it now and heretofore are (1) that, as the responsibility of joint tort-feasors is several as well as joint, one may be exonerated and another held culpable; and (2) that one may not have the benefit of an adjudication as an estoppel, unless he would have been prejudiced by it had it been the other way. But it is quite

generally held that these objections do not prevent an estoppel where, as here, the one exonerated was the immediate actor and his personal culpability is necessarily the predicate of the plaintiff's right of action against the other, and we think that upon principle this ought to be true.

One of the earliest cases in which the question arose is *Ferrers v. Arden*, 2 Cro. Eliz. 668, which was trespass on the case for the conversion of an ox. The defendant pleaded that in a prior action for the same trespass, prosecuted by the same plaintiffs against other defendants, the latter had justified in his right and were acquitted, and it was held that, if the second action was for the same cause, the defendant's plea was good; for "although he be a stranger to the record, whereby the plaintiffs were barred, yet he is privy to the trespass, wherefore he well may plead it, and take advantage of it." In another relation, the same question arose in *Biggs v. Benger*, 2 Ld. Raymond, 1372, an action of trespass against two defendants. One made default, and the other pleaded that the act charged was done by him in the right of his codefendant and under the license of the plaintiff. The latter took issue on the plea, which was found against him, and it was held that the defendant who made default was entitled, on motion in arrest, to the benefit of the plea because it showed that the plaintiff could have no cause of action against him. Of like import are 2 Tidd's Pr. 895, 2 Black on Judgments, § 781, and *Williams v. McGrade*, 13 Minn. 46, 54 (Gil. 39). A leading case in this country is *Emery v. Fowler*, 39 Me. 326, 63 Am. Dec. 627, which was trespass quare clausum against one who had acted under the direction of his father. In a prior action by the plaintiff against the father for the same act the father, who admitted that the son acted under his direction, had been acquitted, and it was held that the son was entitled to the benefit of that adjudication. We quote from the opinion:

"To permit a person to commence an action against the principal and to prove the acts alleged to be trespasses, to have been committed by his servant acting by his order, and to fail upon the merits to recover, and subsequently to commence an action against that servant and to prove and rely upon the same acts as a trespass, is to allow him to have two trials for the same cause of action, to be proved by the same testimony. In such cases the technical rule that a judgment can only be admitted between the parties to the record or their privies expands so far as to admit it, when the same question has been decided and judgment rendered between parties responsible for the acts of others."

The doctrine of that case was reaffirmed in *Atkinson v. White*, 60 Me. 396, the facts in which were these: The owner of certain logs sold them to A. by a mortgage bill of sale, and subsequently sold them to B. by an absolute bill of sale. A. sold a portion of the logs to C., and warranted the title. C. converted them, and B., asserting the invalidity of the sale to A., sued C. in trover. The action resulted in a judgment establishing the validity of that sale, and thereafter B. brought a like action against A., who sought the benefit of the judgment in favor of C., his warrantee. Of this it was said:

"That the question involved in each suit is precisely the same, and to be proved by the same testimony is beyond a doubt. It is equally clear that the plaintiff is the same, and that he has had his day in court. He has had a full

hearing upon the law and fact involved in the very question he now proposes to try again in another suit. He has had every privilege the law allows him, unless he is entitled to another hearing, simply because he is now attempting to enforce his claim against another defendant in name, but the same in interest.

"Ordinarily judgments have been held conclusive only between parties and their privies, and only when both parties are bound. But this rule is subject to exceptions; as in the case of an alleged trespass by two persons, when one acts as servant of the other, and by his command. Such persons are not privies, and yet, if the plaintiff fails in his action against one, he is precluded by that judgment from maintaining an action for the same trespass against the other."

Then, after it was observed that one reason for the rule, that estoppels, to be binding, must be mutual, ceased with the enactment of statutes enabling parties to be witnesses, it was held that the former judgment was conclusive against the plaintiff. Well in point is *Emma Silver Mining Co., Limited, v. Emma Silver Mining Co. of New York* (C. C.) 7 Fed. 401, 407, which was a suit in equity for the rescission of the sale of a mine and other property because of deceit charged to have been practiced by the defendant, through certain of its agents, in effecting the sale. The defendant interposed a plea to the effect that the complainant had theretofore instituted an action at law against the defendant's agents to recover damages for the deceit, in which the matter of that charge had been adjudicated in their favor; and, in response to the complainant's contention that the defendant could not avail itself of that judgment as a bar, or as a conclusive determination of the facts, because the defendant was not a party to it, it was said by Judge Choate:

"The weight of authority, however, is that where an agent in a transaction is sued after the termination of his agency, and upon a trial of the merits the issue is determined against the plaintiff, the principal, though not a party to the suit, can avail himself of the judgment as a bar, when he is sued by the same plaintiff on the same cause of action. While the principal, if he had no notice of the former suit, and no opportunity to defend it, may not be concluded by a judgment against his former agent, or made responsible by the agent's bad pleading or blunders in the trial of the cause, because so to conclude him would be to deprive him of his property without due process of law, yet, as regards the plaintiff who has before sued the agent and been defeated, there is no reason why he should not be concluded upon that principle of public policy which gives every man one opportunity to prove his case, and limits every man to one such opportunity. He has had his day in court, and it is immaterial whether he has chosen to test his right as against the principal or the agent in the transaction, provided the issue to be tried was identical as against both."

In *King v. Chase*, 15 N. H. 9, 19, 41 Am. Dec. 675, where a sheriff was sued for the conversion of personal property because it had been wrongfully taken, as was claimed, by his deputy, Stebbins, under a writ of attachment, it was said in respect of the question here under consideration:

"The sheriff is responsible for the acts of his deputy in attaching property. The plaintiff might have sued the defendant for the act of Stebbins in taking the oats. But he had the right also to sue Stebbins himself, and this he elected to do. Having litigated the title to the oats with him, and failed, he ought to be precluded from trying the same matter in another suit against the defendant, on the ground that the defendant is responsible, and that he had a right of action against him also."

In *Lake Shore & Michigan Southern Railway Co. v. Goldberg*, 2 Ill. App. 228, an action of trespass where the defendant's liability was grounded entirely upon the acts of one Cornwall, its agent, the court observed that "where the real actor, none the less liable personally because acting for another, is not guilty, it necessarily follows that the party for whom he acted cannot be," and held that the defendant could avail itself of a judgment exonerating Cornwall in a prior action against him by the plaintiff for the same acts. Of like import is *Marks v. Sullivan*, 8 Utah, 406, 410, 32 Pac. 668, 20 L. R. A. 590. In *Sonnentheil v. Moody* (Tex. Civ. App.) 56 S. W. 1001, which was an action for conversion against persons charged with inducing an officer to make a wrongful seizure of the plaintiff's property, it was held that the plaintiff was estopped by a judgment in a prior action by him against the officer wherein it was adjudged that the seizure was lawful.

Other cases which establish that the rule that estoppels, to be binding, must be mutual, is not absolute, or without rational exceptions, are *Hill v. Bain*, 15 R. I. 75, 23 Atl. 44, 2 Am. St. Rep. 873, *Featherston v. N. & C. Turnpike*, 71 Hun, 109, 24 N. Y. Supp. 603, *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, *Stevick v. Northern Pacific Ry. Co.*, 39 Wash. 501, 81 Pac. 999, *City of Anderson v. Fleming*, 160 Ind. 597, 67 N. E. 443, 66 L. R. A. 119, *Anderson v. West Chicago Street R. R. Co.*, 200 Ill. 329, 65 N. E. 717, *Muntz v. Algiers, etc., Co.*, 116 La. 236, 40 South. 688, *McGinnis v. Chicago, etc., Co.*, 200 Mo. 347, 98 S. W. 590, 9 L. R. A. (N. S.) 880, *Chicago, etc., Co. v. McManegal* (Neb.) 103 N. W. 305, where the rulings before mentioned were applied to actions for personal injuries in which the defendant's liability was grounded upon the alleged negligence of another, who, when sued by the plaintiff, had been adjudged free from negligence; *Spencer v. Dearth*, 43 Vt. 98, where a judgment against the plaintiff, on the ground of payment, in an action against one of several makers of a joint and several promissory note, was declared a bar to a recovery against the others; *Cowley v. Patch*, 120 Mass. 137, where, in an action on an alleged joint liability of the defendant and a third person, it was held that the defendant was entitled to the benefit of a judgment, in a prior action by the plaintiff against the third person, whereby it was adjudged that the liability was not joint; and *Glaze v. Citizens' National Bank*, 116 Ind. 492, 18 N. E. 450, where a judgment in favor of a wife, in an action where she had litigated with her husband the right to money theretofore drawn by her from a bank, was held available to the bank when the husband sought to recover the same money from it.

Thus it is settled by repeated decisions that the general rule that one may not have the benefit of a judgment as an estoppel unless he would have been bound by it had it been the other way is subject to recognized exceptions, one of which is that in actions of tort, such as trespass, if the defendant's responsibility is necessarily dependent upon the culpability of another, who was the immediate actor, and who, in an action against him by the same plaintiff for the same act, has been adjudged not culpable, the defendant may have the benefit of

that judgment as an estoppel, even though he would not have been bound by it had it been the other way. And we think it could not well be otherwise, for, when the plaintiff has litigated directly with the immediate actor the claim that he was culpable, and, upon the full opportunity thus afforded for its legal investigation, the claim has been adjudged against the plaintiff, there is manifest propriety, and no injustice, in holding that he is thereby concluded from making it the basis of a right of recovery from another who is not otherwise responsible. To such a case the maxim, "*Interest reipublicæ ut sit finis litium*," may well be applied.

We conclude that the verdict and judgment exonerating Price and Burbridge, which upon this record neither are nor can be called in question, are available to Stratton's Independence, and therefore that, if there was error in any ruling in its favor at the trial, the error has now become harmless.

The judgment is accordingly affirmed.

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JOHNSON v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 10, 1907.)

No. 1,668.

CONSPIRACY—CONSPIRACY TO COMMIT OFFENSE AGAINST UNITED STATES—INDICTMENT.

An indictment will not lie under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], for a conspiracy to effect the concealment by a bankrupt of property from his trustee, in violation of Bankr. Act 1898, § 29b, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433], where the trustee himself is charged as one of the conspirators, and the averments of the indictment show that there was, in fact, no concealment of property from him, and no purpose that there should be such concealment.

In Error to the District Court of the United States for the Northern District of Texas.

The plaintiff in error, B. H. Johnson, E. H. Coleman, and A. F. Mitchell, were jointly indicted for conspiring to commit an offense against the United States. The indictment, omitting formal parts, is as follows:

"Heretofore, to wit, on the 25th day of January, A. D. 1904, one B. H. Johnson, one E. H. Coleman, and one A. F. Mitchell did unlawfully and fraudulently conspire together within the Dallas division of the Northern district of Texas, to wit, in Navarro county, state of Texas, and within the jurisdiction of this court, to commit an offense against the United States of America, in the manner and form as hereinafter shown; that is to say, the said E. H. Coleman was then and there at the said time engaged in the selling of drugs and druggist's sundries in the town of Frost, county of Navarro, and state aforesaid, and he, the said E. H. Coleman, and he, the said B. H. Johnson, and he, the said A. F. Mitchell, on the date aforesaid and within the venue aforesaid, conspired and agreed and confederated to the effect and in substance that he, the said E. H. Coleman, should file his voluntary petition in bankruptcy under and as provided for in and by the acts of the United States Congress in the act commonly known and called the 'Law of Bankruptcy,' but that he, the said E. H. Coleman, should unlawfully, knowingly, and fraudulently conceal, secrete, and keep a certain part of his stock of drugs out of and from his schedules in the said bankruptcy proceedings, and should conceal, as aforesaid, unlawfully, knowingly, and fraudulently from his trus-



tee in bankruptcy a certain part of his said stock of drugs and a certain amount of money, which said drugs and which said money were really a part of the assets of the said E. H. Coleman belonging to his said business and subject to the said bankrupt act, and which should be properly scheduled as a part of his estate in bankruptcy, and by him turned over to his trustee in bankruptcy, and that he, the said B. H. Johnson, and he, the said A. F. Mitchell, would assist the said E. H. Coleman in the sort of concealment aforesaid of his said property, and on the said 25th day of January, A. D. 1904, the said E. H. Coleman filed in the United States District Court for the Northern District of Texas, in the Dallas Division of the said District, his certain voluntary petition in bankruptcy, and was thereupon and thereunder, to wit, on the said date, adjudged a bankrupt under the provisions of the act of Congress relating to such matters by the Honorable Eugene Marshall, who was then and there the properly appointed, qualified, and acting referee in bankruptcy for the Dallas Division of the Northern District of Texas; that, thereafter, and in the regular and legal course of said bankruptcy proceeding, to wit, in February, A. D. 1904, the said B. H. Johnson was duly and legally appointed and elected trustee in the said bankruptcy proceeding, and thereafter, in the said month of the said year, he, the said B. H. Johnson, duly qualified as such trustee, and continued to act as such trustee from that date up to the time of the presentment of this bill of indictment into this honorable court; and the grand jurors aver that before and while the said E. H. Coleman was a voluntary bankrupt, as aforesaid, and before and while the said B. H. Johnson was his duly appointed, qualified, and elected and acting trustee in bankruptcy, as aforesaid, he, the said B. H. Johnson, and he, the said E. H. Coleman, and he, the said A. F. Mitchell, within the Dallas Division of the Northern District of Texas, on the date aforesaid, to wit, on the 25th day of January, A. D. 1904, did, as aforesaid, unlawfully and fraudulently conspire and confederate and agree that the said E. H. Coleman, when he should become such bankrupt, and while such bankrupt, should unlawfully, knowingly, and fraudulently conceal a portion of his stock of drugs, as hereinbefore set out, which said portion and part of his stock of drugs was then and there a portion and part of the property that should be and ought to have been listed by him as such bankrupt and turned over to the possession and custody of him, the said B. H. Johnson, as trustee as aforesaid, which said property was the following, to wit: [Here follows a detailed description of the property.] And in pursuance of such agreement and confederation so unlawfully and fraudulently made, as aforesaid, and to effect the object thereof, he the said E. H. Coleman, did unlawfully, knowingly, willfully, and fraudulently conceal while such bankrupt, as aforesaid, the aforementioned property from his trustee in bankruptcy, as aforesaid, the said property then and there belonging to the said Coleman's estate in bankruptcy, and he, the said E. H. Coleman, then and there well knew that the said property then and there belonged to his estate in bankruptcy, and should have been scheduled and turned over, as aforesaid, to his trustee in bankruptcy, and that the said unlawful, willful, knowing, and fraudulent concealment, as aforesaid, continued from the above said date to the 25th day of January, A. D. 1906, and that the said goods and drugs and merchandise so concealed was of the reasonable value of \$1,000 lawful current money of the United States of America, and that the same were concealed and secreted and not turned over to the said Johnson in the said Johnson's capacity as said trustee of said estate in the manner and form aforesaid, and in pursuance of the conspiracy and agreement of the said B. H. Johnson, A. F. Mitchell, and E. H. Coleman, all of which was contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America."

The defendant, B. H. Johnson, plaintiff in error in this court, demurred to the indictment, assigning many grounds of demurrer, among which were the following:

"(1) That the indictment herein seeks to charge the defendant as trustee of a bankrupt with a conspiracy to conceal from himself, as trustee, certain property of the bankrupt. The offense under the statute is for the bankrupt to knowingly and fraudulently conceal property from his trustee. The indictment seeks by the allegations of conspiracy to make the alleged act of the

bankrupt the act of his trustee, and is, in effect, a charge that the trustee knowingly, etc., concealed from himself, an offense not created by Congress, nor any part of section 29b. The indictment charges no offense against the defendant, Johnson, for that, if any offense could exist as to him, the same would fall under section 29a, defining dereliction of trustee.

"(2) That said indictment seeks to charge a conspiracy to commit the offense denounced by section 29b of the bankrupt act, enacted by the Congress of the United States, to wit, for a bankrupt knowingly and fraudulently to conceal his property from his trustee in bankruptcy; that the gist of said offense is the concealment knowingly and fraudulently made by the bankrupt from his trustee, and the indictment herein is fatally defective, in that it alleges that the conspiracy was entered into by E. H. Coleman, the alleged bankrupt, the defendant, B. H. Johnson, his trustee, and by one A. F. Mitchell. Under the allegations of the indictment, the defendant is made to conspire to conceal from himself, an impossible condition, and the bankrupt made to accomplish the equally impossible condition of concealing from his trustee by their mutual agreement. The allegation, if anything, discloses a dereliction, constituting an offense under section 29a of said bankrupt act."

The demurrer was overruled by the District Court. The trial proceeded on the plea of "not guilty." The jury found Johnson guilty. He made a motion in arrest of judgment, raising the same questions raised by his demurrer. The District Court overruled the motion, and sentenced the defendant to imprisonment in the penitentiary for two years.

It is assigned that the court erred in overruling the demurrer and the motion in arrest of judgment.

J. C. Muse and Geo. E. Miller (Muse & Allen and Miller & Dycus, on the brief), for plaintiff in error.

William H. Atwell, U. S. Atty.

Before PARDEE, McCORMICK and SHELBY, Circuit Judges.

SHELBY, Circuit Judge (after stating the facts as above). The federal statute against conspiracies provides that if two or more persons conspire "to commit any offense against the United States \* \* \* in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than two years." Rev. St. U. S. § 5440 [U. S. Comp. St. 1901, p. 3676]. Section 29 of the bankruptcy act of July 1, 1898 (30 Stat. 554, c. 541 [U. S. Comp. St. 1901, p. 3433]), defines certain criminal offenses. The indictment in this case charges B. H. Johnson, the plaintiff in error, E. H. Coleman, a bankrupt, and A. F. Mitchell with a conspiracy to commit an offense described in section 29b, which is in these words:

"A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy. \* \* \*" Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433].

The plaintiff in error is charged with conspiring with his two co-defendants to commit the offense described by the words we have quoted. The language is aimed at the bankrupt. He alone is condemned for the concealment of property belonging to his estate in bankruptcy. It does not condemn him for the mere concealment of the property. It is only a concealment by the bankrupt "from his trustee" that is made

criminal by the statute. If he hid it from the whole world, but not "from his trustee," he would not violate this statute. The purpose of the statute was to insure that the trustee obtained knowledge and possession of the bankrupt's property. The essence of the offense prescribed by the language of the statute is the placing of the property out of the trustee's reach by the bankrupt's concealing it "from his trustee."

The indictment shows that B. H. Johnson, the plaintiff in error, was the trustee of E. H. Coleman, the bankrupt and one of the co-conspirators. Now, if the indictment was for the specific offense of concealing the bankrupt's property from the bankrupt's trustee, no one would claim that Johnson, the trustee, could himself be guilty of it. He could not conceal the property from himself; and, besides, the statute in question is directed against the acts of the bankrupt alone. But he is not charged with the specific offense. He is charged with conspiring with Coleman, the bankrupt, and Mitchell, to commit the offense described in the statute, and it is an offense which Coleman, the bankrupt, one of the alleged conspirators, could commit. It is true, as a general rule, as argued by the learned United States attorney, that it is sufficient to sustain a charge of conspiracy to commit an offense that some one of the co-conspirators was capable of committing it, though another co-conspirator may not have been so capable. 2 Wharton's Criminal Law (10th Ed.) § 1340a. A defendant, therefore, may be convicted of a conspiracy to commit an offense, when, in the nature of things, he could not have committed the offense himself, if it be an offense which one of his co-conspirators could commit. Referring to this general principle, Lumpkin, C. J., in *Boggus v. State*, 34 Ga. 275, 278, observed that:

"Lord Audley was convicted of rape upon his own wife; being present, aiding and abetting one of his minions to perpetrate this monstrous crime, and for which this devil-crazed nobleman was hung." 3 Howell's State Trials, 402.

Although no one but the bankrupt may commit the offense prescribed by section 29b, it may be conceded in this case, though it is a question not necessary to be decided, that others may be jointly indicted with him and convicted, under Rev. St. U. S. § 5440 [U. S. Comp. St. 1901, p. 3676], of a conspiracy to commit that offense. *U. S. v. Bayer*, 4 Dill. (U. S.) 407, Fed. Cas. No. 14,547; *U. S. v. Martin*, 4 Cliff. (U. S.) 156, Fed. Cas. No. 15,728.

The case at bar involves a different question. The charge here is a conspiracy of three persons to conceal certain described property from one of the three. There can be no offense unless there is a concealment from this person; and yet he is one of the conspirators. If the property be not hidden from him, no offense is committed, and yet he is charged with conspiring to do the hiding. In the state courts A. and B. may be indicted and convicted of conspiring to steal the property of C.; but how would it be if C., the owner and possessor of the property, entered also into the conspiracy? If the indictment charged that A., B., and C. conspired to steal the property of C., it would be bad, because it would show the consent of C. that his property should be taken. The knowledge and approval of the owner of the goods to

which the conspiracy related would prevent conviction. *Connor v. People*, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295. And so, if several persons conspire to rob one of their number, the proposed victim being taken into the conspiracy and agreeing thereto, his knowledge and agreement would prevent conviction. *Rex v. Macdaniel*, quoted in 2 East's P. C. 665. See, also, *People v. Clough*, 59 Cal. 438; *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126. A man and a woman may be indicted and convicted of a conspiracy to commit the crime of rape upon another woman. But what would be the effect of charging that the woman on whom the rape was to be committed was a party to the conspiracy? Her knowledge and consent to the alleged crime being charged, it would cease to be the crime alleged.

A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful by criminal or unlawful means. The indictment must allege the conspiracy; and, when the criminality consists in an unlawful agreement by the defendants to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment. *Pettibone v. United States*, 148 U. S. 197, 203, 13 Sup. Ct. 542, 37 L. Ed. 419. If the facts constituting the purpose, when fully stated, show that they constitute no crime, the indictment is fatally defective. Reading this indictment, we find that the conspiracy charged is that Johnson and Mitchell are to unite with the bankrupt in knowingly and fraudulently concealing "from his trustee" in bankruptcy a certain "part of his stock of drugs" and a "certain amount" of money that belonged to the bankrupt estate. It appears even in the charge of the conspiracy that the trustee in bankruptcy is a party to it; and the part of the indictment describing the offense that the defendants conspired to commit describes in detail the articles that were to be concealed and to which the conspiracy related. The indictment, therefore, shows that the trustee, Johnson, himself knew of the concealing or withholding of a certain amount of money and of certain described articles from the schedules and from his possession. In other words, although it charges a conspiracy to conceal and a concealing from the trustee, facts are stated which show that there was no concealment in fact from him.

The defect in the indictment is not that it charges a conspiracy by three persons to commit an offense which only one of the three could commit. That may not be a defect. The fatal defect is that it charges Johnson, one of the alleged conspirators, with participation in, and knowledge of, a transaction, which could only be an offense against the law when it was concealed from him.

It is contended by the government that the purpose of the part of the statute in question is to insure the turning over of all the estate of the bankrupt for the benefit of the creditors, and that the alleged conduct of Johnson comes within the meaning and purpose of the statute; that if he refuses to take possession of property, and refuses to discover hidden property, it may be held that he concealed it from himself. We cannot accept this view. It is a penal statute, and it cannot be extended by construction. *Field v. U. S.*, 137 Fed. 6, 69 C. C. A. 568. Other

provisions of the statute afford protection to creditors against the wrongdoing of the trustee. He is required to give a bond (Act July 1, 1898, c. 541, § 50c., 30 Stat. 558 [U. S. Comp. St. 1901, p. 3440]) conditioned for the faithful performance of his official duties; and it is made, by section 29a, a criminal offense for him to embezzle, spend, unlawfully transfer, or knowingly and fraudulently appropriate to his own use any of the property of the bankrupt estate which comes into his charge as trustee. These provisions are ample to protect the creditors of the bankrupt from wrongs perpetrated by the trustee, and, if they are not, the courts are not authorized to extend the criminal statutes beyond their plain meaning.

The judgment of the District Court is reversed, and the cause remanded, with instructions to sustain the demurrer to the indictment, and to discharge the defendant.

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In re HALEY.

In re HUTCHINSON & WILMOTH.

(Circuit Court of Appeals, Sixth Circuit. January 16, 1908.)

No. 1,722.

1. BANKRUPTCY—CORPORATIONS—SUIT AGAINST STOCKHOLDERS—SUMMARY PROCEEDINGS.

Where the organizers of a corporation fraudulently overvalued its assets in the issuance of stock, and the corporation's trustee in bankruptcy claimed that H., a nonresident stockholder, who paid substantially all the money which went into the concern, had notice of the fraud, the trustee could not subject her to liability for the debts of the corporation on an order to show cause, issued on a petition in the bankruptcy proceedings, delivered by mail and by publication; such relief being obtainable only in a suit in equity based on personal service in the forum where she was subject to suit.

2. SAME—SUITS BY TRUSTEE.

A suit by the trustee of a bankrupt corporation to compel a stockholder to pay corporate debts because of her alleged participation in a fraudulent overvaluation of the corporation's assets in payment for stock was not a case of a preferential or fraudulent transfer within Bankr. Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], as amended by Act Cong. Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1024], giving courts of bankruptcy jurisdiction in suits for the recovery of property under sections 60b, 67e, and 70e (30 Stat. 562, 564, 565 [U. S. Comp. St. 1901, pp. 3445, 3449, 3452], 32 Stat. 799, 800 [U. S. Comp. St. Supp. 1907, pp. 1031, 1032]), relating to fraudulent and preferential transfers, but was a suit of a plenary nature, of which the bankruptcy court had no jurisdiction except by defendant's consent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 410-414.]

Petition to Review Order of the District Court of the United States for the Southern Division of the Eastern District of Michigan, in Bankruptcy.

A. W. Sempliner, for petitioner.

B. B. Selling, for respondent.

Before LURTON and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

RICHARDS, Circuit Judge. On the 13th of April, 1906, Hutchinson & Wilmoth, a Michigan corporation, was adjudicated an involuntary bankrupt, and on September 25, 1906, Edgar E. Heavenrich, trustee for such corporation, filed a petition upon which Judge Swan of the District Court for the Eastern District of Michigan, issued an order to show cause. This order was directed more especially against Carrie W. Haley, a resident of Paris, Ky., and it was served on her by mail and by publication in the Detroit Legal News. On October 22, 1906, following such service, Carrie W. Haley filed a motion to set aside the service, which was overruled by the court below, and this petition is for the purpose of reviewing such decision.

The petition upon which the order to show cause was based, which was served on Carrie W. Haley by mail and by publication, stated, in substance, that the corporation of Hutchinson & Wilmoth was organized in Michigan in March, 1905, for the purpose of conducting a general merchant tailoring business, with its principal office or place of business at Detroit. The capital stock was \$15,000, composed of 1,500 shares of the par value of \$10 each. The articles of incorporation stated that the amount of capital stock subscribed was \$15,000, and the amount actually paid in at the date of the filing of the articles on March 14, 1905, was \$15,000, of which \$1,500 had been paid in cash, and \$13,500 had been paid in the stock, fixtures, and tools belonging to the tailoring business formerly conducted at No. 34 Fort street, Detroit Mich., by Frank A. Hutchinson & Co. The stockholders were Frank A. Hutchinson, 750 shares, Charles R. Wilmoth, 749 shares, and Norval A. Hawkins, 1 share. All the stockholders live in Detroit. The petition in bankruptcy was filed April 13, 1906, and the adjudication took place April 13, 1906. The claims proved against the estate aggregated \$9,826.06. A dividend of 10 per cent. upon the claims has been paid, and the trustee had on hand at the filing of the petition the sum of \$976.45; being the proceeds of the tangible assets of the bankrupt.

There are claims aggregating \$10,099.78, to which objections have been filed. The trustee represents that it will take more than \$9,000 to pay the balance of the allowed claims, and, should the claims which have been objected to be allowed, it will take more than \$10,000. Prior to the organization of the bankrupt corporation, there existed a corporation in Detroit known as the "Frank A. Hutchinson & Co.," which had taken over the business and assets of Frank A. Hutchinson, who before that time was insolvent. The assets of the Frank A. Hutchinson & Co. consisted of stock, fixtures, and tools, were appraised by Nathan Finley and Phil Curtis, persons selected by Frank A. Hutchinson and Charles R. Wilmoth, and the appraisal did not exceed \$5,000, which was their full value. At the time of the organization of the bankrupt corporation, in March, 1905, these assets, worth not more than \$5,000, were taken at a valuation of \$13,500, although this was well known to the original incorporators and also to Carrie W. Haley and J. Walter Drake, her attorney. The trustee represents that the assets of the F.

A. Hutchinson & Co. were purchased for \$2,500, which was distributed among the creditors of that company and Frank A. Hutchinson personally. These assets were afterwards turned in for \$13,500.

At the first meeting of the bankrupt corporation on March 11, 1905, Hutchinson, Wilmoth, and Hawkins, the incorporators, were elected directors for one year, and a resolution was adopted accepting these assets for the sum of \$13,500 in payment of the stock of the incorporators amounting to 1,350 shares. This transaction was fraudulent and was so known to the incorporators and J. Walter Drake, their attorney, and the trustee represents, upon information and belief, that its fraudulent character was known to Carrie W. Haley, the mother-in-law of Charles R. Wilmoth, who advanced \$2,500 to purchase the said stock. Of the 749 shares of the bankrupt corporation subscribed for by Wilmoth 375 shares became the property of Carrie W. Haley, under an agreement made January 10, 1906, between Wilmoth and her, which witnesses that whereas 1,197 shares of the stock had been transferred from time to time by Wilmoth to Haley and by Haley to Drake, as trustee for her, and whereas the other 3 shares were held by Wilmoth, Hawkins, and Drake, and whereas Wilmoth was indebted to Haley in the sum of \$2,225, with interest, now, therefore, it was agreed and understood that Carrie W. Haley is the owner of 749 shares of stock held by Drake as trustee, and that the remaining 748 shares of stock held by Drake, as trustee, is owned by Wilmoth and was transferred to Haley to secure the payment of a note of \$2,225, and that Haley is to hold said 748 shares as collateral for said note.

The trustee represents that Norval A. Hawkins is an expert book-keeper, and, realizing that it was a fraud to charge up to the creditors \$13,500 of assets which cost only \$2,500, and which were appraised at less than \$5,000, he charged \$8,000 to the account of good will. This charge was fraudulent, as was well known to the incorporators and directors, and to Carrie W. Haley and J. Walter Drake. The capital stock of the Hutchinson & Wilmoth Company was continuously impaired from the moment of its incorporation; there never being a time when it did not owe at least \$8,000 more than the value of its assets. The capital stock was still further impaired before December 9, 1905, by Frank A. Hutchinson withdrawing the sum of \$2,500 in cash, and converting it to his own use, a fact known to all the parties. Prior to this date, December 9, 1905, Frank A. Hutchinson pledged unto Carrie W. Haley, 200 of the 749 shares of stock standing in his name. On December 9, 1905, Carrie W. Haley caused these 200 shares of stock thus pledged to her as collateral to be canceled, and a new certificate for 200 shares issued to her in her own name. On that day the remaining 749 shares of stock of Frank A. Hutchinson were transferred to J. Walter Drake, as trustee, for Carrie W. Haley. At the time this was done \$750 were paid out of the assets to Frank A. Hutchinson, and he was released from the overdraft of \$2,500, or thereabouts, and the personal creditors of Hutchinson, who were debtors to the corporation, were credited with the amount of their claims against Hutchinson. By reason of these transactions, which were carried on with the full knowledge of all the parties, the entire capital stock of the bankrupt cor-

poration was wiped out. On January 10, 1906, Carrie W. Haley owned all the stock of the bankrupt corporation with the exception of three shares held by Charles R. Wilmoth, Norval A. Hawkins, and J. Walter Drake. At that time there was an agreement between Wilmoth and Carrie W. Haley whereby the latter agreed to transfer 748 shares to Wilmoth upon the payment of \$2,225.

The trustee represents that at the present time Carrie W. Haley is the actual owner of 1,497 shares; that J. Walter Drake has no interest in the stock he holds except as attorney or trustee for her. The trustee represents that, unless the owners of the capital stock are compelled to pay for the stock actually issued for them and turned back that which they wrongfully caused to be taken from the corporation, the creditors will suffer greatly. At the inception of the bankrupt corporation there was put in actual property at the highest \$6,500 upon the total subscription of \$15,000. The assets obtained from the F. A. Hutchinson & Co., which cost \$2,500, should be considered worth \$5,000, so there was subscribed \$8,000 of capital which is still due and unpaid for. Assets of the value of \$3,000 belonging to the bankrupt were taken and used to acquire the stock of Frank A. Hutchinson, which was thereupon transferred to Carrie W. Haley; and the trustee represents that she therefore owes the further sum of \$3,000 received in that transaction.

"For as much as your petitioner is without remedy, except in a court of equity, your petitioner respectfully prays," if the court should hold any contract was made by the transaction of March 11, 1906, whereby the bankrupt corporation purchased from the directors the stock, etc., of the Frank A. Hutchinson & Co., for \$13,500, which had only cost the incorporators \$2,500, that such contract be set aside; that it be declared that said stock was overvalued, and there still remains due on the original stock subscription the difference between \$13,500 and the actual value of the property of the old concern; that an assessment sufficient in amount to pay off all the indebtedness of the bankrupt corporation and the expenses of this proceeding be levied on the original subscribers to the capital stock, or upon their transferees, and that Carrie W. Haley be declared the owner of all the stocks standing in the name of J. Walter Drake, trustee, and as such be declared personally liable for such assessment; that Carrie W. Haley, J. Walter Drake, Charles R. Wilmoth, and Norval A. Hawkins be required to pay to the trustee the value of the assets turned over to Frank A. Hutchinson & Co. for stock transferred by him to Carrie W. Haley and J. Walter Drake, as trustee. "Your petitioner further prays that all the stockholders of the said corporation, all the subscribers to the capital stock of said corporation, to wit, Carrie W. Haley, Charles R. Wilmoth, Frank A. Hutchinson, Norval A. Hawkins, and J. Walter Drake, trustee, be required to show cause \* \* \* why the assessment and call prayed for \* \* \* should not be made and why the relief prayed for should not be granted," etc.

The above contains the substance of the petition on which service of an order to show cause was made by mail and publication upon Carrie W. Haley. The sole question is whether she could be brought into



court, and compelled to show cause on a petition setting out the facts and praying the relief which this petition did. It will be observed that it was not a petition which simply demands an assessment and call upon the stock of the bankrupt corporation, as in the case of *Scovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968. It is clear from a reading of the petition that Hutchinson and Wilmoth, who organized the corporation and held all the stock except one share, are bankrupts, and that the attempt of the trustee is to bring in Carrie W. Haley, a nonresident, the mother-in-law of Wilmoth, who it seems paid substantially all of the money which went into the concern, as a defendant, and compel her to answer averments which charge her with being a party to certain fraudulent acts which it is alleged, subjected her to liability for the debts of the corporation. We do not think this can be done without serving her personally and giving her the opportunity of defending herself in the forum where she is subject to suit. *Toland v. Sprague*, 12 Peters, 300, 328, 9 L. Ed. 1093. In the ordinary case, where an assessment and call is made on the stock of a bankrupt corporation, the order to show cause demands an investigation by the court in charge of the bankrupt into the necessity and propriety of making the assessment and call; and afterwards, when a suit is brought to collect the assessment, the stockholder has the opportunity of presenting his defense in the court in which it is necessary, in order to obtain jurisdiction, to serve him personally. But in the present case, as we have suggested, and as the abstract we have made of the petition shows, there is presented against Carrie W. Haley a suit in equity which she ought not to be compelled to answer, except in the proper forum, and after that personal service which the law accords her as a means of protecting her rights. A court of bankruptcy has no jurisdiction of a suit at law or in equity brought by a trustee to recover property or collect debts, or to set aside transfers of property alleged to be fraudulent, except by consent of the defendant. *Loveland on Bankruptcy*, § 20, p. 97, section 20a, p. 100, et seq.; *Bardes v. Hawarden Bank*, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175. By the amendment of February 5, 1903, such court was given jurisdiction of suits for the recovery of property under section 60b, section 67e, and section 70e. Act July 1, 1898, c. 541, 30 Stat. 562, 564, 565 [U. S. Comp. St. 1901, pp. 3445, 3449, 3452], as amended by Act Feb. 5, 1903, c. 487, §§ 13, 16, 32 Stat. 799, 800 [U. S. Comp. St. Supp. 1907, pp. 1031, 1032]. But this is not a case of a preferential or fraudulent transfer under those sections. The suit outlined in the bill is therefore one of a plenary nature of which the bankruptcy court has no jurisdiction except by consent of the defendant, of which there is no pretense here. The motion to set aside the service by mail and publication of the order to show cause should therefore have been sustained.

The judgment of the court below is reversed, and the case remanded, with directions to set aside the service, and to dismiss the petition.

## HENRY v. NORTH AMERICAN RY. CONST. CO

(Circuit Court of Appeals, Eighth Circuit. November 29, 1907.)

No. 2,571.

## 1. DAMAGES—MEASURE OF DAMAGES—BREACH OF CONTRACT TO DELIVER BONDS.

The measure of damages for breach of a contract to deliver bonds of a corporation, the consideration for which has been paid, is the value of the bonds at the time they should have been delivered under the contract, with interest, and such value is prima facie their face value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 344-350.]

## 2. EVIDENCE—HEARSAY—MARKET VALUE—EVIDENCE OF SALES.

Where the bonds of a corporation have been sold in market, or there is an established demand therefor, this may be shown as a means of fixing their value in measuring the damages for breach of contract by nondelivery, but such market value is not conclusive, and it may be shown that their real intrinsic value is either greater or less, and where there is no established market value, the real value is to be ascertained from such elements of value as are obtainable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1214-1216.]

## 3. DAMAGES—CONSTRUCTION OF CONTRACT.

Where a contract provided that plaintiff should receive for doing certain work "the sum of sixty-five hundred dollars, said sum to be paid \* \* \* in the first mortgage bonds" of a corporation, and there was a failure to deliver the bonds, plaintiff is not entitled to recover, as the expressed value of the work, the sum of \$6,500 in money, regardless of the value of the bonds.

## 4. SAME.

An action to recover damages for breach of a contract to deliver a certain amount in face value of the bonds of a corporation is not one for fraud, and plaintiff is not entitled to recover the face value of such bonds because the defendant may have caused the corporation to issue bonds for an amount largely exceeding the value of its assets, but the only issue, where the nondelivery is admitted, is as to the value of the bonds at the time they should have been delivered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 344-350.]

In Error to the Circuit Court of the United States for the District of Colorado.

K. C. Schuyler (W. F. Schuyler, on the brief), for plaintiff in error.  
Henry McAllister, Jr. (Vaile & Waterman, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff in error (hereinafter designated the defendant) entered into a contract with the defendant in error (hereinafter designated the plaintiff) for the construction of a street railway at Shawnee, Okl. T. The stipulated amount of the cost of the work was \$74,800. There was to be paid in cash \$34,800. The balance of \$40,000 was to be paid upon the completion of the work by 20 of the first mortgage 5 per cent. gold bonds of the Shawnee Trac-

tion Company, each for the principal sum of \$1,000, guaranteed by the Shawnee Light & Power Company as to the payment of interest, and by certificates representing \$20,000 of the capital stock of said traction company. There was a supplemental contract afterwards entered into between the parties for doing some additional work "for the sum of sixty-five hundred dollars (\$6,500), said sum to be paid immediately upon completion of the extension aforesaid, in the first mortgage bonds of the Shawnee Traction Company, at their face value, and in addition to said bonds, an equal amount (\$6,500) of the full paid capital stock of the Shawnee Traction Company, said bonds and stock to be of the same description and issue as that to be given" under the former contract. The contract and undertaking of the construction company was fully performed. The contract price, in manner and form as prescribed in the contract, was fully paid with the exception of the \$6,500 of the first mortgage bonds under the supplemental contract. Demand for and refusal to deliver the bonds according to the contract constitute the basis of this suit. The answer admitted that the \$6,500 of bonds had not been delivered, but denied that any sum was due plaintiff by reason of the matters complained of.

It being conceded that the plaintiff had fully performed its undertaking, but the defendant had failed to keep and perform his contract by delivering to the plaintiff the \$6,500, face value of bonds, in the action for breach of contract the essential question is: What is the measure of damages? The answer the law makes is: The value of the bonds at the time they should have been delivered under the contract. *Prima facie* the amount expressed upon the face of the bonds is the value thereof. 3 Sutherland on Damages (3d Ed.) p. 1921; 2 Clark & Marshall on Corporations, p. 1170; Moffit v. Hereford, 132 Mo. 513, 34 S. W. 252; Menkins v. Menkins, 23 Mo. 252, 253; Meixell v. Kirkpatrick, 29 Kan. 679, 685; Potter v. Merchants' Bank, 28 N. Y. 641, 86 Am. Dec. 273; Baldwin v. Central Savings Bank, 17 Colo. App. 7, 67 Pac. 179; Express Company v. Parsons, 44 Ill. 312-317; Hersy v. Walsh, 38 Minn. 521, 38 N. W. 613, 8 Am. St. Rep. 689.

When, therefore, the plaintiff had shown that the defendant had failed to deliver the bonds in question when they should have been delivered, it had made out a *prima facie* case entitling it to judgment for the face value of the bonds, with interest from date of default. The defendant then assumed the laboring oar to show, if he could, that the actual value was less. At the threshold of his undertaking to do this, the objection was interposed on behalf of the plaintiff that the only criterion for ascertaining this fact was the market value of the bonds. As the evidence showed that at that time the bonds had acquired no market value, the court ruled that the plaintiff was entitled to judgment for their face value, with interest. This was error. Where a given article or commodity, or stocks and bonds of an association or corporation, have been sold in market, or there is an established demand therefor, this may be shown as a means of fixing the value in measuring the damages for breach of contract for nondelivery. This for the reason that, if they can be bought in the market, the vendee or person entitled to them can thereby "replace himself"; but even this

market value may not be conclusive in the sense of a conclusive legal presumption. "It stands as a criterion of value because it is a common test of the ability to purchase the thing. In such cases, what is called the 'market price,' or the quotations of the articles for a given day, is not the only evidence of value. The true value may be drawn from other sources." 3 Sutherland on Damages (3d Ed.) p. 1894; Sedgwick on Damages (8th Ed.) § 250; 2 Cook on Corporations (4th Ed.) § 581; Colebrook on Collateral Securities (2d Ed.) 546; 2 Clark & Marshall on Private Corporations, p. 1170.

The bonds, having acquired no market value, did not, however, leave the defendant helpless. Resort in such contingency may be had to other sources of information for ascertaining the actual value. The plaintiff would have the right to show that the real intrinsic value of the bonds exceeded their face or market value; and the defendant, in the absence of any established market value, would have the right to show that the real value was less than that called for on their face. "In such cases the real value is to be ascertained from such elements of value as are obtainable." *Murray v. Stanton*, 99 Mass. 345; *Freon v. Carriage Company*, 42 Ohio St. 30, 38, 51 Am. Rep. 794; 2 Cook on Corporations (4th Ed.) § 581; 2 Clark & Marshall on Private Corporations, 1170; *Jonas v. Noel*, 98 Tenn. 440, 444, 39 S. W. 724, 36 L. R. A. 862; *Trust & Savings Company v. Home Lumber Company*, 118 Mo. 447, 24 S. W. 129; *Greer v. Lafayette County Bank*, 128 Mo. 559, 577, 30 S. W. 319; *Moffit v. Hereford*, supra; *Redding v. Godwin*, 44 Minn. 358, 46 N. W. 563; *Industrial & General Trust Company v. Tod*, 180 N. Y. 215, 231, 73 N. E. 7; *Griggs v. Day*, 136 N. Y. 162, 32 N. E. 612, 18 L. R. A. 120, 32 Am. St. Rep. 704; *Crichfield v. Julia*, 147 Fed. 65, 77 C. C. A. 297; *Nelson v. First National Bank*, 69 Fed. 798, 16 C. C. A. 425.

The defendant sought to introduce evidence for the purpose of minimizing the value of the bonds. As this line of proof was cut off by the ruling of the Circuit Court, on the ground that the only criterion for ascertaining the value of the bonds was their market value, we do not feel called upon to discuss and pass upon the character of proof offered by the defendant as to its competency and relevancy. Some of the questions put to the witnesses may have been objectionable. But, as it cannot be known whether or not, on another trial, the defendant will reoffer all or any of such testimony, until the trial court has ruled on the question of their relevancy and admissibility any discussion of the suggested proof at this time might be merely academic. In some of the authorities above cited will be found outlines of the character of proof on such issue, which may be a guide to the trial court on further hearing.

With ingenious force, the learned counsel for plaintiff makes contention that a correct exposition of the contract entitled him to the payment of \$6,500 in money, as the expressed value of the work, and that he is not limited to the bonds in kind. This contention cannot be sustained. While the contract stated that the consideration was "the sum of sixty-five hundred dollars," it expressly stipulated that "said sum to be paid immediately upon the completion of the extension afore-

said in the first mortgage bonds of the Shawnee Traction Company at their face value." This was an express prescription as to the thing in which the bonds were to be paid. If at the time the bonds became demandable their actual value had been \$10,000, it would doubtless be deemed by counsel for the plaintiff as rather audacious for the defendant to come into court and tender 65 bonds in discharge of his obligation when their value had shrunk to \$5,000. The plaintiff would have the right to reply: "*Non hæc in foedera veni.*" He would be entitled to demand, because such is the letter of his contract, the bonds or their value at the time they should have been delivered. It is to be borne in mind that the plaintiff had received \$6,500 of the capital stock of the company, which was a part of the consideration for the work done under the supplemental contract. If, in addition thereto, the plaintiff is to have payment in cash to the amount of \$6,500 on the contention of its counsel that the contract so meant by the expression "for the sum of \$6,500," the result would be that the plaintiff would get for his work and material, not only the cash value thereof, but, in addition thereto, \$6,500 "of the full paid capital stock of the Shawnee Traction Company." Reason and authority are against this contention. *Cleveland & P. R. Co. v. Kelley*, 5 Ohio St. 180; *Johnson v. Dooley*, 65 Ark. 71, 44 S. W. 1032, 40 L. R. A. 74; *Eastern Railroad Company v. Benedict*, 10 Gray (Mass.) 212; *Rutan v. Hinchman*, 29 N. J. Law, 112.

The final contention of counsel for the plaintiff is that, it appearing from the whole record that the directed verdict on behalf of the plaintiff is justifiable on other ground than that assumed by the trial court, the judgment should be affirmed. This contention is predicated of a statement made by defendant's counsel in seeking to introduce evidence to show that the actual value of the bonds was less than their face value. *Inter alia*, counsel for defendant, in stating what he proposed to show by the defendant Henry, said:

"Further, that at the date, to wit, May 26, 1904, the Shawnee Traction Company had an authorized bond issue under its first mortgage of \$250,000 of bonds, of which \$150,000 were outstanding, and that the plant of the company at that time, subject to the mortgage and bonds, including franchise and all assets of the company, did not exceed in value the sum of \$35,000."

The argument is that as the defendant had not only agreed to deliver so many bonds, but full paid stock of the company, the plaintiff company had the right to assume that the bond issue would bear an honest, equitable relation to the capitalization and the value of the property; and therefore it does not lie in the mouth of the defendant, who was the president and active promoter of the traction company to escape liability to the plaintiff by showing that he had issued \$250,000 of first mortgage bonds, of which \$150,000 were outstanding, when the plant, etc., did not exceed in value \$35,000. In support of this contention the case of *Crichfield v. Julia*, 147 Fed. 65, 77 C. C. A. 297, is cited. While the court in that case held that it was to be presumed the parties had in mind a substantial value in making a contract for \$100,000 of preferred stock, yet it was simply to answer an argument that the preferred stock could have had no value because it was never issued or provided for in the organization of the

company, and that the defendant Crichfield purposely omitted to provide for the issuance, and therefore the presumption that it was of par value was rejected by the court. And in its instructions throughout the jury were told it was for them to find the value of the \$100,000 of preferred stock, based upon the best evidence obtainable. That is not this case. The contract declared on is a single common law action to recover damages for nondelivery of a given number of "first mortgage bonds." It is not an action on the case for the recovery of damages resulting from an actual fraud on the part of the defendant by reason of an overissue of bonds to the plaintiff's injury. Moreover, the proof sought to be made, as indicated by the defendant's offer, was simply that the company had an authorized issue of \$250,000 of first mortgage bonds. It did not appear that such amount had been issued; and the proof offered was merely to show that at the time when the bonds due the plaintiff became deliverable, the value of the property to secure the bonds did not exceed \$35,000. Under the issue made on the pleadings the only question for judicial ascertainment is: What was the actual value of the \$6,500 of bonds of the first mortgage class at the time they should have been delivered; and not whether the traction company had defrauded the plaintiff by an overissue of bonds.

It results that the judgment of the Circuit Court must be reversed, and the cause remanded, with directions to grant a new trial.

#### NOVELTY TUFTING MACH. CO. v. BUSER et al.

(Circuit Court of Appeals, Sixth Circuit. December 17, 1907.)

No. 1,685.

#### 1. APPEAL—POWERS OF LOWER COURT AFTER REMAND—BILL OF REVIEW—LEAVE TO FILE BILL—APPLICATION TO APPELLATE COURT.

An application for leave to file a bill of review should be finally determined on the merits by the court which entered the decree sought to be reviewed; but, where such decree was entered by a Circuit Court pursuant to a mandate from the Circuit Court of Appeals, permission should be obtained from the latter court to present such application to the court below, and such permission will only be granted where on the case made the appellate court has a strong impression that the decree ought to be opened and reviewed by the Circuit Court.

#### 2. EQUITY—BILL OF REVIEW—GROUNDS FOR REVIEW—NEWLY DISCOVERED EVIDENCE.

Where the Circuit Court of Appeals in a suit for infringement of a patent sustained the defense of prior use, and directed a decree dismissing the bill on the production of an evidently old and used machine and photographs of it, shown to have been taken many years before, when the machine was in the possession of defendants, and on evidence of witnesses who testified to the use of such machine while in defendants' employ at that time, permission to apply to the Circuit Court for leave to file a bill of review will not be granted on a showing that other employees who worked for defendants at different times will testify that they did not see or know of such a machine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 1091-1093.]

#### 3. SAME—DILIGENCE.

It is not a sufficient excuse for failing to take the testimony of witnesses known to have some knowledge respecting the matters in controver-

sy that they refused to state what their testimony would be, and a party so failing is not entitled to file a bill of review after decree to present their testimony as newly discovered evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 1094.]

Petition for Revision of Proceedings of the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

On petition for leave to file a bill of review in the Circuit Court.

W. F. Murray, for petitioner.

A. M. Allen, for respondents.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is a petition for leave to file in the Circuit Court a bill of review in the cause above entitled, which was for the infringement of letters patent, and was heard in that court upon pleadings and proofs and by this court on appeal from the decree there rendered. The court below sustained some of the claims of the patents which were for tufting cushions, chairs, and the like, and, finding infringement, decreed for the complainant. The defendant appealed to this court. We were of opinion that the patents were altogether void by reason of the former public use of a machine embodying the same devices, and reversed the decree. 151 Fed. 478.

The petition is grounded upon an allegation of new evidence discovered since the final decree of the Circuit Court, and the questions presented are, as stated by counsel for the petitioner:

"First. Has this evidence come to the knowledge of your petitioner since the period it could have made use of it in its suit? Second. Could your petitioner have found this evidence by the use of reasonable diligence in time to have made use of it in this suit? Third. Had this evidence been before the court, is there a probability that it would have produced a different result?—citing *Daniell, Chan. Pr.* 1577; *Story Eq. Pl.* 412, 413, 417; *Kisinger-Ison Co. v. Bradford Belt Co.*, 123 Fed. 91, 59 C. C. A. 221; *Jourolman v. Ewing*, 85 Fed. 103, 29 C. C. A. 41; *Society of Shakers v. Watson*, 77 Fed. 512, 23 C. C. A. 263; *Purcell v. Miner*, 4 Wall. 521, 18 L. Ed. 435."

The rule by which this court is governed in disposing of such applications is this: If, upon the case made, we have a strong impression that the decree which we have directed to be entered in the Circuit Court ought to be reopened and reviewed in that court, we will release the lower court from its obligation to observe our mandate to the extent of allowing it to entertain the application and decide upon its merits; but not otherwise. The decree entered upon the direction of the appellate court, though in form it is the decree of the lower court, yet is in substance its own decree, and it ought not for light reasons to allow it to be disturbed. Nevertheless, if it is seen from circumstances coming subsequently to light that the decree is probably contrary to the justice and right of the case and there has been no negligence or other fault on the part of the aggrieved party, the appellate court ought not to permit its mandate to stand in the way of the correction of the decree which it has caused the lower court to enter. Normally a bill of review is addressed to the court where the final decree is entered and which is proceeding with its execution, and the only embar-

assment which the court below has is that its decree has been ordered by an appellate court. But the cause is at its finish pending in the court below, and not in the appellate court. Due regard to the forms of procedure would seem to require that the court which made the decree, though it was done under a mandate should ultimately, when freed from its obligation to execute the decree as ordered, pass upon the merits of an application for leave to file a bill of review.

The defense which we sustained was that there had been a prior public use by the defendant of substantially the same invention more than two years before the supposed invention or inventions for which the patents were granted. The defense was sustained upon the production of an evidently old machine and of photographs which were shown to have been taken of it many years ago while it was in the possession of defendant, and the evidence of witnesses who, while then in the employment of the defendant, saw and used it in his business. The newly discovered evidence is that of other witnesses who were at different times in the employment of the defendant who are expected to testify that during the times they were so employed they did not see or know of such a machine, a species of negative testimony which would not disprove the former use, and, indeed, is not necessarily in conflict with it. We did not find that the former use was constant, nor was it necessary that it should be so in order to anticipate the invention of the patents. We relied much upon the appearance of the old machine and the evident marks of wear from former use. And these indications were naturally more persuasive than the oral testimony of witnesses.

With regard to the ignorance of the complainant of this new evidence, and its diligence in finding it while the proof was being taken, it appears that the witnesses whose testimony is now wanted had been in the employment of the defendant during the time when the machine was, or might have been, in use in the defendant's business and that the complainant knew this. But he forebore to subpoena them, because, as is said they were manifestly under the influence of the defendant and afraid to testify against him, and would not state what they would testify to. And now the petitioner has not been able to get their affidavits for the same reasons. But that was not a sufficient reason for not securing their testimony. The attitude of these witnesses, when the proofs in the cause were taken, necessarily implied that their testimony would have been favorable to the plaintiff, and due diligence required that the witnesses should then have been required to give their testimony. And we are convinced that, if the same effort had been made to secure the testimony of these witnesses before the hearing of the cause as has been displayed since the decision of this court, there would have been as good a chance for securing it then as now. It has been laid down by high authority that parol evidence is too unreliable to justify the granting of a review. *Taylor v. Sharp*, 3 P. Wms. 371, per Talbot, Lord Chancellor; *Livingston v. Hubbs*, 3 Johns. Ch. (N. Y.) 124, per Chancellor Kent; *Southard v. Russell*, 16 How. 547, 569, 14 L. Ed. 1052, per Mr. Justice Nelson. But we think that, although in most cases this rule might properly be applied, yet



there might be exceptions to it when the parol evidence is of so direct and positive, and of such a controlling character as to leave no fair doubt of error in the decree.

For the reasons which we have given, we cannot think the court below would, in the circumstances here shown, be justified in granting leave to file the proposed bill of review, and we must therefore withhold our consent thereto.

The petition is accordingly denied, with costs.

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SMITH v. ARMOUR PACKING CO.

(Circuit Court of Appeals, Eighth Circuit. November 27, 1907.)

No. 2,542.

TROVER AND CONVERSION—TITLE—INNOCENT PURCHASER.

Plaintiff advanced money for the purchase of certain cattle for plaintiff under an agreement that T. should purchase the cattle with plaintiff's advances, pasture and care for them at T.'s expense, and when sold, after returning the money advanced by plaintiff without interest, the profits arising should be equally divided between them. Plaintiff left with T. bills of lading for billing the cattle when they were to be shipped to market, and he, with plaintiff's knowledge, shipped 50 of the cattle, and accounted to plaintiff for the proceeds. T. thereafter shipped the cattle in controversy, which defendant purchased in good faith in the open market, the proceeds of which T. failed to account for. *Held*, that T. had an interest in the cattle entitling him to their possession, and that defendant's purchase thereof did not constitute a conversion of plaintiff's interest, under the rule that, where one of two innocent parties must suffer, he must bear the loss whose act put it in the power of the third party to commit the wrong.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 47, Trover and Conversion, §§ 95-98.]

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 6 Ind. T. 479, 98 S. W. 165.

W. A. Ledbetter and S. T. Bledsoe, for plaintiff in error.

H. C. Potterf and W. F. Bowman, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff in error brought an action in trover against the defendant in error for the conversion of 77 head of cattle. The controversy arose out of substantially the following state of facts: The plaintiff furnished the money with which John Thrasher bought the cattle, under the agreement that Thrasher was to pasture and care for them, and when sold, after returning to plaintiff the money advanced for the purchase, without interest, the profits arising from the sale were to be equally divided between them. According to the plaintiff's testimony, this arrangement was but a continuation of the terms of an antecedent agreement between them respecting the purchase and sale of mules. As that contract was in

writing it must speak for itself. The plaintiff was to furnish the money, and Thrasher was to buy the mules, "gather them up, feed, pasture, and graze them, and to be at all the expense in taking care of them." In the purchase of the mules Thrasher used checks of the Ardmore National Bank, made payable to the order of the vendor, "and in the left-hand corner of each check he should direct the check thus: To C. R. Smith, Ardmore, I. T., and attach a bill of sale from the party from whom such mule or mules are purchased for each check so given." The mules so purchased were to be the property of the plaintiff. The closing paragraph of the contract is as follows:

"When said mules are sold, the purchase price of same shall be retained by the said C. R. Smith, and all moneys received from the sale of said mules, after the purchase price has been so returned to said C. R. Smith, shall be equally divided between said C. R. Smith and John Thrasher, and the said Thrasher is not to be charged with any interest on the money advanced by said Smith in the buying of said mules."

The evidence shows that the plaintiff left with said Thrasher bills of lading for billing the cattle in question when they were to be shipped to market; but they were not billed out in the name of the plaintiff as consignor. The evidence further shows that the number of cattle bought by Thrasher under the arrangement was 128 or 130 head. The first shipment made by Thrasher was about the 21st day of June, 1902, of two car loads, containing about 50 head. While the plaintiff claims that he was from home when both shipments were made, his own testimony is that, with knowledge of the fact that Thrasher had shipped the said 50 head of cattle, he received payment of his interest therein from Thrasher out of the proceeds. The last shipment of three car loads, of the 77 cattle in question, was made about the 28th or 30th of June, 1902. It was the proceeds of this last shipment which Thrasher failed to account for. At the conclusion of the plaintiff's evidence the District Court directed a verdict for the defendant, on the ground that the evidence disclosed a partnership relation between the plaintiff and Thrasher in said cattle. This judgment was affirmed by the Court of Appeals of the Indian Territory, but not on the ground of the existence of such partnership.

In his testimony the plaintiff sought to have it believed that under the arrangement between him and Thrasher the latter had no other office to perform than to buy the cattle, pasture, graze, and care for them, with no authority to ship or sell them in the market. To this end, he claimed that one Addington was to determine when and how the cattle were to be shipped. He admitted, however, that Thrasher "was to take them [the cattle] over and ship them," but in his name. The only office, in fact, that was to be performed by Addington was that, as he was an experienced cattle man, he should assist in cutting out the cattle, and selecting those that were deemed fit for market. But he had nothing to do with the shipping and sale of the cattle. There was nothing on the face of the contract to indicate that the marketing of the cattle was to be done alone by the plaintiff; but as the cattle were left in the exclusive possession of Thrasher, and "after the purchase price had been so returned to" the plaintiff, the remainder, if any, should be divided between them, Thrasher had something

more than a possessory right to the cattle. He had a direct conditional interest in the proceeds of the sale. The plaintiff could not take from Thrasher the possession and dispose of the cattle. As Thrasher's compensation for his trouble, care and cost of keeping the cattle depended entirely on the profits arising from the sale, his right of possession could not be interfered with by the plaintiff until sale and delivery by his consent. The interest of the plaintiff would attach to the proceeds. When he left the cattle thus in the possession of Thrasher, with blank shipping bills to be used by the latter, and the cattle were thus shipped to market by Thrasher, the purchaser in the open market, in good faith, was not guilty of conversion as to the interest of the plaintiff. The case presents an apt instance for the application of the wholesome rule that, where one of two innocent parties must suffer, he must bear the loss whose act put it in the power of the third party to commit the wrong.

We agree with the conclusion reached by the Court of Appeals of the Indian Territory that, although the relationship between Smith and Thrasher may not have been that of copartners, yet in view of the fact that the plaintiff, by accepting the proceeds of the sale of the first 50 head of cattle, had recognized Thrasher's right to sell, and as the plaintiff put Thrasher "in possession of the cattle—a badge of ownership—unless some collusion with the purchaser was shown, Smith would be as much bound by Thrasher's acts as if they were in fact partners." *Trapnall v. Burton*, 24 Ark. 371; *Jowers v. Phelps*, 33 Ark. 465. As the plaintiff intrusted the entire matter of purchasing the cattle to Thrasher, why was Thrasher not authorized to sell, as a means of ascertaining the profits, in the absence, in the written instrument, of any prescription as to who should sell?

It results that the judgments of the United States Court of Appeals of the Indian Territory and of the District Court of the Territory are affirmed.

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FISHBACK v. FOND DU LAC & N. E. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1907.)

No. 1,351.

CORPORATIONS—INCREASE OF CAPITAL STOCK—WISCONSIN STATUTE.

St. 1898, Wis. § 1774, authorizes the stockholders of a corporation to amend its articles of organization so as to increase or diminish its capital stock, and provides that a certified copy of the amendment shall be filed in the office of the Secretary of State and also recorded in the office of the register of deeds where the corporation is located, and that "no amendment shall be of effect until so recorded and such amendment shall be void until so filed and recorded." *Held* that, under such provision, an amendment increasing the capital stock of a corporation upon being filed did not relate back to the time of its adoption, but that until the date of its filing the capital stock for all legal purposes remained as before it was adopted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 173-180.]

In Error to the Circuit Court of the United States for the Northern District of Illinois.

The facts are stated in the opinion.

Charles Quarles, for plaintiff in error.

John H. S. Lee, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge. The action in the Circuit Court was to recover from plaintiff in error, a citizen of Illinois, the sum of fifteen thousand dollars, paid to him by defendant in error, a citizen of Wisconsin, under a contract wherein plaintiff in error was to sell the bond issue of defendant in error, or as much thereof as might be necessary for the commencement and carrying on of the construction of a railroad project by the defendant in error, amounting to one million, seven hundred and fifty thousand dollars; the fifteen thousand dollars sued upon having been paid plaintiff in error, in advance, for such services.

The declaration, when the case went to trial, besides the common counts, contained a special count alleging failure to perform by plaintiff in error, and rescission by defendant in error, with demand for the repayment of the money advanced. Several defenses having been interposed, the case went to a jury, upon whose verdict in favor of defendant in error for the sum claimed, a judgment was duly entered.

The only defense brought here for review grows out of section 1773 of the statutes of Wisconsin of 1898, reading as follows:

"No such corporation shall transact business with any other than its members until at least one-half of its capital stock shall have been duly subscribed and at least twenty per centum thereof actually paid in; and if any obligation shall be contracted in violation hereof the corporation offending shall have no right of action thereon,"

—the claim of plaintiff in error being that at the time of the transaction sued upon, out of which the obligation to repay arises, twenty per cent. of the capital stock of defendant in error had not actually been paid in. The original capital stock of the defendant in error was ten thousand dollars; and there was proof sufficient to go to the jury to show that two thousand, or twenty per cent., had been paid in at the time the contract with plaintiff in error was made. But it is averred that before that time a resolution had been passed, in pursuance of the laws of Wisconsin, increasing the capital stock to seven hundred and fifty thousand dollars; which resolution, subsequently to the transaction sued upon, was filed with the Secretary of State, whereby, by relation back to the time the resolution was passed, the capitalization was seven hundred and fifty thousand dollars, at the time the resolution was passed, and therefore at the time of the transaction sued upon—the whole point of this defense turning upon the question whether the increased capitalization dates from the passage of the resolution, or from its filing with the Secretary of State.

Section 1774 of the Revised Statutes of 1898 of Wisconsin provides:

"Any corporation organized under this chapter may, at any meeting of its members, by a vote of at least two-thirds of all the stock then outstanding, in case of stock corporations, without stock, unless a greater vote shall be re-

quired in its articles, amend its articles of organization so as to increase or diminish its capital stock. \* \* \* When adopted, a copy of such amendment, with a certificate thereto affixed, signed by the President and Secretary, or if none, the corresponding officers, and sealed with the corporate seal, if there be any, stating the fact and date of adoption of such amendment, and that such copy is a true copy of the original, shall be filed in the office of the Secretary of State, and within thirty days after such filing by the Secretary of State, a like copy shall be recorded in the office of the registrar of deeds where such corporation is located. \* \* \* And no amendment shall be of effect until so recorded, and such amendment shall be void until so filed and recorded."

It seems clear to us that such increase of capital stock is not effective until filed and recorded, for such is the exact language of the statute. And it seems equally clear to us that until such increased capitalization does take effect, the preceding capitalization remains in effect, for otherwise the capitalization during a certain period of the company's existence would not be a fixed figure, but would be in nubibus; dependent, not as the law contemplates upon the record open to the public, but upon whether a certain resolution, wholly within the keeping of the corporation's officers, shall or shall not thereafter be filed for record. And upon this view, as to what under the law of Wisconsin was the capitalization of defendant in error at the time of the transaction sued upon, the defense under review disappears.

The judgment of the Circuit Court is affirmed.

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### HAYDEN v. OGDEN SAVINGS BANK.

(Circuit Court of Appeals, Eighth Circuit. November 29, 1907.)

No. 2,631.

#### 1. WRIT OF ERROR—FINDINGS OF FACT—CONCLUSIVENESS.

Where an action is tried to the court, and there is no stipulation that the court shall make a special finding of facts or any request therefor, the court's conclusion on the facts is in the nature of a general verdict, and is conclusive of all matters of fact to the same extent as the verdict of a jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3955-3969.]

#### 2. SAME—RECORD—SCOPE OF REVIEW.

Where, in an action tried by the court, there was neither stipulation nor request for a special finding of facts and no such finding was made, the inquiry on a writ of error is limited to the sufficiency of the petition, and the rulings on questions of law arising during the trial, if any are preserved.

#### 3. SAME—ASSIGNMENTS OF ERROR—HOLDINGS ON QUESTIONS OF LAW.

Where no declarations of law were requested by either party in an action tried by the court, and none were given by the court of its own motion, assignments of error directed to the holdings of the court on questions of law could not be reviewed on writ of error.

#### 4. SAME—OPINION.

The opinion of the trial court in an action tried by the court without a jury is not available on a writ of error as a special finding of facts and declarations of law predicated thereon.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2339.]

## 5. SAME—STIPULATION—FILING.

Where a stipulation of facts in an action tried by the court was not filed in nor considered by the trial court, it could not be considered on a writ of error, the only office of which is to review the action of the trial court on questions of law presented by the bill of exceptions.

In Error to the Circuit Court of the United States for the District of Utah.

Hiram E. Booth, E. O. Lee, Carl A. Badger, and Albert H. Gleason, for plaintiff in error.

C. C. Richards (A. E. Pratt, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff in error brought suit against the defendant in error to recover the sum of \$2,400 alleged to be owing by the defendant on a contract executed between it and W. F. Burns & Co., the plaintiff claiming to be the assignee of said contract after its performance by said W. F. Burns & Co. By stipulation of the parties the case was tried to the court without the intervention of a jury. The court found the issues for the defendant, and adjudged that the plaintiff take nothing by his action. There was no stipulation between the parties that the court should make a special finding of facts, nor was any request made to the court to do so. In such situation the conclusion of the court on the facts is of the nature of a general verdict, and is "conclusive upon all matters of fact, precisely as the verdict of a jury." The inquiry in this court in such condition of the record is, therefore, "limited to the sufficiency of the complaint (or petition) and the rulings, if any be preserved, on questions of law arising during the trial." *Lehnen v. Dickson*, 148 U. S. 71, 72, 73, 13 Sup. Ct. 481, 37 L. Ed. 373; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed. 862.

No question is made by the assignment of errors as to the sufficiency of the petition in stating a cause of action. There was no request by the plaintiff for a directed verdict. There was no question raised in the assignment of errors to the effect that there was no evidence to support the verdict. The only assignment of error touching the action of the court in ruling on the admission of evidence pertains to an objection to certain questions put to the witness Catlin; but in the brief of counsel for plaintiff in error "this assignment of error is waived."

All the other assignments of error are directed to the holdings of the court on questions of law. As no declarations of law were requested by either party, and none were given by the court, *sua sponte*, such assignments are ineffective. They are directed to nothing reviewable. Counsel seem to have assumed that the opinion of the court sent up with the record performs the office of a special finding of facts by the court, and of declarations of law predicated thereon. This is a misconception. *York v. Washburn*, 129 Fed. 564, 64 C. C. A. 132.

In their brief filed herein counsel for plaintiff in error have set out what purports to be a stipulation respecting the facts proved in the court below. No such stipulation was filed in the Circuit Court, and was not, therefore, considered or passed upon by it; and it can perform no other office in this court than an agreement between the respective counsel, for their convenience, as to what the evidence on the trial of the case was. As the only office of the writ of error is to review the action of the trial court on questions of law, and the bill of exceptions in the case includes all the evidence presented to the court below, our inquiry is limited to the transcript of the record sent up from the Circuit Court.

It results that the judgment of the Circuit Court must be affirmed, and it is so ordered.

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NELSON v. SOUTHERN RY. CO.

(Circuit Court of Appeals, Sixth Circuit. January 16, 1908.)

No. 1,728.

1. MASTER AND SERVANT—DEATH OF SERVANT—FELLOW SERVANT.

Where several crews of switchmen were engaged in switching operations in a railroad yard, the members of the different crews were fellow servants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 510-514.]

2. SAME—NEGLIGENCE—RULES—QUESTION FOR JURY.

Where defendant employed several hundred men in a yard containing numerous tracks on which they were continuously engaged in moving trains and cars, and intestate, a switchman, was killed by the impact given to the cars on one side of him by a train backing in from that direction without warning, whether the railroad company was negligent in failing to prescribe rules for the management of its business in the yards, and in failing to require warning of such operations, was for the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1032-1043.]

3. SAME—ASSUMED RISK.

Where decedent had worked as a switchman in a railroad yard for eight or nine months prior to his being crushed and killed by the impact given to the cars on one side of him by cars of a train backed in on the same track without warning, and knew of the manner of switching in the yard during such period, and the absence of a rule requiring warning to be given of such operations, he assumed the risk.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 596.]

In Error to the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee.

G. W. Pickle, for plaintiff in error.

W. L. Welcker, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The plaintiff in this cause sought to recover damages for the causing of the death of her husband by the negligence of the defendant railroad company. The deceased was a

switchman in its employment in its yards at Knoxville, and was at the time engaged in separating the unsound cars in a train on one of the tracks from the sound ones, and, while engaged in uncoupling two of them, was crushed to death by the impact given to the cars on one side of him by cars of a train backing in from that direction without warning. The crews of both trains were fellow servants, and the ground on which the action is based is that the defendant was guilty of negligence, in that it prescribed no rules in regard to the conduct and movements of trains when backing into a track where its employés were engaged in breaking up and sorting out trains which exposed them to danger. The work in which the deceased was engaged was of a kind which is highly dangerous, and we think upon the circumstances which the evidence tended to show the jury might have found that the defendant was negligent in not prescribing rules for the management of its business in such circumstances, which were calculated to guard its employés from the dangers incident thereto. The yard was large, and several hundred men were employed therein in switching cars and trains from one track to another, and in separating them and taking them to their various destinations. The tracks were numerous, and the movement of cars and trains thereon constant. In *Railroad Company v. Doty*, 133 Fed. 870, 67 C. C. A. 38, we recognized the rule contended for by counsel for the plaintiff, that in such a business the railroad company is bound to prescribe and enforce such rules and regulations as are reasonably necessary for the safety of its employés in carrying it on. In the present case it is easy to see that a rule requiring a warning to be given when cars are driven into a place where men might be engaged in coupling and uncoupling cars might have saved the decedent's life.

But the deceased was a competent man. He had been employed in that yard as a switchman for eight or nine months, and was familiar with the manner in which the business was carried on. It is true that during that time he was at work in that part of the yard known as the "running yard," out of which cars were run into that part where the cars needing repairs were separated, and switched off upon different tracks according to the gravity of the necessity for repairs. But his experience there was in a place where he had equal means of information in regard to the management of trains or cars sent thence into the next yard as if he had been in the yard into which they were taken. The taking out and the taking in of trains were parts of the same operation. On the morning of the accident he had been directed to take charge of a switching crew in that part of the yard where some cars needing repairs were collected and which were required to be sorted out and separated; and, although a foreman, was doing work belonging to a switchman, a thing shown to be not unusual. The manner of the switching and the movements of cars that day was not different from that which had been pursued during the whole period of his employment in the yard. If this accident had happened directly after his employment began, it might have been said that he had the right to rely upon the presumption that his employer had taken proper precautions for making the business reasonably safe for its em-



ployés. And the same rule would have held good if the sources of danger were beyond his ken, and the employer had permitted them to continue while the servant was in his employment, for the employé does not assume risks which are not apparent and of which he knows nothing. But here the dangers were not obscure. On the contrary, they were perfectly obvious, as open to the deceased as to any one, and had been for a long time. The case is one falling within the exception to the rule above stated. The exception is, as stated by Mr. Justice Day in *Choctaw, etc., R. R. Co. v. McDade*, 191 U. S. 64, 68, 24 Sup. Ct. 24, 25, 48 L. Ed. 96:

"That when a defect is known to the employé, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge, and without objection, without assuming the hazard incident to such a situation."

This was given as a statement of the law in respect to the assumption of risks arising from physical defects or sources of danger, but the same reasons exist for recognizing the exception to the general rule in cases where the defect which gives rise to the danger is a fault in the manner in which the business is conducted. A case decided by the Circuit Court of Appeals for the Third Circuit is cited in which the facts concerning the negligence of the employer were similar to the case at bar (*Union R. R. Co. v. Tate*, 151 Fed. 550, 81 C. C. A. 66), and the opinion in that case was delivered by Judge Gray. We have no criticism to make upon the rule of law in regard to the duty of the employer as there laid down. It is not essentially different from that affirmed by this court in the case of *Railroad Co. v. Doty*, *supra*. But in the case in the Third Circuit the facts did not present the question of the assumption of the risk by the employé. It is upon that distinction that we are constrained to affirm the judgment of the court below.

Judgment affirmed, with costs.

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THE JOHN A. HUGHES.

(Circuit Court of Appeals, Second Circuit. December 4, 1907.)

No. 47.

TOWAGE—LOSS OF MUD SCOW IN DUMPING—LIABILITY OF TUG.

A tug held not chargeable with negligence which rendered it liable for the sinking of a mud scow which it had towed to the dumping grounds, caused by the failure of the after pocket to dump its load promptly, where the weather was not so dangerous as to render it negligent to take the scows out, but the sea was so rough that the tug could not safely go alongside the scow to assist the dumping by using its hose to loosen the material as was sometimes necessary, and where the dumping was in the sole charge of the scowman who did not act under orders from the tug.

Appeal from the District Court of the United States for the Eastern District of New York.

H. L. Cheyney and Harrington Putnam, for appellant.  
Albert A. Wray, for appellee.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. March 17, 1903, James E. Hughes chartered his tug John A. Hughes to the Morris & Cumings Dredging Company, "to be used by them for towing mud scows between Boston Harbor and the government dumping ground, which is seaward of a straight line through Minot's Ledge and Egg Rock Lighthouses, and such other services as charterer may require in and about Boston Harbor." May 5th the tug towed two mud scows, 43 and 48, to the dumping ground, where the tow arrived about 10:15 a. m. When the tow had crossed the line inside of which dumping is not permitted, the tug blew a signal, so that the scowmen might know that they were where operations could properly begin. The scows contained six large pockets smaller at the bottom than at the top, so that when the pauls were knocked out the bottoms of the pockets opened, and the contents, by force of gravity, dumped into the sea. The practice is to empty the amidship pockets first, and afterwards the forward and aft pockets in order to keep the scow in trim as she lightens. The scowman on No. 48 testified that he did so on this occasion, but that the after pocket dumped slowly so that the scow went down by the stern, and water washed aboard and sank her.

It was testified that thick clay not infrequently does stick, and that in such cases it is usual for the tug to come close alongside and play a hose at the edges of the clay, so as to soften it, and help it out. All the witnesses agree that the tug on this occasion could not have done this because the sea was too choppy to permit her to get close alongside, and, if she had done so, being iron, there would have been great danger of breaking her steam pipes. The libel proceeded on the theory that the real negligence of the tug was in taking the tow to sea in dangerous weather, but at the trial after the libelants had rested they were given leave to amend, by alleging "that it was a fault on the part of the Hughes to proceed to sea in such bad weather as would preclude the possibility of her going alongside the scow to pump out the material if it should stick in the pocket, and not dump, and that she failed in her duty to the scow in not going alongside and pumping it out or not making an effort to do so." The district judge absolved the tug from the charge of negligence in taking the tow out in dangerous weather, and concluded his opinion as follows:

"It is not intended to hold that the Hughes should not have started out; that the way out was beset by weather or seas that would deter other than feeble or too apprehensive mariners, nor that the condition of the dumping ground necessarily precluded tows dumping at the time, but the purpose is to decide that the master was negligent in incurring the danger of dumping, if he knew that he could not aid against the result of a common incident of dumping, or that, if he was justified in dumping because he had means of aiding in necessity, he was negligent in failing to use such means. In either case the tug was negligent."

We are of opinion that the operation of dumping was in the sole charge of the scowman, and that the master of the tug did not order him to dump. No doubt, if the scow's distress was seen or ought to have been seen by those on the tug, it would have been their duty to give whatever assistance they could, but, it being admitted on all

hands that the tug could not safely go alongside, we think the master was not negligent for failing to do so.

The decree is reversed, with costs.

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THE SCANDINAVIA.

(Circuit Court of Appeals, Second Circuit. December 4, 1907.)

No. 84.

**COLLISION—STEAM VESSELS CROSSING—VIOLATION OF STARBOARD HAND RULE.**

The steam vessel New Brunswick left a slip in Jersey City in the evening, and proceeded up the river about 500 feet from the New Jersey shore, the river being there 4,000 feet wide. Two minutes later the ferryboat Scandinavia left her slip on the New York side about opposite that of the New Brunswick, and proceeded up and diagonally across the river toward the Hoboken ferry, and when near such ferry the vessels came into collision. *Held*, that the Scandinavia, starting so near the time of the New Brunswick, and being the faster, was not an overtaking vessel, but that the starboard hand rule governing crossing vessels applied and required the New Brunswick to keep out of the way and avoid passing ahead of the Scandinavia, and that her failure to observe such rule on proper signal from the Scandinavia rendered her in fault for the collision.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Collision, §§ 197-199.

Overtaking vessels, see note to *The Rebecca*, 60 C. C. A. 254.]

Appeal from the District Court of the United States for the Southern District of New York.

Robinson, Biddle & Benedict (Roderick Terry, Jr., and W. S. Montgomery, of counsel), for appellant.

James J. Macklin and L. S. Gove, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

**PER CURIAM.** The decision of this court in the case of *The Islander*, 152 Fed. 385, 81 C. C. A. 511, rendered after the decision of the District Court in the present case, makes the narrow channel rule inapplicable here. If, therefore, the New Brunswick's only fault lay in its failure to observe that rule, we could not sustain the decision below. But we think that the District Court was right in also holding the New Brunswick negligent for violating the starboard hand rule, and that the rule governing overtaking vessels did not apply.

The better evidence shows that the New Brunswick left the railroad slip at Jersey City at 8:30 p. m., moved into the stream and proceeded up the river about 500 feet out from the New Jersey shore. She was bound for the Twenty-Third street slip, Manhattan. At 8:32 p. m. the Scandinavia came out of the Barclay street slip, and proceeded up and diagonally across the river toward the Hoboken ferry. The railroad slip at Jersey City is nearly opposite the Barclay street slip, and the river is about 4,000 feet wide. The collision occurred near the Hoboken ferry—both vessels having practically kept their courses. From this statement it is apparent that the New Brunswick could not have got under headway, gone out into the stream, and proceeded so far up

the river before the Scandinavia started that those on board the Scandinavia could not have seen her starboard light. Considering the time—not more than two minutes—the speed of the New Brunswick, and the width of the river, it is impossible that the Scandinavia should have been an overtaking vessel within the meaning of the rule, when she left her slip; and, as she was faster than the New Brunswick, she manifestly did not become one afterwards.

If the overtaking rule did not apply, the starboard hand rule did. The vessels were proceeding on diagonal courses, and the New Brunswick had the Scandinavia on her starboard hand. It was the duty of the former to avoid the latter. She did not do so, and the collision occurred.

The New Brunswick, therefore, was at fault in failing to observe the starboard hand rule. The Scandinavia gave the proper signal, kept her course, and observed the rule.

The decree of the District Court is affirmed, with costs.

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DIGGS v. LOUISVILLE & N. R. CO. (two cases).

DUNNAWAY v. SAME.

(Circuit Court of Appeals, Sixth Circuit. December 26, 1907.)

Nos. 1,724-1,726.

CARRIERS—OPERATION OF RAILROAD TRAINS—ANNOUNCEMENT TO PASSENGERS OF "NEXT STATION."

A statement made by a brakeman to the passengers in a railroad car between stations, giving the name of the "next station," is merely an announcement, and not a call of the station; and, unless made when the train is immediately approaching a station, passengers for such station are not justified in treating it as an invitation to alight when the train next stops.

On petition for rehearing.

For former opinions, see 156 Fed. 564.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

PER CURIAM. The motion to rehear is apparently largely based on the statement of this court that Chandler was the last station before reaching Knoxville, and that the call that the next station or stop would be Knoxville was made after leaving Chandler and constituted "an announcement." It is said this was a misstatement, that the announcement was made by the trainman as the train approached Knoxville, and not after it left Chandler, and therefore constituted "a call," and, finally, that the question whether there was "an announcement" or "a call" should have been left to the jury. We think it immaterial whether the last station was Chandler or not. Of course, the material thing was whether the statement of the trainman that the next station or stop would be Knoxville, was "an announcement" or "a call." We are still clear in the opinion that it was an announcement, and not a call. When it was made is immaterial, unless it was made so close to Knoxville as to be a call. It is clear it was

not made that close. Two witnesses, King and Lee, testified it was made before the train reached the bridge. All the witnesses testified that the train stopped at least twice after the announcement was made and before it reached the station; once at the switch on the trestle, and again at the Y. There was no reasonable ground for any passenger to treat the announcement as a call, or invitation to alight.

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BROWN v. OWEN et al.

(Circuit Court of Appeals, Seventh Circuit. October 8, 1907.)

No. 1,378.

PATENTS—CONTRACT OF ASSIGNMENT—RIGHT OF ASSIGNEE TO IMPROVEMENT PATENTS.

A decree affirmed, which determined that, under a contract by which certain patents were assigned, the assignees were entitled to subsequent patents obtained by the assignor as improvement patents within the meaning of the contract.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

Dwight B. Cheever, for appellant.

Frank F. Brown, for appellees.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. There is nothing in the record before us satisfying us, against the decree of the court below, that the patents subsequently taken out by appellant, the subject-matter of this bill, are not improvements of the patents assigned by appellant to appellees, within the meaning of the contract between appellant and appellees; and there is nothing in the record that satisfies us that there has been, on the part of appellees, any breach of such contract respecting such subsequent patents as would entitle appellant to the enjoyment of such patents, notwithstanding his contract with appellees.

The decree of the Circuit Court is, accordingly affirmed.

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ECCLES v. BRADLEY.

(Circuit Court of Appeals, Second Circuit. December 6, 1907.)

No. 187.

PATENTS—INFRINGEMENT—THILL COUPLING.

The Bradley patent, No. 609,928, for a thill coupling, the novel element in which is a spherical leather packing, held infringed by a coupling identical with that of the patent when sold, but in making which, instead of using a packing previously pressed into shape in a mold, the coupling itself is utilized as a press for such shaping.

In Error to the Circuit Court of the United States for the Northern District of New York.

This is a writ of error to review an order of the Circuit Court for the Northern District of New York holding the plaintiff in error in contempt for disobeying an injunction issued in an action between these parties restraining the defendant Richard Eccles from infringing the claim of letters patent No. 609,928 granted to Christopher C. Bradley for an improvement in thill couplings. The patent has been twice before this court; the opinions being reported in 126 Fed. 945, 61 C. C. A. 669, and 139 Fed. 447, 71 C. C. A. 291.

W. A. Megrath, for plaintiff in error.

H. P. Denison, for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The single question presented by the oral argument and the briefs is whether or not the leather packing sold by Eccles infringes the claim of the Bradley patent. That this packing, as sold, is spherical, and is "provided with an open longitudinal joint along its side and with truncated ends at the ends of said joint, said packing enveloping the knuckle entirely and separating the same from the spherical bearing surfaces of the surrounding draft-eye," is too obvious for discussion. It is argued, however, that it avoids the claim, because, when the packing is placed in the coupling and riveted in the lower jaw, it is not the device of the patent, but a piece of flat leather. This is true, but it is also true of the Bradley packing before it is put in the press and moulded into shape. Instead of using a separate press for this purpose, Eccles utilizes the coupling itself, and by clamping the leather around the knuckle of the thill eye between the jaws of the coupling he secures the spherical moulded packing of the patent permanently secured in the jaw of the coupling. This condition is not produced by actual use after the leather has passed into the hands of the user. It is done deliberately by the seller, and by so doing he secures all the advantages of the Bradley packing, or, at least, all the advantages which can be secured by apparently inferior material. If the same result were produced by forming the packing in a press constructed on the same lines as the coupling, removing the packing therefrom and riveting it to the jaw of the coupling, it is manifest that infringement would be established. And yet this is, in effect, precisely what is done; the necessity for a separate press being avoided by using the coupling for that purpose.

In short, the plaintiff in error is making and selling a device which embodies every element of the claim.

The order is affirmed, with costs.

NATIONAL CONDUIT & CABLE CO. v. JOHN A. ROEBLING'S SONS CO.

(Circuit Court of Appeals, Second Circuit. December 4, 1907.)

No. 31.

PATENTS—INFRINGEMENT—ELECTRIC CONDUCTOR.

The McCracken patent No. 304,539, claim 1, for an electric conductor consisting of a wire having an insulating covering of paper, is limited by the proceedings in the Patent Office during which the patentee, to meet

objections made by the office, changed the claim so as to describe the paper as "spirally-wound," and is not infringed by a wire having a longitudinal wrapping of paper.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree dismissing a bill for infringement of U. S. patent No. 304,539, issued September 2, 1884, to Edwin D. McCracken for an electric conductor. No opinion was delivered in the Circuit Court.

Warner, Johnson & Galston, for appellant.

C. J. Sawyer and M. B. Philipp, for appellee.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The patentee states in his specification that he has invented a new and useful improvement in electrical conductors. That for all insulated electric conductors or wires it is desirable that the covering of insulating material should be as thin as is consistent with a perfect insulation. "I have," says the patentee, "discovered that thin manila or other pure vegetable paper possesses in a high degree the qualities necessary for a perfect insulation, and that by its use can be obtained a perfect insulation with a less thickness of covering than is possible in any other way. The invention consists in an electric wire having a covering consisting of a spirally-wound and lapping strip or strips of paper composed of pure vegetable fiber and applied in its unchanged fibrous condition to the wire, the paper forming of itself the insulating-covering for the wire. The invention also consists in an electric wire having a covering consisting of a spirally-wound and lapping strip or strips of paper applied with a waterproof adhesive substance, consisting of a thin solution of india rubber, the paper forming of itself the insulating covering for the wire. \* \* \* In Fig. 1 the single strip, which constitutes the insulation, is wound spirally and lapped about half its width, thus producing an insulation consisting of two thicknesses of paper. In Fig. 2 the insulation consists of two strips wound one over the other with a lap of about half the width; the second strip being laid so as to break joints with the first, thus giving an insulation of four thicknesses of paper." Elsewhere in the specifications it is stated that, "Fig. 2 represents a piece of wire having an insulation which consists of two spirally-wound strips of paper," which is a correct description of the drawing.

The first claim of the patent, upon which alone complainant relies, reads as follows:

"1. An electric wire having a covering consisting of a spirally-wound and lapping strip or strips of paper composed of pure vegetable fiber, and applied in its unchanged fibrous condition to the wire, the paper forming of itself the insulating-covering for the wire, substantially as herein described."

The question of infringement will be first considered. A sample of insulated wire was introduced in rebuttal and marked "Sample of Defendant's Cable No. 2." It is not disputed that there is no proof in the record that such cables were made, sold, or used by defendant

before February, 1900, a year and a half after the bill was filed. This alleged sample, therefore, cannot be considered in determining the question of infringement. The form of insulation which defendant has used comprises an inner longitudinal wrapping of paper which lies next to the wire and immediately incloses it, being wide enough to completely enfold it and overlap, thus providing a continuous and complete insulating covering for the wire. This longitudinal insulating strip is held in place, sometimes by string wound spirally around it, sometimes by a strip of paper similarly wound. In the latter structure the strip of paper merely takes the place of the string in keeping the inner strip in place; the latter, completely inclosing the wire, is the insulating covering. Complainant contends that this longitudinal insulating paper strip is the equivalent of the "spirally-wound and lapping strip" of the patent. Defendant contends that, being longitudinal and not spirally-wound, it is not covered by the claim. In the case of a meritorious invention a reasonable liberality in applying the doctrine of equivalents is not unusual, and patentees are not always held closely to the precise form stated in the claim when the same functions are found in a structure of a somewhat different form. But the history of this patent during its passage through the Patent Office precludes any construction of the claim which will eliminate the qualifying words "spirally-wound." The principle of construction which should be followed was expressed by this court in *Victor Talking Machine Co. v. American Graphophone Co.*, 151 Fed. 601, 81 C. C. A. 145:

"The applicant for a patent is entitled to specify and claim in his application the subject-matter of which he believes himself to be the original inventor, and to persist in his assertions and claims until final action thereon by the Patent Office. But when his claims are rejected on references cited against them, he is called upon to exercise his election between insistence and appeal or desistance and acquiescence. And while the language of the patent as issued may not be contradicted by mere voluntary expressions of opinion, or argumentative suggestions made by the applicant in his communications to the Patent Office, especially where no change is made in the claims, \* \* \* yet, on the other hand, the public is interested in securing due limitations upon the claim of an exclusive monopoly, on the ground of patentable novelty, and is entitled to the benefit of admissions imposed upon the applicant as a condition precedent to the allowance of the patent. \* \* \* While, therefore, an applicant for a patent may stake out the boundaries of his territory, yet if, upon notice from the Patent Office that some portion of said territory is the property of another or is held in common by the public, he acquiesces in such statement, and alters his boundaries accordingly, he is concluded by such abandonment, and cannot afterward undertake to define his territory by rolling stones, which he may move about across the lines of his original boundaries so as to appropriate property previously conceded to belong to others."

This language is exactly applicable to the case at bar. The patentee came into the Office with a specification substantially the same as above quoted, but with a somewhat different statement of invention, reading as follows:

"The invention consists essentially in an electric conductor having an insulation consisting of a wrapping of paper applied with adhesive substance, which is preferably waterproof where the conductor or wire will not be kept dry. The invention consists also in an electric conductor or wire having an insulation consisting of a spirally-wound and lapping strip or strips of paper."



The first claim of the original application was:

"1. An electric conductor or wire having an insulation consisting of a wrapping of paper the edges of which are united by adhesive substance, substantially as herein described."

The five other claims mentioned the "spirally-wound" strip or strips as an element. Had the patent issued, unchanged from the original application, the patentee could not have been restricted to spirally-wound paper. The Office rejected all the claims, and cited three patents against them, one of these being U. S. Patent to Tainter, No. 289,725, Dec. 4, 1883. That patent, among other things, contained the following statement of invention:

"The invention consists, fourthly, in insulating a conductor with a strip or strips of paraffined paper, or paper coated or impregnated with other insulating material, or otherwise rendered insulating, or of other fabric suitably coated, impregnated, or prepared, folded longitudinally around the conductor to be insulated."

In response to this reference the patentee wrote:

"My claims are not in patent to Tainter, because he does not state that his paper is pure vegetable fiber; because he does not use a waterproof adhesive substance consisting of a thin solution of india rubber; because his paper is not laid on spirally; and, for the greatest reason of all, that he uses the paper simply as an envelope to confine the insulating substance," etc.

Not content with this "argumentative suggestion," patentee amended his specification and claim. In place of the statement above quoted from the original application, setting forth the invention, he substituted:

"The invention consists in an electric wire having a covering consisting of a spirally-wound and lapping strip, etc. \* \* \* The invention also consists in an electric wire having a covering consisting of a spirally-wound and lapping strip or strips," etc.

The patentee also amended the first claim, which in the original application contained no statement as to how the covering was to be wound, so as to read:

"1. An electric wire having a covering consisting of a spirally-wound and lapping strip or strips," etc.

These changes thereafter remained in specification and claim, and are found in the patent as issued. Under these circumstances we are clearly of the opinion that the words "spirally-wound" thus inserted in the claim cannot be disregarded, and that infringement of this claim cannot be predicated of any structure in which the insulating paper is wound, not spirally, but longitudinally.

The decree of the circuit court is affirmed with costs.

## HARTFORD et al. v. HOLLANDER et al.

(Circuit Court, S. D. New York. November 26, 1907.)

## PATENTS—VALIDITY AND INFRINGEMENT—SHOCK ABSORBER FOR SPRING VEHICLES.

The Truffault reissued patent, No. 12,437 (original No. 695,508), for a frictional retarding means for spring vehicles, claims 1 to 10, inclusive, are void as not for the same invention claimed in the original patent. Reissued patent No. 12,399 (original No. 743,995), to the same patentee for an antivibration device for vehicles, *held*, not infringed.

In Equity. Suit for infringement of reissue letters patent No. 12,437 (original No. 695,508) for a frictional retarding device for spring vehicles issued January 16, 1906, to Jules M. M. Truffault, and reissue No. 12,399 (original No. 743,995), issued November 7, 1905, to the same patentee for an antivibration device for vehicles. On final hearing.

Arthur J. Baldwin and Clifford E. Dunn, for complainants.  
John A. Straley and Conrad A. Dieterich, for defendants.

PLATT, District Judge. Upon the hearing it struck me that the complainant had no case, unless he was entitled to a construction of patent No. 1 in suit, which would prevent any trespassing upon the broad monopoly of a rotary shock absorber as an adjunct to vehicle springs. As I listened I could not think that the situation disclosed such a monopoly. Upon taking the matter up again, my first impressions are intensified. In the original patent the inventor disclosed three ways of using friction to retard shocks and claimed their combined use produced from a unitary motive power. He neither said nor claimed that any one of them would do what he wanted to do. The third described means was incidental to and supplemental of the others. He had no notion that alone it was all sufficient. In his reissue he admits that claims 1 and 2 of his original patent were too broad. He discarded them, and adopted claim No. 6 as the basis of his reissue. This he calls "No. 11" in his reissue. From that he carves out the 10 claims upon which he sues, but fails to put No. 11 at issue. I cannot avoid the conclusion that, by narrowing the number of means, he broadens the scope of his invention. He has not therefore reissued for the same invention. The patentee's action does not, to my mind, savor of a square deal with the rest of the community. Whatever advantages the complainants can get in a business way they are entitled to, but I cannot feel that the patent law should be put at their disposal in that struggle.

I can see no merit in the latter part of the case, which deals with the trade-mark and unfair competition. It was not pressed in the application for preliminary injunction, nor in the final proofs, nor at my hearing. Complainant now says that it has registered "Absorber" as a trade-mark at Washington, but such action does not change my views. Reasons for the conclusion which I have reached are as plentiful as blackberries in the season, but experience has taught me that, if I begin to set them down upon paper, there will be no end in sight,

and the stress of affairs which has come upon me of late is my excuse for halting on the threshold.

Let the bill be dismissed, with costs.

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KELLOGG SWITCHBOARD & SUPPLY CO. v. INTERNATIONAL TELEPHONE MFG. CO. et al.

(Circuit Court, N. D. Illinois, E. D. November 26, 1907.)

No. 26,527.

1. PATENTS—INFRINGEMENT—TELEPHONE TRANSMITTER.

The Dean patent, No. 687,499, for a telephone transmitter, the essential feature of which is the mounting of a practically weightless transmitter case upon the vibrating or main diaphragm of a telephone, and associating it with a fixed back electrode and a supplemental diaphragm, by which it is claimed that packing of the carbon granules within the chamber is prevented and stronger and more distinct tones are produced, although not a great advance upon the prior art, discloses patentable novelty and is valid; also, *held* infringed.

2. SAME—VALIDITY—ABANDONMENT.

One seeking to invalidate a patent on the ground that the invention had been abandoned has the burden of proof to establish by clear and convincing evidence an intention on the part of the inventor to dedicate the invention to the public.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 112.

Abandonment of invention, see note to Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 70 C. C. A. 6.]

3. SAME—ESTOPPEL—DELAY IN APPLYING FOR PATENT.

The fact that a patentee, after perfecting his invention, delayed for six years before applying for a patent therefor, does not estop him from claiming priority for such patent over one subsequently issued to another, who had in the meantime conceived the same invention, but who took no steps to obtain a patent until after the first patentee had filed his application and had introduced his invention into public use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 115.]

In Equity. On final hearing.

Jones, Addington & Ames and Robert S. Taylor, for complainant.  
Coburn & McRoberts, for defendants.

KOHLISAAT, Circuit Judge. Complainant seeks hereby to enjoin the defendant from infringing claims 1, 2, 8, 10, 11, 13, 15, 16, 17, and 18—10 in all—of patent No. 687,499, granted to Dean November 26, 1901, for a telephone transmitter. They read as follows:

"1. In a telephone-transmitter, the combination with a suitable diaphragm, of a chamber for the granules carried thereon, an electrode within said chamber and moving with said diaphragm, a supplemental diaphragm peripherally secured to said main diaphragm and a second electrode associated with said supplemental diaphragm in an intraperipheral position, substantially as described.

"2. In a telephone-transmitter, the combination with a suitable diaphragm, of a chamber for the granules carried thereon, an electrode within said chamber and partaking of the movement of said diaphragm, a supplemental diaphragm peripherally connected with said diaphragm, a second electrode associated with said supplemental diaphragm in an intraperipheral position,

and an abutment for said second electrode mounted in a stationary position, substantially as described."

"8. In a telephone-transmitter, the combination with a suitable sound-receiving diaphragm carrying a laterally-deflected chamber for the granules of an electrode within said chamber and moving with said diaphragm, a supplemental diaphragm adapted to close said chamber, and a second electrode associated with said supplemental diaphragm in an intraperipheral position, substantially as described."

"10. In a telephone-transmitter, the combination with a diaphragm having a chamber for the granules carried thereon, of a supplemental diaphragm peripherally secured to said main diaphragm, a block fitting against the outer face of said supplemental diaphragm, a plate fitting against the outer face of said supplemental diaphragm, a plate fitted against the inner face of said diaphragm, and means to clamp said plate and block together upon the diaphragm, substantially as described."

"11. In a telephone-transmitter, the combination with a main diaphragm, a chamber or recess carried thereby, a supplemental diaphragm peripherally secured to said main diaphragm, a block pressing against the outer face of said supplemental diaphragm, a plate similarly located with reference to the inner face of the supplemental diaphragm and having a shank extending through a bore in said block, means to secure the shank so as to clamp the plate and block together upon the said diaphragm, and a support for the block, substantially as described."

"13. The combination with a vibratory member forming a chamber, of an electrode adapted to vibrate therewith, a supplemental member to close said chamber, a second electrode associated with said supplemental member and adapted to be rigidly mounted, and comminuted conducting material within said chamber, substantially as described."

"15. In a telephone-transmitter, the combination with a diaphragm, a recess or chamber carried thereby, a supplemental diaphragm, a block secured to the supplemental diaphragm a support for the block, and means to secure the block in its support in any position, whereby the block may be adjusted in its support by the vibration of the diaphragm and then secured in adjusted position, substantially as described."

"16. In a telephone-transmitter, the combination with a suitable sound-receiving diaphragm, of a chamber for the granules carried thereon, an electrode within said chamber and moving with said diaphragm, a supplemental diaphragm adapted to close said chamber, and a second electrode associated with said supplemental diaphragm in an intraperipheral position, substantially as described."

"17. In a telephone-transmitter, the combination with a suitable diaphragm, of a chamber for the granules carried thereon, an electrode within said chamber and moving with said diaphragm, a supplemental diaphragm having its periphery secured to the edge of the chamber, and a second electrode associated with said supplemental diaphragm in an intra peripheral position, substantially as described."

"18. In a telephone-transmitter, the combination with a diaphragm having a laterally-deflected chamber thereon, of an electrode in said chamber and movable therewith, a supplemental member, a second electrode associated therewith, said supplemental member being adapted to close said chamber and permit the free relative vibration of said electrodes, and comminuted conducting material within said chamber, substantially as described."

The feature of Dean's alleged invention here involved consists in mounting a practically weightless transmitter case upon the vibrating or main diaphragm of a telephone, and associating it with a fixed back electrode and a supplemental diaphragm, which form the rear wall of the transmitter case, whereby he claims that he secures the direct compression of the granules between the front and rear electrodes (which was not new), and also what he terms the inertia or action upon each other of the granules, which was also not new. If the patent in suit contains any novelty, it consists mainly, if not exclusively, in

the combination of the elements which produce these two forces, or, rather, in the device which sets them both into operation at once. As might be expected, the prior art introduced is profusely illustrated in the various patents covering transmitters. With the history of the art we need have little to do. It is replete with devices employing vertical electrodes held in constant electrical relation to each other by means of an interposed body of carbon granules whenever subjected to the current. The differentiation consists in the manner in which this is done. It seems that one grave difficulty in the practical operation of the transmitter lies in the tendency of the granules to pack. This causes defective action in reproducing the voice tones thrown against the main diaphragm. For complainant it is insisted that Dean's device prevents packing, and produces clearer and stronger tones than had heretofore been obtained, and by the use of simpler means. Defendant insists that there is nothing novel in the claims in suit. Of these there are two which in themselves embrace substantially all the features which are urged as anticipating the claims in suit; i. e., the White patent of 1892, and the Stromberg and Carlson patent of 1897. The former differs from the claims in suit in that the transmitter case is not carried on the front diaphragm. It has a mica supplemental diaphragm, which, together with the front electrode, forms the front wall of the granule chamber. The front electrode is carried on and moves with the main diaphragm. The rear electrode is stationary, as is the whole transmitter case, except the front wall. The rear electrode and the heavy chambered block in which it rests together form the rear wall of the case, which is comparatively very heavy. The supplemental diaphragm permits the front electrode to move relatively to the chambered block, being practically the same diaphragm as that which, together with the rear electrode, forms the rear wall of complainant's transmitter case. As a result, complainant insists there is no inertia effect with regard to the carbon granules.

The Stromberg-Carlson transmitter resorts to extraordinary means for preventing packing of the granules. Both electrodes are faced with wire gauze shields, and the granule chamber between the electrodes is divided by a like sheet of gauze. The chamber is surrounded by a yielding ring of felt or other elastic substance, whereby an expansive movement of the granules is facilitated. The whole is hermetically sealed in a water-tight case, which is difficult of adjustment in the event that repairs are required. These and other details make this device intricate. It seems to have worked successfully, but cannot be considered the equivalent of the White or Dean transmitters, which employ greatly simplified means. The theory that the so-called inertia effect upon the granules, in connection with the direct pressure, caused by attaching the transmitter case to the front diaphragm, results in a particular and extraordinary excellence of commercial telephone performance or distinctness theretofore unknown by reason of the overtones or other vibrations or electrical action permitted by the particles of carbon in their increased freedom from packing, seems to find its origin in the fertile brain of counsel and expert, rather than in the mind of the inventor. We look in vain for any such suggestion

in the claims or specifications. All the inventor was seeking for was increased freedom from packing of the granules by a new combination device. "The granules which are located out of the sphere of action of the electrodes," he says, "and which have absolutely nothing to do with the talking qualities of the instrument, are moved backward and forward by the small exposed portion of the diaphragm not covered by the moving electrode." What results, other than agitation of the granules, and as a result, substantial freedom from packing, follow from the so-called inertia effect produced by the transmitter case swinging with the front diaphragm, must, to one not electrically metaphysical, so to speak, rest largely in mere conjecture, in the presence of widely diverging expert evidence on the subject, unless he may be permitted to indulge somewhat in probabilities. It seems to be true that Dean was the first to attach his transmitter case to the main diaphragm in combination with a fixed back electrode and a supplemental diaphragm. "What I did, and what I considered I was doing," says Dean, "was reversing the White solid back button and making it light enough not to impede the vibration of the diaphragm." Complainant differs with Dean in this, and insists that the mere reversal of the White button cannot be made to produce the device in suit. Nor can it. Dean was a better inventor than witness. Counsel for complainant say that Dean's invention belongs to that class wherein the merit and novelty lie rather in the inventive thought than in the mere details of construction by which the inventive thought may be embodied in material form. This statement is of weight only so far as it emphasizes the importance of small changes in the device employed. To find an increased efficiency in an old device, even when overlooked by the patentee, is not invention. The case then stands like this: The device of the patent in suit is a new combination. Complainant's experts proclaim a new and somewhat mysterious result therefrom. Even though it serves but to give greater freedom to the granules, it has added something to the art, which it would seem must now advance with mincing step. Defendant uses the combination with the difference that its transmitter case is not integral with the front diaphragm, but is mechanically attached thereto. For the defendant the case stands thus, i. e.: No new result according to its experts is conclusively demonstrated. The combination is old as to all its meritorious features. The defendant does not use it. This last proposition does not seem tenable, while complainant's case is formed by upsetting the center of the main diaphragm into the shape of a cup standing on its side. Yet this form of transmitter case cannot be said to be an indispensable feature of complainant's transmitter. Even if it were, it is satisfactorily shown that Dean invented the designs used by defendant prior to defendant's application, and later applied for a patent thereon. Much of the briefs are devoted to this matter. In the view taken by the court, it is immaterial. Manifestly it could add nothing to the effect produced by mounting the transmitter case upon the front diaphragm to make the case integral with the diaphragm. The action would be precisely the same in either case, and the controlling idea is the same. Considering, therefore, the evidence produced on both sides, together with those

indicia which fairly seem to blaze the way toward invention, I am of the opinion that complainant's device shows patentable novelty, and that defendant has appropriated it.

There remains one other serious question. It is stated by defendant as follows, viz.:

"Under the rule announced by the Circuit Court of Appeals for this circuit in *Universal Adding Machine Company v. Comptograph Company*, 146 Fed. 984, 77 C. C. A. 227, the bill must be dismissed for want of equity."

Dean shows that he invented the transmitter in suit in 1895, and that it was complete and operative, so far as the vital principle of the device in suit is concerned. It seems that at that time Dean was under contract to turn over his new invention to his then employer. He chose to keep the discovery secret, or, at any rate, from his employer. Afterwards, at the instigation of complainant, in the spring of 1901, Dean went into the Patent Office for a patent, having urged the complainant to take the matter up as early as 1899. McCormick, defendant's assignor, filed his application for letters patent subsequent to that of Dean and subsequent to Dean's introduction into commercial use. McCormick claims to have made his invention prior to the filing of the Dean application, but to have laid it aside for some months. Under the circumstances, defendant insists that either Dean's alleged invention was an abandoned experiment or he was estopped from claiming the same by reason of the years which intervened between the invention and the filing of the application, applying the rule laid down in the *Comptograph Case* above referred to. But there are marked differences between the present case and that case. In the first place, Dean applied for his patent and introduced the invention into public use before McCormick applied for his patent. His attempt to carry this doctrine of the *Comptograph Case* back to cover his invention, which, according to his story, might have been placed of record in the Patent Office, prior to Dean's application, is not sustained by that decision. He had taken no steps, and there would not exist the ground for equitable estoppel alleged by the court in that case. McCormick was himself negligent. Equitable estoppel could hardly be based upon what two men held locked up in their minds. He who would invoke this doctrine must have himself done something—not thought something. Moreover, Dean was the first to give the matter to the public. Nor is there any satisfactory evidence of actual or implied abandonment on Dean's part. The record shows he had no such intention. He hoped to use it to his own advantage. Under the statute the burden of showing abandonment is upon him who asserts it. In *Victor Talking Machine Company v. American Graphophone Company* (C. C.) 140 Fed. 866, the court says:

"Nor, indeed, should evidence of abandonment rest upon doubtful or controverted inferences."

In the Eighth Circuit it has been held that "clear evidence of an intention to dedicate an improvement to the public is indispensable to establish abandonment," and "the patent in suit and the application upon which it is based are persuasive proof that Ide never intended to dedicate the improvement they secure to the public." *Ide v. Trorlicht*

D. & R. Carpet Company, 115 Fed. 144, 53 C. C. A. 348. "All reasonable doubt must be solved in favor of the patent." Crown Cork & Seal Company v. Aluminum Stopper Company (C. C.) 108 Fed. 850. Abandonment rests upon the intention of the inventor, and should be established by convincing evidence. Mast Foos Company v. Dempster Mill Mfg. Company, 82 Fed. 331, 27 C. C. A. 191. Judged by these principles, the evidence clearly fails to make out a case of abandonment to the public.

It is therefore adjudged that the patent is valid, that defendant's device infringes the same, and that a decree go as prayed.

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RICHARDS et al. v. MEISSNER et al.

(Circuit Court, W. D. Missouri, W. D. March 8, 1906.)

No. 2,954.

**1. INJUNCTION—PRELIMINARY INJUNCTION—EFFECT OF EX PARTE RESTRAINING ORDER.**

The granting of a preliminary restraining order ex parte is so perfunctory in character as to be entitled to little weight when the defendants appear to show cause against its further continuance.

**2. SAME—GROUNDS—DISCRETION OF COURT.**

The granting of a preliminary injunction rests largely in the sound discretion of the chancellor, and while it is not necessary that the court should be satisfied before granting it that the complainant will certainly prevail on final hearing, it should be careful that he has a probable right, and that there is probable danger that such right will be defeated without the court's interposition; and where it appears on the showing made that the right is quite doubtful, and that at least as much injury would result to defendant from granting the injunction as to complainant from its denial, the application should be refused, and especially where there is grave doubt of an adequate redress to the defendant in the event of the bill being dismissed on final hearing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 304.]

**3. PATENTS—SUIT TO COMPEL ISSUANCE—PRELIMINARY INJUNCTION.**

Where there has been a contest as to priority of invention between two applicants for patents before the Patent Office and the Court of Appeals for the District of Columbia, both of which tribunals have decided in favor of the same contestant, and the unsuccessful party has instituted a suit in equity in a circuit court to relitigate his right under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], he begins his controversy in that court with a prima facie case against him which he must overcome by such a weight of evidence as to carry thorough conviction to the mind of the judge, and his right to a preliminary injunction in such suit to restrain the defendant from paying his final fee and obtaining a patent is seriously questionable; and in any event such an injunction should not be granted without a clear showing that irreparable injury will otherwise result to complainant.

In Equity. On application for preliminary injunction.

Gage, Ladd & Small and E. Hayward Fairbanks, for complainants.  
Frank Hagerman and Rector, Hibben & Davis, for defendants.

PHILIPS, District Judge. The restraining order granted herein by another judge, in practice is so perfunctory in character as to entitle it to little weight when the defendants appear to show cause against



its further continuance. It is essentially *ex parte*; made without notice to the adverse party. Such restraining orders are often, and perhaps too often, issued by judges when so pressed with other matters that they have not the time to consider, with even little care, the questions of fact and law presented, feeling assured that little harm can come to the defendant in the few days intervening until the application for a temporary injunction will be heard *pro* and *con*. With the knowledge this court possesses of the various causes which have concurred to delay so long this hearing, it is of opinion that the complainants are in no position to assert any lack of diligence on defendants' part in not pressing an earlier hearing. The application for a temporary injunction, therefore, stands as if freshly made. Surely the complainants ought not to complain when, for so long a period, they have held the defendants restrained without their day in court. The granting of a temporary injunction rests largely in the sound discretion of the chancellor. While it does not finally determine the rights of the parties to the action, and is intended only to preserve the existing status until the case can be fully heard, and therefore it is not necessary that the court should, before granting it, be satisfied that the complainant will certainly prevail upon the final hearing of the case, the court should, nevertheless, be careful that the complainant has a probable right, and that there is probable danger that such right will be defeated without the special interposition of the court. It is equally true that where, on the showing made at the preliminary hearing, the law as to the right to an injunction is quite doubtful, and that as much, if not more, injury would probably ensue to the defendants than to the complainants, and especially where, in the event of the bill being dismissed on final hearing, there is grave doubt of an adequate redress to the defendants resulting from the injunction, the court should refuse the application for a temporary injunction, and await action until all the facts appear on final hearing.

It appears from the bill itself, accentuated by the affidavits presented on this hearing, that the complainants and the defendants had a serious and protracted contest over their conflicting claims to a patent before the department of the government designated by law for the determination of such questions in the first instance; that, on the successive hearings in the Patent Office, the finding was in favor of the defendants, and that on review by the Court of Appeals of the District of Columbia the action of the Patent Office was affirmed, and a patent directed to be issued to the defendants. While it is true that under section 4915, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3392], the defeated party is entitled to his remedy by bill in equity in the Circuit Court of the United States to have the whole question of priority of invention and right to a patent between the parties thrashed over and determined by the court, it is not correct to say, as some of the Circuit Courts have intimated, that little, if any, regard is to be had for the conclusion reached by the Patent Office on the questions of fact in the contest between the parties before it. On the contrary, Mr. Justice Brewer, in *Morgan v. Daniels*, 153 U. S. 120, 125, 14 Sup. Ct. 772, 773, 38 L. Ed. 657, held that "upon principle and authority,

it must be laid down as a rule that where the question decided in the Patent Office is one between contesting parties as to priority of invention, the decision there must be accepted as controlling upon that question of fact in any subsequent suit between the same parties, unless the contrary is established by testimony which, in character and amount, carries thorough conviction."

The effect of this pronouncement by the Supreme Court is that where such a contest, as in the case at bar, has been had before the Patent Office, and before the Court of Appeals designated by law for such appeals, and the unsuccessful party nevertheless invokes his right under section 4915, by resorting in equity to a United States circuit court, he begins his controversy in the latter court with a *prima facie* case against him, which he must overcome by such a weight of evidence as to carry "thorough conviction" to the mind of the circuit judge. Superadded to this, the right of such a complainant, who not only has not obtained a patent, but whose claimed presumptive right thereto has been denied after solemn proceeding on final hearing before the proper department of the government, where such applications are initiated, to a temporary injunction, on filing his bill, under said section 4915, is seriously questionable. In *Illingworth v. Atha* (C. C.) 42 Fed. 141, Judge Green held that inasmuch as this proceeding under said section 4915 is purely statutory, prescribing specifically what powers the court may exercise thereunder, and does not directly confer upon it the power in such a contingency to grant a temporary injunction *pendente lite*, such power does not exist. This conclusion, it must be conceded, is reinforced by reference to the succeeding section 4921 [U. S. Comp. St. 1901, p. 3393], which is in *pari materia*. It declares that "the several courts vested with jurisdiction of cases arising under the patent laws shall have power to grant injunctions according to the course and principles of courts of equity, to prevent the violation of any right secured by patent, on such terms as the court may deem reasonable." Thus limiting the power of the court to grant an injunction "to prevent the violation of any right secured by patent." This, for the obvious reason that until the party has obtained a patent from the government he has no exclusive right to the invention, and is ordinarily not entitled to a standing in court as against an adversary to invoke the extraordinary remedy of injunction. Without here deciding this question one way or the other, it is sufficient for the purposes of the present discussion to say that the right to an injunction is seriously debatable.

It is not apparent to my mind that the cases of *Bernardin v. Northall* (C. C.) 77 Fed. 849, *Wheaton v. Kendall* (C. C.) 85 Fed. 666, 669, at all conflict with the ruling of Judge Green in *Illingworth v. Atha*, *supra*. The courts in the *Bernardin* and *Wheaton* Cases were not discussing the question of the right to an injunction. It does not appear that an injunction was asked for or conceded in those cases. The courts were simply discussing the right of the party under section 4915 after his defeat before the Patent Office, to invoke the assistance of a court of equity; and it was of this condition that the courts, in effect, held that the trial was a judicial hearing by original bill, "with

all the powers of a court of equity at the service of the parties to the suit." The language of courts must be restrained to the fitness of the subject-matter; and in the absence of the question of the right to grant an injunction being before the courts the opinions would be mere obiter dicta had they even discussed such question, which they did not touch. This court, in *Standard Scale & Foundry Co. v. McDonald et al.* (C. C.) 127 Fed. 709, had occasion to examine this question in a related sense. Mr. Chief Justice Taney, in *Gayler v. Wilder*, 10 How. 477, 13 L. Ed. 504, said that:

"The discoverer of a new and useful improvement is vested by law with an inchoate right to its exclusive use, which he may perfect and make absolute by proceeding in the manner which the law requires" and that such inchoate right was assignable. He expressly said "the inventor of a new and useful improvement certainly has no exclusive right to it, until he obtains a patent. This right is created by the patent, and no suit can be maintained by the inventor against any one for using it before the patent is issued."

Because of this legal status of a mere claimed inventor, before the concession of a patent, it is not obvious to my mind what restitution the defendants in this case would have against the obligors in an injunction bond in the event of the dissolution of such an injunction. There would be no interference by the complainants with any exclusive right of the defendants as a basis for assessment of damages. What damage would they be in a position to show? At all events, in view of the position of the respective parties to this controversy, the prima facie case already existing against the merits of the complainants' claim, and the grave doubt in the mind of the court as to the existence of the injunctive right under the statute, the complexity presents a clear case where the exercise of the discretion in granting an injunction well justifies the court in refusing to continue in force the restraining order.

The contention of complainants' counsel that if the statu quo is preserved between these parties by the injunction it would obviate any future controversy after the Patent Office had granted a patent to the defendants is of little force. The defendants have followed the law in contesting complainants' right to a patent before the proper tribunal designated by law for passing primarily upon the rights of the parties, which resulted in a determination that the defendants are the first inventors, and are entitled to a patent. And while section 4915 has preserved to the complainants the valuable right to a hearing de novo on the merits before the court, under the circumstances of this case it does seem to me to be but an act of justice to the defendants that the court should await the coming in of all the evidence before taking any affirmative action in the complainant's favor. The bill of complaint on its face does not disclose any facts showing the complainants' right to invoke the extraordinary remedy of injunction. The only allegation touching this question is "that if the said defendant or his assignee, or their attorneys, agents or servants shall be permitted to pay the final fee as aforesaid, that a patent will be issued by the Commissioner of Patents upon his false, fraudulent, and wrongful application as set forth and notwithstanding your orator's rights in the premises, and that if such patent should be permitted to issue, great

and irreparable wrong, injury, and damages will result to your orators." There is no specification or showing as to how there could be any irreparable wrong, injury, or damage to the complainants, pendente lite.

It results that the temporary restraining order will be vacated, and the application for a temporary injunction denied.

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PORTLAND FLOURING MILLS CO. v. PORTLAND & ASIATIC S.  
S. CO. et al.

(District Court, D. Oregon. December 16, 1907.)

No. 4,800.

INSURANCE—SHIPPING—LIEN FOR FREIGHT—EFFECT OF SALVING OF CARGO OF  
STRANDED VESSEL BY INSURER.

Where a portion of the cargo of a stranded vessel was salvaged by strangers, under directions, however, of an agent of the insurer which had written a valued policy on the cargo, and with the consent of the agent of the vessel owners, while the master stood by and gave advice, but exercised no control, the operation was equivalent to an abandonment to the insurer as effecting a surrender of the vessel's lien for freight which could not thereafter be resumed as to the salvaged cargo or its proceeds.

In Admiralty. On exceptions to amended libel.

Exceptions to the original libel were sustained by the court for the reasons stated in the opinion rendered. See 145 Fed. 687. The changes attending the present libel as compared with the original are, in substance, as follows: The allegation that the vessel, together with her cargo, was immediately abandoned by her master and crew without any necessity therefor, and without any attempt at salvage of cargo or any part thereof, or any notification to libellant, and the steamship was abandoned to the underwriters of the vessel as a total loss, is omitted from the amended libel. By the original libel it is alleged that the salvage of cargo was immediately begun by Japanese fishermen on or about February 6, 1902, and that one Rennie Tipple, the surveyor to Lloyd's agent and local underwriters, took charge of salvage operations, while in the amended libel it is set forth that Tipple, "the surveyor to Lloyd's and as agent of local underwriters, including this respondent Commercial Union Assurance Company, and as agent for respondent Portland & Asiatic Steamship Company, took charge," etc. And it is further set out, by the latter clause of paragraph 10, that the work of directing the salvage was undertaken by Tipple under instructions from the underwriters of the cargo, and by consent of and as agent for Samuel Samuel & Co., Japanese agent for respondent steamship company. It is further shown by paragraph 11 that the salvaged flour was sold, under authority of a meeting of local agents to underwriters, "including this respondent, and also by consent and authority of this respondent, said steamship company," and the proceeds were deposited to the joint credit of Samuel Samuel & Co., who were the Japanese agents of respondent steamship company, and H. R. Playfair, who was the Japanese agent of respondent assurance company, "as trustees for whom it might concern"; the quotations showing the new matter added. It is then further alleged, under paragraph 13, in effect, that the price for which the salvaged flour was sold was increased by the amount of the freight, thus adding to its value by that much, which freight, as between libellant and assurance company, libellant was not liable to pay, and ought not, in equity and good conscience, to be compelled to pay; that the Chinese syndicate has been dissolved by the death of some of its members, and that the surviving members are wholly bankrupt; that the assurance company has acted with full knowledge and notice of the claim of libellant; that though the respondent steamship company, by its local agents in

Japan, Samuel Samuel & Co., did not actively participate in the salvage or sale of said flour, said flour was salvaged and sold, and the proceeds thereof deposited in bank, with the consent and co-operation of said Samuel Samuel & Co. as agent of the steamship company, and for the joint account of said Samuel Samuel & Co. and the underwriters of the cargo, for the benefit of whom it might concern as events should transpire; that the steamship company did not, in fact, release its lien on said flour, or on said fund, for the freight, but reserved said lien subject to payment by and for the benefit of libellant, and that, when said money was paid over to respondent assurance company, it executed to Samuel Samuel & Co., as such agents, a bond conditioned that it should take the place of said fund as between the steamship company and the assurance company, and that the latter company should hold the former harmless by reason of the surrender of such fund.

Williams. Wood & Linthicum, for libellant.

W. W. Cotton and James G. Wilson for Portland & Asiatic Steamship Company.

Snow & McCamant, for Commercial Union Assurance Company.

WOLVERTON, District Judge (after stating the facts as above). With the changes as indicated by the above statement, it does not yet seem to me that the amended libel states a good or sufficient cause for the relief demanded. Libellant's theory of the cause, as was stated in the previous opinion, is that it, the flouring mills company, was surety for the Chinamen for the payment of freight to the steamship company, which relation was well known to both the respondents; that the steamship company had a shipowner's lien on the cargo of flour by way of security for the payment of such freight; that the lien not only existed on the cargo while aboard ship in its original state, but that it was not released, but attended such cargo in its salvaged condition, and attached to the fund arising from a disposal thereof, and that, by subrogation to the rights of the steamship company, libellant is entitled to the benefit of that lien for its reimbursement in paying the freight money under compulsion from the court. If the steamship company possessed a shipowner's lien on the flour at the time the freight was paid by the libellant, and libellant was in reality but a surety for the Chinamen, and not the principal obligor for the payment of the freight, and the steamship company was aware of the true situation, I assume that the subrogation would follow, so that the libellant would come into the rights of the steamship company as it respects the lien, and would be entitled to enforce it. And this would be so as against the assurance company, respondent, if it came into possession of the flour and the fund with full knowledge, as it is alleged, of the conditions attending the lien, as its rights, whatever they might be, would be subordinated thereto. It is hardly necessary to reiterate that this is not a matter disposed of in the case of Portland Flouring Mills Company v. British & Foreign Marine Ins. Co., 130 Fed. 860, 65 C. C. A. 344, as this is a controversy between the principal and the surety, while that was a litigation, in its legal effect, between the obligee and the principal, and the shipper was, in pursuance of settled law, not allowed to show that he was, as against the obligee, but a surety, contrary to the plain reading of the bill of lading. As between joint obligors upon a paper, or as between the principal and surety, the true relation of the parties can ordinarily be shown, notwithstanding

ing their apparent relation as indicated by the writing. Not so when the controversy is between the obligee and the obligors. There the writing itself is conclusive of the legal relation, and nothing to the contrary will be permitted to be shown. So I take it that the former case does not conclude the libellant in the theory by which counsel now brings the cause upon the record.

It is strongly presented that the amended libel is utterly inconsistent with the original, and with the position taken by libellant throughout the trial of the British & Foreign Marine Insurance Company Case. But, whether that be true or not, this pleading should be determined upon its own merits, without reference to other papers or proofs filed or given in this or other cause. By the former opinion it was determined that when the steamship company abandoned the cargo to the underwriters, as it was alleged by the original libel that it did, it thereby waived or lost its lien on the flour as security for the payment of freight. The question now arises whether or not there was yet an abandonment of the cargo on the part of the steamship company, as shown by the amended libel. If there was, unless it was conditional or with some reservation of the lien, then the lien was lost to the ship, and could not again be resumed. Whether the steamship company released or reserved the lien for freight, its right to recover the freight from the shipper was not impaired; the lien being a protection for its sole benefit. And it is only in the event that the lien still attached when the freight was paid to it by the surety that the surety would be subrogated to its right to enforce the lien against the thing, or that which represents the thing—the fund arising from a sale of the salvaged flour. The delivery of the cargo to the consignee without reserving in any way the lien which the law imposes, or was reserved by the bill of lading, would be deemed a waiver of such lien. 4,885 Bags of Linseed, 1 Black, 108, 17 L. Ed. 35. The like result would ensue from any relinquishment of possession without in some way reserving the lien, so that constructively the possession would still remain with the ship; for when, as I have shown, possession is lost unconditionally, or what is tantamount thereto, the lien is lost also. The ship was “grounded and stranded,” and supposedly proceeded no further. Then, pursuing the averments of the libel, it appears that salvage of the cargo was begun by Japanese fishermen, and that thereupon Rennie Tipple, as agent of the underwriters, took charge of the salvage operations, in which operations the master of the vessel exercised no control, but for a time stood by personally and gave advice, and that Samuel Samuel & Co., local agents of the steamship company in Japan, did not actively participate in the salvage or sale of the flour, but that the proceeds thereof were deposited to the joint account of said Samuel Samuel & Co., as such agents, and the underwriters of the cargo, for the benefit of whom it might concern as events should transpire. Thus it is shown that there was a wreck of the vessel, and a part of the cargo was salvaged; but by whom, and for whose benefit? The ship did not save it, and took no part in the salvage operations, except that the master stood by and gave advice. Nor does it appear that the master, or any one in authority as to the ship, gave further or any directions touching the salvaged flour. There was no attempt on the part of

the ship to carry the flour on to destination, or to procure it to be so carried. Nor was there any declaration of purpose to retain possession with a view of preserving the lien for freight. Because of the stranding of the ship, the entire cargo would doubtless have been lost had it not been for the work of salving. The Japanese fishermen, people supposedly wholly disconnected in interest or by employment with the vessel, began the work; and Tipple, as agent of the local underwriters, took charge of the operations. A part of the flour was accordingly salvaged. Without more, it would naturally follow that the flour was salvaged for the underwriters; and this is what happened, I think, when all the averments of the libel are considered together, even by the rule of liberal construction. I am not saying whether the rule applies, but am conceding the benefit thereof to libellant, that the matter may be put beyond dispute. The master of the ship having stood by personally and given advice, while exercising no control in the premises, it could not be taken to mean that the ship retained any authority whatever over the salvaged flour. But by averment it is said that Tipple took charge of the salvaging operations as agent for the steamship company, as well as agent for the local underwriters. A little later, however, and in the same paragraph (10), it is said that the work of directing the salvaging operations was undertaken by Tipple under instructions from the underwriters, and by consent of and as agent for Samuel Samuel & Co., Japanese agents of the steamship company; so that it appears now that it was simply by the consent of Samuel Samuel & Co., who were the Japanese agents for the steamship company, that Tipple took charge of the salvage operations. But still further on in the libel (paragraph 13) it is averred that though the steamship company by its local agents, Samuel Samuel & Co., did not actually participate in the salvage or sale of the flour, said flour was salvaged and sold, and the proceeds deposited to the joint account of Samuel Samuel & Co., as agents of the steamship company and the underwriters of the cargo, for the benefit of whom it might concern. This averment puts it beyond controversy that the part that Samuel Samuel & Co., took in salvaging the flour was nothing more than to give their consent that it might be salvaged by the underwriters. The underwriters could have had but one purpose in salvaging the flour, which was to reimburse them for the loss they should sustain under their insurance. It is conceded that the policy written by the respondent assurance company upon the cargo was what is known in marine insurance as a valued policy, subjecting the insurers to the payment of the entire sum when loss occurs and the goods are abandoned to the underwriters. So that upon the whole, the flour was salvaged by the underwriters, with the consent of the local agents in Japan for the steamship company, which is simply to say that the steamship company consented to the underwriters' thus possessing themselves of the flour for the purpose of their reimbursement for insurance written thereon, which was tantamount to an abandonment of the flour to such underwriters by the ship, or the steamship company which controlled it, by reason whereof the lien for freight was lost. This brings the case within the decision upon the original libel, and the amended libel is

therefore also insufficient. That the proceeds of the salvaged flour were deposited to the joint account of Samuel Samuel & Co. and the underwriters does not change the result. Such deposit was for the benefit of whom it might concern, and the underwriters, under the conditions prevailing, were the sole beneficiaries, as the fund was afterwards so treated. The abandonment of the flour by the ship to salvage by the underwriters was a relinquishment of possession, and a consequent waiver of the lien for freight. Henceforth the ship could have no more concern with the salvaged flour or the fund arising therefrom, and the lien for freight therefore never attached to, nor does it now incumber, the fund in the hand of the respondent assurance company. That the flour was enhanced in value by reason of the transportation to the Orient can make no difference in the application of the principles discussed; nor do I conceive that any trust relations existed except such as in a manner might have arisen through the lien for freight that attached in the first instance. But, this lien being solely for its benefit, the carrier could, as has been stated, abandon or relinquish it at any time without impairing its right in the least to a recovery of the freight money. An abandonment or relinquishment by the ship or its owners of the shipowner's lien is what happened; and hence there can be no subrogation.

The exception to the libel on the merits will be sustained.

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DE LA MONTANYA v. DE LA MONTANYA et al.

(District Court, N. D. California. December 21, 1907.)

No. 14,451.

1. REMOVAL OF CAUSES—PETITION—NONRESIDENTS.

A petition to remove a cause from the state court of California, alleging that when the action was commenced and when the petition was filed petitioner was a resident of New York, did not allege that he was a "non-resident" of California, as required by Removal Act March 3, 1875, c. 137, § 2, 18 Stat. 470 [U. S. Comp. St. 1901, p. 509], and was therefore insufficient.

2. SAME—AMENDMENT.

Where a removal petition was defective in alleging that, when the action was commenced and when petition was filed, petitioner was a resident of New York, instead of alleging that he was a nonresident of the state in which the action was brought, but it also alleged that petitioner was a citizen of the republic of France, such allegation, coupled with the allegation of nonresidence in the state, gave petitioner the right to remove, and hence entitled him to amend the removal petition so as to correct the allegation of nonresidence.

Bishop & Hoefler and Alfred J. Harwood, for the motion.  
Knight & Heggerty and Wm. M. Madden, opposed.

VAN FLEET, District Judge. Motion is made by the plaintiff to remand this cause to the state court on the ground that the petition for removal does not show that the defendant was, at the commencement of the action, a nonresident of the state, and hence that it does



not show jurisdiction of the case in this court. The allegation of the petition in that respect is that the petitioner "was at the time said action was commenced, and is now, a resident of the state of New York"; and the objection is that this allegation is not the equivalent of an allegation that petitioner was a "nonresident" of the state, such as to bring it within the requirement of Removal Act March 3, 1875, c. 137, § 2, 18 Stat. 470 [U. S. Comp. St. 1901, p. 509]. This objection is supported by reference to the case of *Fife v. Whittell*, 102 Fed. 537, decided in this court by Judge Morrow, where, relying upon the authorities there cited, it is explicitly held, under a precisely similar averment, that it is not sufficient to bring the case within the statute; that nothing short of an allegation in the precise language of the statute or its equivalent is sufficient to that end.

The defendant meets this contention by a reference to the later case of *Zebert v. Hunt* (decided by Judge Baker in the Circuit Court for the District of Indiana) 108 Fed. 449, where it is quite as explicitly held that an allegation in the language of this petition is sufficient as an allegation of nonresidence, and where Judge Baker refuses to follow *Fife v. Whittell*. It may be said that the objection is an exceedingly technical one and the sufficiency of the petition upon the point a close question; but, in view of the very strict construction which the provisions of the removal act have from the first received at the hands of the Supreme Court, I am disposed to follow the ruling of *Fife v. Whittell*. Every inference is to be indulged against, and not in favor of, the jurisdiction of this court.

In the present case, however, I am satisfied, from the facts stated in the petition, that but for the particular defect relied upon the petition shows a case within the jurisdiction of the court. It is alleged that the defendant "was at the time that said action was commenced, and was for many years prior thereto, and is now, a citizen of the republic of France." This fact, coupled with that of nonresidence in this state, would unquestionably give the defendant the right of removal; and under such circumstances the case is brought clearly within the doctrine of *Powers v. Railway*, 169 U. S. 92, 101, 18 Sup. Ct. 264, 42 L. Ed. 673, and *Kinney v. Columbia Savings & Loan Association*, 191 U. S. 78, 24 Sup. Ct. 30, 48 L. Ed. 103, and cases there cited, which hold that such a defect in the petition may be cured by amendment in the Circuit Court—a right in which the defendant here asks to be indulged. In *Powers v. Railway* the rule in that regard is thus stated:

"If, upon the face of the petition and of the whole record of the state court, sufficient grounds for removal are shown, the petition may be amended in the Circuit Court of the United States, by leave of the court, by stating more fully and distinctly the facts which support those grounds."

And in *Kinney v. Columbia S. & L. Ass'n*, where the Circuit Court had allowed an amendment to the petition to more clearly disclose the facts upon which its jurisdiction was predicated, it is said by Mr. Justice Brewer, after discussing certain cases:

"These cases recognize the power of the Circuit Court to permit amendments of pleadings to show diverse citizenship and of removal proceedings where there is a technical defect and there are averments sufficient to show jurisdiction. The facts here disclosed clearly show a case in which an amendment

was rightfully made. The citizenship of the defendant, both at the time the suit was commenced and when the petition for removal was filed, was clearly and positively stated. There was a general averment that it was a case of diverse citizenship, and therefore one in which by the statute the party was entitled to a removal."

In this respect the facts differ from those disclosed in *Fife v. Whit-tell*, and take the case out of the rule, there declared, that the petition could not be amended in this court. I hold, therefore, that, while the petition is technically insufficient to show jurisdiction, the defendant is, under the facts stated, entitled to amend in the particular requested.

The order will therefore be that the motion to remand be granted, unless the defendant within 20 days file an amendment to his petition obviating the objection thereto.

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In re L. M. ALLEMAN HARDWARE CO.

(District Court, M. D. Pennsylvania. December 26, 1907.)

No. 920, in Bankruptcy.

**BANKRUPTCY—CORPORATIONS—CORPORATE ASSETS—PRECEDENT INDIVIDUAL OWNERSHIP—FRAUDULENT TRANSFER—LACHES—RIGHTS OF RESPECTIVE CREDITORS.**

A bankrupt in July, 1900, made a fraudulent transfer of his stock in trade; and in March, 1903, a corporation was formed to continue the business, the bankrupt having one share of the stock, the majority of which was distributed among others. The corporation contracted new debts and acquired new creditors, when it became a bankrupt in December, 1906, with assets insufficient to pay its creditors. *Held*, that the corporation's assets, notwithstanding the original fraud, were subject to the claims of its creditors, and hence the trustee of the individual bankrupt was not entitled to have the corporation's assets transferred to him for distribution among the creditors of the individual bankrupt's estate; nor were such creditors entitled to file their claims against the bankrupt corporation.

In Bankruptcy. On exceptions to report of J. E. Vandersloot, referee, sur petition of P. A. Miller, trustee of L. M. Alleman, to turn over funds.

William Hersh and E. A. Weaver, for exceptions.

W. C. Sheely, John D. Keith, and C. J. Delone, opposed.

ARCHBALD, District Judge. The petitioner, who is the trustee in bankruptcy of L. M. Alleman, asks that the funds realized from the sale of the assets of the L. M. Alleman Hardware Co., which is also bankrupt, be taken out of the hands of its trustees, and turned over to the petitioner to be administered and distributed as the estate of L. M. Alleman individually, whom he represents. This is based on the alleged identity of L. M. Alleman with the hardware company bearing his name, which concern, as it is charged, is nothing more than L. M. Alleman himself in corporate guise. If this were true, the transfer which is asked for might be a proper one to make, although it would still be a question whether the same result could not be reached by allowing the creditors of L. M. Alleman individually to make

proof of their claims against the company and so avoid circuitry. But the difficulty is that the facts are not as thus assumed. There is evidence, no doubt, from which it could be found that the arrangement by which in July, 1900, S. L. Johns and H. N. Gitt took a bill of sale from Alleman for his store stock was collusive and fraudulent as to existing creditors, on the strength of which an execution or attachment, levied on the goods, would probably have held. No move of that kind, however, was made, and the situation at this time is not the same, so as to give a right now to what might have been done then. Over seven years have elapsed, and other rights have come in, which are entitled to consideration here. After an intermediate partnership, bearing the same name, the L. M. Alleman Hardware Company was incorporated in March, 1903, with a capital of \$50,000, Johns subscribing for 49 shares, Gitt for 48 shares, and Alleman, C. J. Spaulding, and George D. Gitt for 1 share each, and to it the business and stock in trade were duly transferred. In the transaction of its business, following upon that, up to the time it became bankrupt in December, 1906, new goods were purchased by the company and new and independent indebtedness incurred therefor, a large part of which remains unpaid. The parties to whom it is due, having given credit solely to the company, can look to no one else, and must be paid, so far as they are paid at all, out of its property, which the transfer to the trustee of L. M. Alleman, which is sought, would entirely cut off. It may be that a considerable portion of the goods, which belonged to Mr. Alleman individually, at the time of the bill of sale to Johns and Gitt, was still in stock and has helped to produce the money which the trustees of the company have in hand. But whatever right of seizure or reclamation the creditors of L. M. Alleman might have had, if asserted at the time, they, of course, had no lien upon the goods, and after the organization of the company, and the intervention of others, the goods became the property of the company and liable for its debts, whatever might be said of them before, and that is necessarily the controlling consideration here. Nor is this affected by the fact that the capital stock of the company is still practically in the hands of the parties to the original fraud. If they alone were concerned, it may be that the creditors of L. M. Alleman, who suffered by the covinous arrangement, would still have the right to have the property treated as his. But that is not the case. The rights of the creditors of the company are to be kept constantly in mind, having regard to which the identity of L. M. Alleman with the L. M. Alleman Company, by reason of the continuing fraud, cannot be maintained.

It is said, however, that laches are not to be imputed to the creditors of L. M. Alleman in this matter, as it is only since the examination of the parties in the bankruptcy proceedings that the fraudulent character of the transaction has been disclosed. But while the evidence to establish the fraud, which is charged, may not have been within reach in the same fullness as now, the outward indications of it were certainly there, and were as well known at the time of the occurrence as at any time since; and even if the details could not have been compelled from the immediate parties, as they have been here, there is

no reason why they could not have been effectively obtained from the other witnesses called, who seem to have had knowledge at least of the essential facts. It is to be noted, moreover, that the present petition is refused, not so much upon the ground of laches as out of regard for the rights of creditors of the hardware company who are clearly entitled to the first concern.

But it is further said that the creditors of L. M. Alleman should at least be permitted to prove their claims as debts against the hardware company, with which relief it is asserted that they will be content. This was the alternative prayer of the petition, but was abandoned before the referee, as inconsistent with the prayer to have the funds transferred from the one estate to the other. The trouble with that is that in no real sense are these claims debts of the company. The purpose of the proceedings in hand is to avoid the disposition made of his property by L. M. Alleman on account of the fraud involved, and, if sustained, it would only be as to the specific property with regard to which this could be shown. It fails, if for no other reason, because the right to set up the fraud cannot be successfully asserted so long as creditors of the hardware company remain unpaid. If there were an overplus above what was so required, it might be different. But of that there is no hope, even if what is due to Mr. Gitt, as one of the participants in the fraud, were thrown out. The indebtedness of the hardware company is \$100,000, of which \$38,000 is due for merchandise and \$40,000 upon notes in bank, to pay off which the trustees have not half the necessary amount; and from these claims it cannot be diverted in favor of the creditors of L. M. Alleman individually, who have suffered by the fraud.

It will be seen, from what I have thus said, that I do not agree in all particulars with the findings of the referee; but I do with the general result, in accordance with which the petition must be dismissed.

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IN re KYTE.

(District Court, M. D. Pennsylvania. December 19, 1907.)

No. 1,035.

1. **BANKRUPTCY—ACCOUNTS OF RECEIVER—APPRAISAL OF PROPERTY.**

The fees paid by a receiver in bankruptcy for appraisal of the property, if otherwise proper, will not be disallowed in his accounts merely because the trustee succeeding him deemed the appraisal too low and had a new one made; such proceeding being unwarranted.

2. **SAME—INSURANCE BY RECEIVER.**

Insurance on personal property, taken out by a receiver, if paid for by him, is a proper subject of credit in his accounts, but not, if left to be taken care of by the trustee, as a matter inuring to the benefit of the estate.

In Bankruptcy. On exceptions to account of L. F. Camp, receiver.

W. H. Godwin, for exceptions.

W. N. Reynolds, Jr., opposed.

ARCHBALD, District Judge. The exceptions to the appraiser's fees cannot be sustained. They seem large, but there was a good deal of stock to look over, and there is nothing to show that the time for which claim is made was not fully occupied in doing so and the fees in that way earned. It is said that the trustee was not satisfied with the appraisement, and has had a new one made, by which a greater aggregate value has been attained. If additional goods were discovered by the trustee, not included in the receiver's appraisement, it was no doubt proper to inventory and value them. But there was no warrant for an entirely new appraisement of all the property, just because the trustee thought the figures of the first appraisers were not so high as they ought to be. And, if a second appraisement has been made at the instance of the trustee upon any such basis, he may have to bear the expense. The main purpose of an appraisement is simply to get a general idea of the extent of the estate, so as to charge the party in whose custody it is with its value, and at the same time enable all concerned the better to keep track of it. Incidentally it may serve as a guide also to prospective buyers, but it is not to be independently undertaken with that in view, and except for this purpose it is difficult to see what object was gained in going over the same goods a second time.

The insurance taken out by the receiver, which was for a full year, has continued for the benefit of the trustee, and, if the premium was paid by the receiver, it would be a proper subject of credit in his account, any rebate by reason of an earlier termination of it either by a surrender or transfer of the policy inuring in the end to the estate. But the premium, although brought into his account by the receiver, has not been in fact paid by him, and, as the trustee is the one who will really have to take care of it, it should be eliminated here.

The receiver was in charge less than two months, and asks \$200 compensation. But, considering the duties which he was called upon to perform and the responsibility which he assumed, this seems a little too large. My judgment is that \$150 is enough, and this will be the amount allowed.

The attorney for the receiver also asks for \$200, and, as attorney fees go, it may have been earned. But, according to the standard which prevails in bankruptcy matters, \$150 is also all that I think should have been asked. The account of the receiver will therefore be modified by striking out the item of \$173 for insurance on stock, and by reducing the fees of the receiver and counsel to \$150 each. And, as so modified, the account is confirmed.

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#### MUIR v. GREGORY.

(Circuit Court, S. D. New York. November 21, 1907.)

No. 9,079.

#### GIFT—VALIDITY.

A delivery of bonds by the owner to defendant's husband, since deceased, held, under the evidence, to have been as a lawful gift in presenti and not in trust, so that a gift of such bonds by the donee to defendant vested her with an absolute ownership.

In Equity.

Lanier McKee, for complainant.

Charles C. Marshall, for defendant.

PLATT, District Judge. This is an action for an account, and to impress a trust upon certain bonds or their proceeds. It is conceded that in 1898 the bonds, amounting to \$50,000, belonged to Mrs. McPherson, and that they were then given by her to the defendant's husband, now dead. The dispute turns upon whether they were given to him in trust or outright.

I am convinced that the bonds were given to Gregory absolutely, unequivocally, and lawfully. When given, they were in a deposit box under Gregory's control. He accepted the gift and gave them to his wife, now his widow and defendant. The tragic tale which I have read in order to reach this conclusion is more interesting than fiction, and it would be an agreeable task to rehearse it, if the time at my disposal permitted. In the circumstances, I am content to say that my conclusion is the result of careful deliberation.

Let the bill be dismissed, with costs.

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In re BRUCE.

(District Court, N. D. New York. December 31, 1907.)

1. EXECUTION—PAYMENT—APPLICATION OF FUNDS.

Action having been brought and judgment recovered against an alleged firm for a debt contracted after A.'s retirement as a partner, payment was demanded of A., who, in order to prevent a levy on his property, executed a check to the sheriff for an amount sufficient to pay the balance of the judgment; the sheriff agreeing to hold the check until he could procure an assignment of the judgment from the judgment creditor. The next day an execution was levied on the property of the surviving partner, which the sheriff advertised for sale, but which was not sold until after the surviving partner had been adjudged a bankrupt more than four months after the entry of the judgment and delivery of the execution to the sheriff, prior to which the judgment had been assigned, and the plaintiffs in execution having demanded their money from the sheriff, he had remitted the same to them out of the proceeds of A.'s check. *Held*, that the sheriff received such check in trust as security, so that he had no right to apply it in satisfaction of the execution until he had made the sale of the continuing partner's property, and that the sheriff's improper application of the check did not constitute payment of the execution nor satisfaction of the judgment.

2. SUBROGATION—SCOPE OF REMEDY.

The remedy of subrogation is not limited to sureties or quasi sureties, but extends to cases where a person not a volunteer pays a debt which in equity and good conscience he ought not to pay, for the purpose of protecting property in which he is interested.

3. EXECUTION—VALIDITY OF LIEN—DORMANT EXECUTION.

Where a levy was legally made under an execution, and the sale was adjourned from time to time and stayed by order of court, the execution did not become dormant.

4. BANKRUPTCY—LIENS—EXECUTION—SUBROGATION.

Judgment having been recovered against A. after his retirement from a firm, for a firm debt for which he was not liable, because of the con-

tinuing partner's misrepresentations that the debt was paid, on execution being presented and payment demanded from A., he informed the sheriff that the continuing partner was liable on the debt, and that his property should be first levied on. In order to prevent a levy on A.'s property, he gave a check for the balance due on the judgment, which check was subsequently made good by money advanced by A.'s wife, to whom the judgment was assigned after levy on the continuing partner's assets. More than four months after the taking of the judgment and the delivery of the execution to the sheriff, the continuing partner became a bankrupt while the levy was still in force. *Held*, that the assignee of the judgment and execution was entitled to subrogation to the rights of the judgment creditor, and was entitled to have the proceeds of the property levied on in the hands of the bankrupt's trustee applied in settlement of the amount such assignee advanced as against the trustee and general creditors of the bankrupt, who had no greater rights than those of the bankrupt when the petition was filed and the adjudication made.

#### Action to Declare Property of Bankrupt Subject to Lien of Judgment.

The question involved is the validity in the hands of Jessie M. Aldrich, assignee thereof, against the estate of the above-named bankrupt of a judgment, and execution and levy thereunder, for \$241.74, less a payment of \$73.87, in favor of the Syracuse Hardware & Iron Company against Edwin S. Aldrich and Timothy E. Bruce, said bankrupt, entered and docketed in Onondaga county clerk's office December 27, 1907, transcript filed and judgment docketed in Franklin county clerk's office December 28, 1906, execution issued January 4, 1907, and levy made March 2, 1907, a sale under such levy having been stayed by this court. The matter was sent to Wm. P. Badger as special master to ascertain and report the facts and testimony.

McClary & Allen, for trustee.

Leslie M. Saunders, for Jessie M. Aldrich.

RAY, District Judge. Prior to October 18, 1905, Edwin S. Aldrich, husband of Jessie M. Aldrich, and said Timothy E. Bruce were in partnership, doing business under the firm name of "the Aldrich-Bruce Company," at Tupper Lake, N. Y. On that day, October 18, 1905, they agreed to dissolve the partnership, and Aldrich sold his interest to Henry W. Bruce, the father of Timothy E. Bruce, the bankrupt, who immediately transferred such interest to said Timothy E. Bruce. In fact, Timothy E. Bruce thereupon became the owner of the business, and liable for all debts thereafter incurred in the business. No notice of the dissolution was published until in December, 1906, and after the service of the summons and complaint in the action in the Supreme Court of the state, wherein and upon which the judgment hereafter referred to was entered. On and after May 7, 1906, and while said Timothy E. Bruce was running the business, he purchased of the Syracuse Hardware & Iron Company certain goods, for the purchase price of which the judgment was obtained, through an agent of that company then at Tupper Lake, informing such agent at the time that the firm of Aldrich-Bruce Company no longer existed. The goods came addressed to Aldrich-Bruce Company, and were accepted and retained by Bruce in his business. Aldrich knew nothing whatever of the purchase of these goods, and had nothing to do with the business at the time. As Bruce did not pay for the goods said Syracuse Hardware & Iron Company commenced an action in the Supreme Court of the

state of New York, county of Onondaga, against said Aldrich and Bruce, and the summons and complaint were served on both defendants. Aldrich thereupon went to Tupper Lake and saw Bruce who told Aldrich he had sent a check to pay the claim. Aldrich relied on this statement, and did not appear or answer in the suit, and thereafter judgment was entered against both defendants. No such check had been sent. Thereafter, and December 31, 1906, an execution on such judgment to the sheriff of Franklin county was duly issued, and January 4, 1907, same was placed in the hands of George S. Henry, as sheriff of Franklin county, where Bruce resided, and thereafter, and March 2, 1907, his deputy, one Kempton, presented same to Aldrich at Regis Falls, N. Y., where he lived and was doing business, and demanded payment. Aldrich informed the deputy that the judgment was for Bruce to pay, and that he did not want his stock levied upon, but the deputy stated that Bruce was covered by chattel mortgages, and that if not paid he would be compelled to levy. Aldrich then stated that rather than have his stock of goods levied upon he would place in the hands of the deputy his check for an amount sufficient to pay the balance of the judgment, Bruce having paid a part, and fees, and did place in his hands his check for \$205, and requested him to hold it until he could procure an assignment of the judgment. To this arrangement the sheriff assented and promised to do his best in holding the check. That same evening Aldrich went to Tupper Lake with the deputy sheriff, at Aldrich's suggestion and request, and the deputy, by virtue of such execution on the next day, levied upon the stock of goods and fixtures belonging to said Bruce. He did not remove the goods but left them in the care of Bruce who receipted for the same in writing. This receipt stated, amongst other things, that \$53.87 had been paid on the execution, leaving due \$211, including expenses, and "such goods" those levied upon, "being left with me as caretaker, hereby waiving any delay in advertising the said goods for sale by the said sheriff." The sheriff also levied on the accounts, etc., of Bruce, and this receipt stated that the goods levied on should be sold by Bruce for cash only, the money to be accounted for and paid over to the sheriff as well as all money received by him on the accounts. This was duly signed by Bruce and acknowledged. The sheriff immediately advertised the goods of Bruce for sale on the execution, and Aldrich applied to the plaintiffs in the execution for an assignment of the judgment in blank. The day appointed for a sale was April 26, 1907, but same was adjourned from time to time, and, finally, to June 14, 1907. The sheriff made the last adjournments May 9 and May 25, 1907, respectively. In the meantime, and on the 8th day of May, 1907, said Timothy E. Bruce filed his voluntary petition in bankruptcy, and was duly adjudicated a bankrupt on the 9th day of May, 1907, more than four months after the docketing of such judgment and the delivery of the execution to the sheriff. In the meantime, and on the 13th day of March, 1907, the Syracuse Hardware & Iron Company, plaintiff in the execution, executed and soon thereafter, March 29th, delivered to said Edwin S. Aldrich an assignment in blank of said judgment and all moneys due thereon, and the name of Jessie M. Aldrich was filled in



such assignment as the assignee of such judgment. Jessie M. Aldrich advanced to her husband, Edwin S. Aldrich, at the time he gave his check to the sheriff the sum of \$150 to make his check good. In the meantime the plaintiff in the execution demanded their money, and the sheriff cashed the check of Aldrich, and remitted to their attorneys, who turned the money over to such plaintiff, but not until after the assignment was executed.

It is quite evident that the assignment was withheld until the money was sent and received by the attorneys. The sheriff also returned the execution to Franklin county clerk's office, to the sheriff of which county it was issued, before the assignment was received. On receiving the assignment completed as aforesaid, the sheriff went to the clerk's office and erased a part of the return made, which return read as follows: "State of New York, Franklin County. ss.: The within execution paid and satisfied in full. Dated Malone, N. Y. 8/12/07. Geo. S. Henry, Sheriff"—and inserted "assigned to Jessie M. Aldrich," so that it then read "the within execution assigned to Jessie M. Aldrich," the date remaining unchanged. The questions are, was this execution in fact satisfied by the check given to the sheriff by Aldrich; was the levy on the property of Bruce abandoned by the sheriff as well as the proposed and advertised sale; and was Bruce released as caretaker for the sheriff?

The equities are all with Aldrich as against the bankrupt, the bankrupt estate and its creditors, and the trustee in bankruptcy. It is evident that Edwin S. Aldrich did not intend that his check placed in the hands of the sheriff should be applied in payment of the balance of such judgment unless the sheriff failed to make the balance of the execution from the property of Bruce. It is evident that the sheriff so understood it and received the check on that understanding. I do not think he had any right to apply it in satisfaction of the execution until he had made sale of Bruce's property levied on. If he failed to make the amount thereof, then he had the right to apply the check, or if he decided it was fruitless to pursue the property of Bruce, then he should have gone to Aldrich and levied on his property, or advised him of his purpose to apply the check to the payment of the execution. He held the check in trust and as security. He had no right to apply it except to fulfill the purpose for which it was delivered to and accepted by him and in accordance with the agreement. Aldrich never consented that he should. Having taken it for one purpose, the sheriff had no right to apply it to another. But the assignment did not come, and he returned the execution as satisfied, when it was not in fact satisfied by any payment made by either defendant or by a sale of any of the property of either of them. This he did March 12, 1907. Did he abandon the levy on the property of Bruce? Having no execution in his possession and having returned it as satisfied, if it was in fact satisfied by either Aldrich or Bruce, then the levy fell as did the proposed sale. But it was not in fact satisfied as it was not paid. It was the duty of the sheriff to retain it and enforce it as against Bruce and the property Bruce held as caretaker. That the sheriff did not intend to release the property of Bruce is demonstrated by the fact that he

continued to adjourn the sale thereof, thereby asserting his jurisdiction over it. He rejected bids when offered of \$150 and \$200. No other rights have intervened. The property of Bruce levied upon and held by him as caretaker for the sheriff at the time he filed his petition in bankruptcy has been converted into money, and is with this court taking the place of the property under an agreement entered into by all interested. Again, Bruce bought the property, had the proceeds, and they were mingled with his estate. Aldrich had no part of it, and assumed no obligation. He had a defense to the action, but was induced not to make it by the fraud of Bruce, who induced him to think he had sent a check which paid the claim. Aldrich turned out his check, made good by \$150 of the money of his wife, as security to the sheriff in case the property of Bruce should fail to pay the full amount. The sheriff levied on that property, turned it over to Bruce, who agreed to hold it for the sheriff in satisfaction of the execution so far as it would go. He so held it when he filed his petition in bankruptcy. He held it in trust for the sheriff and owners of the judgment when the adjudication was made.

It seems clear to me that in equity this judgment and execution in the hands of Mrs. Aldrich is a lien on the proceeds of this property; one this court, as a court of equity, has the power to protect and enforce as against the trustee and general creditors who have no greater rights than Bruce had when the petition was filed and the adjudication made. The sheriff by mistaken action or errors of law or of fact could not change and defeat the rights and equities of Edwin S. Aldrich or of Jessie M. Aldrich in this property of Bruce so long as he retained the levy, as he did, and the rights of third parties did not intervene. Had some other creditor of Bruce obtained judgment, issued execution, and placed same with the sheriff, or had some person loaned money, taking a mortgage on the property, with this execution in the clerk's office indorsed "Satisfied," the case would be different. It is of course true that had Edwin S. Aldrich paid the judgment it might have been extinguished, but he did not pay it or intend so to do. He turned out his check as security to prevent a levy on his own property, an injury to his own business and credit with the agreement that if not collected of Bruce by levy on and a sale of his property that the check should be applied on the judgment. In equity Aldrich was never liable on this judgment. The assignment was applied for and finally came, and it is evident from all the testimony in the case that when the money was sent forward by the sheriff it was with the understanding that, if the assignment came, it was to apply in payment so far as such money had come from Bruce, and on the assignment, as consideration therefor, so far as it came from Edwin S. Aldrich and his wife. The sheriff rectified his error in returning the execution "satisfied" so soon as the assignment came to his knowledge. This he had the right to do as between Aldrich, Mrs. Aldrich, and Bruce. In equity, in any event, Mrs. Aldrich, who now holds this judgment by a valid assignment to her made for a valid consideration paid or furnished by her, is to be regarded as the owner thereof to the extent she put money into the transaction, with interest, from that time, and the judgment is to be regard-

ed and treated as unpaid and unsatisfied. There is no other way to protect her adequately or at all.

In *Arnold v. Green*, 116 N. Y. 566, 571, 23 N. E. 1, it was held that where one who pays a mortgage upon land in which he has an interest, so that he is not a mere volunteer, and for which mortgage debt he is not personally liable, stands in such a relation thereto that his interests, whether legal or equitable, cannot otherwise be adequately protected, the transaction will be treated in equity as an assignment, and he is entitled to enforce it (the mortgage), for his own reimbursement and the protection of his interest. This rule applies here to Edwin S. Aldrich, and as he had the judgment assigned to his wife who furnished \$150 of the money, she has all his rights and equities. Vann, J., who delivered the opinion of the court said:

"Under some circumstances the payment of a mortgage does not satisfy it or destroy its lien, because equity regards the person making the payment as the owner thereof for certain definite purposes, and keeps it alive, and preserves its lien for his benefit and security. According to the well-established principles upon which the doctrine of equitable assignment by subrogation rests, if the person paying stands in such a relation to the premises that his interest, whether legal or equitable, cannot otherwise be adequately protected, the transaction will be treated in equity as an assignment. *Sheldon on Subrogation*, §§ 1, 3, 14, 16; 3 *Pomeroy's Equity Jur.* § 1211; *Jones on Mortgages*, § 874. The remedy of subrogation is no longer limited to sureties and quasi sureties, but includes so wide a range of subjects that it has been called the 'mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it.' *Harris on Subrogation*, § 1; *Barnes v. Mott*, 64 N. Y. 397, 401, 21 Am. Rep. 625; *Stevens v. Goodenough*, 26 Vt. 676; *Harnsberger v. Yancey*, 33 Grat. (Va.) 527; *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647. While a mere volunteer, with no obligation to pay or interest to protect, is not entitled to its aid, it is frequently applied in favor of a vendee of incumbered real estate, who, although not personally liable, has paid the debt of another which is a charge upon the land, and which, if not paid, might cause him to lose his interest therein. Under such circumstances the debt, although paid and satisfied in form, is regarded in equity as neither paid nor satisfied in fact, but by operation of law the former holder ceases to be the creditor, while the person paying takes his place as owner of the debt and security unimpaired. Where, within the limitations suggested, benefit may result to the person paying without injury to the person who should pay, equity casts the burden upon the latter, who ought in fairness to bear it, provided it will not work injustice or disturb the rights of other creditors of a common debtor. *Id.*; *Johnson v. Zink*, 51 N. Y. 333; *Cole v. Malcolm*, 66 N. Y. 363; *Twombly v. Cassidy*, 82 N. Y. 155; *Gans v. Thleme*, 93 N. Y. 225, 232; *Averill v. Taylor*, 8 N. Y. 44, 51."

I see no reason why this rule is not applicable here. Aldrich and his wife paid the debt of Bruce, if it was paid, and he had such an interest that in equity he is entitled to be regarded as the owner of the judgment which, for a consideration, was transferred to the wife. She may enforce it, and the lien gained by the execution and levy and receipt of the bankrupt for the property as caretaker for the sheriff, which levy was not released. The execution did not become dormant as the sale was adjourned from time to time and only stayed by order of this court pending an ascertainment of the facts. As Judge Vann said, the rights of third persons have not intervened.

As Judge Vann said:

"The remedy of subrogation is no longer limited to sureties or quasi sureties, but includes so wide a range of subjects that it has been called the mode which

equity adopts to compel the ultimate payment of a debt by one who in justice, equity, and good conscience ought to pay it."

Who, but Bruce, in justice, equity, and good conscience ought to pay this debt? Who incurred the debt? Who had the property and its proceeds? Whose property was levied upon on the execution, advertised for sale, and in legal effect delivered to the sheriff for its payment? Who held this property in question for the sheriff to apply in satisfaction of this judgment, and in writing promised it should be so applied? Was it not Bruce and his property? Should the errors or mistakes of the sheriff defeat these equities or change them? Would a court do its duty, acting as a court of equity, which a court of bankruptcy is (section 2, Bankr. Act July 1, 1898, c. 541, 30 Stat. 545 [U. S. Comp. St. 1901, p. 3420]), not to recognize and enforce these equities? I think not. The rule as laid down in *Sheldon on Subrogation*, § 11, is that:

"The doctrine of subrogation is that one who has been compelled to pay a debt which ought to have been paid by another is entitled to exercise all the remedies which the creditor possessed against that other, and to indemnify from the fund out of which should have been made the payment which he has made to the creditor. It is a mode which equity adopts to compel the ultimate discharge of a debt by him who in equity and good conscience ought to pay it, and to relieve him whom only a creditor would ask to pay, although as between debtor and creditor the debt may be extinguished, yet, as between the person who has paid the debt and the other parties, the debt is kept alive so far as may be necessary to preserve the securities."

In *Cole v. Malcolm*, 66 N. Y. 363-366, it was held:

"The doctrine of subrogation applies where a party is compelled to pay the debt of a third person to protect his own rights, or to save his own property."

This is such a case. Aldrich put up his own money with that of his wife to pay the debt of Bruce in a certain event, because he was compelled so to do by the wrong of Bruce, not because he owed or had incurred the debt—not because he was morally obligated to pay. He was compelled to do this to "protect his own rights," and "to save his own property," and to protect his own credit.

Judge Earl, in giving the opinion of the court, said, page 366:

"The equitable doctrine of subrogation has many illustrations in reported cases. *Sandford v. McLean*, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; *Atlantic Ins. Co. v. Storrow*, 5 Paige (N. Y.) 285; *Slade v. Van Vechten*, 11 Paige (N. Y.) 21; *Graham v. Dickinson*, 3 Barb. Ch. (N. Y.) 169; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Patterson v. Birdsall*, 6 Hun, 632, affirmed in Court of Appeals; *Lidderdale's Ex'r's v. Robinson's Adm'r*, 2 Brockenbrough (U. S.) 159, Fed. Cas. No. 8337; *Cottrell's Appeal*, 23 Pa. 294; *Bouvier's Dict.*, 'Subrogation.' It is generally and most frequently applied in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is only secondary liable for the debt; but it is also applicable to cases where a party is compelled to pay the debt of a third person to protect his own rights, or to save his own property. In *Cottrell's Appeal*, Woodward, J., said: 'Subrogation is founded on principles of equity and benevolence, and may be decreed where no contract or privity of any kind exists between parties. Whenever one not a mere volunteer discharges the debt of another, he is entitled to all the remedies which the creditors possessed against the debtor.' In *Lidderdale's Ex'r's v. Robinson's Adm'r*, Chief Justice Marshall said: 'When a person has paid money for which others were responsible, the equitable claim which such payment gives him on those who were so responsible shall be clothed with the legal garb with which the contract he has discharged was

invested, and he shall be substituted, to every equitable intent and purpose, in the place of the creditor whose claim he has discharged.”

In *Pease v. Egan*, 131 N. Y., at page 273, 30 N. E., at page 105, Mr. Justice Peckham, now of the Supreme Court of the United States, said:

“In the cases of *Gans v. Thieme*, 93 N. Y. 225, and *Arnold v. Green*, 116 N. Y. 566, 23 N. E. 1, while not particularly in point here, are yet evidences of the rule that no contract need subsist upon which to base the right of subrogation, and that it is a remedy which equity seizes upon in order to accomplish what is just and fair as between the parties, where the party seeking the aid of the court and the benefit of the rule has been no mere volunteer, and where his action is based upon general equitable rules which it is the peculiar province of a court of equity to enforce.”

Mrs. Aldrich is here not asking to be subrogated strictly, but to have her assignment of this judgment, made for a valid consideration at a time when, to the knowledge of the sheriff, the property of the one who incurred the debt, whose debt it was, had been set apart under a levy on the execution, and placed in his hands to sell for its payment, recognized; to have the judgment and the execution and levy thereunder recognized and enforced as valid and subsisting. The assignment actually subrogated her to all the rights and equities of her husband. The plaintiff in the judgment and execution did not exact payment or understand it was receiving payment in satisfaction and discharge of the judgment. It did understand the money was paid, except as to a small part, for an assignment thereof. The check of \$205 was not placed in the hands of the sheriff to pay the judgment except in a certain contingency, which never occurred. That the sheriff prematurely applied it and mistakenly returned the execution as “satisfied” or paid when it was not, a mistake which he immediately corrected, did not in fact either pay or satisfy the judgment or execution, or destroy the equities.

The assignee of the judgment, Jessie M. Aldrich, is entitled to an order and decree that the said judgment execution and levy are valid and constitute a valid lien on the fund derived from the sale of the property in question; and constituted such a lien at the time of the adjudication in bankruptcy, and were and are valid as against the trustee in bankruptcy, having been obtained in good faith more than four months prior to such adjudication to the amount of \$167.87, and interest thereon from March 13, 1907; that the proceeds of the sale of such property now in the hands of the trustee, Clarence L. King, subject to the order of this court, so far as they will pay said sum of \$167.87 and interest, be paid over by said trustee to said Jessie M. Aldrich in satisfaction of such lien.

BUTTE & BOSTON CONSOLIDATED MINING CO. v. MONTANA ORE  
PURCHASING CO. et al.

(Circuit Court, D. Montana. December 9, 1907.)

No. 70.

## FINES—CRIMINAL CONTEMPT—POWER OF COURT TO REMIT.

A person who is adjudged guilty of a contempt by a court of the United States in willfully violating an injunction order of the court entered in a suit to which he was not a party stands as one who has been found guilty of an offense against the United States, and a fine imposed as a punishment therefor goes to the United States; and, where such person has paid the fine and has taken no steps for a review of the punishment, the court is without jurisdiction, at least after the term has passed, to remit such fine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Fines, §§ 19, 23.]

Carl Rasch, U. S. Atty.

C. R. Leonard and M. S. Gunn, for petitioners A. F. Heinze, Alfred Frank, and J. H. Trerise.

HUNT, District Judge. Upon petition for the return of fines paid upon judgments holding petitioners guilty of contempt.

On March 30, 1904, in the Circuit Court of the United States, sitting at Butte, Hon. James H. Beatty presiding, petitioners, F. Augustus Heinze, Alfred Frank, and Josiah H. Trerise, were adjudged guilty of a contempt of said court in having willfully violated an injunction issued by the court on June 1, 1898, enjoining the Montana Ore Purchasing Company, Chile Gold Mining Company, John MacGinniss, Edward L. Whitmore, and Carlos Warfield, defendants in an action wherein the Butte & Boston Consolidated Mining Company was complainant, from mining or extracting any ore from within the limits of the Michael Devitt lode claim. The order adjudging the petitioner F. Augustus Heinze guilty is as follows:

"This matter came on for hearing upon the affidavit of H. V. Winchell, filed in this cause, charging the Montana Ore Purchasing Company, Johnstown Mining Company, F. Augustus Heinze, Josiah H. Trerise, Alfred Frank and Carlos Warfield with contempt in having violated and refused to obey a certain order of the above named court made and entered in the above entitled action on the first day of June, 1898, enjoining and restraining the Montana Ore Purchasing Company, Chile Gold Mining Company, John MacGinniss, Edward L. Whitmore and Carlos Warfield from mining within the limits of what is known as the Michael Devitt lode claim, described in the complainant's bill of complaint, and fully set forth in said injunction order.

"On the 22d day of March, 1904, all of the parties charged with contempt as aforesaid appeared in response to an order to show cause why they, and each of them, should not be committed for contempt in violating the said injunction and by mining on what is known as the 'enargite vein' within the Michael Devitt lode claim, and each of said parties entered a plea of not guilty to the charges contained in said affidavit. Thereupon the court proceeded to the hearing of testimony touching the said charges of contempt, and, after hearing the testimony and argument of counsel, on the 30th day of March, 1904, made and entered its judgment and decision, to the effect that the defendant Carlos Warfield was not guilty of the contempt charged in said affidavit, and that the said Montana Ore Purchasing Company, Johnstown Mining Company, F. Augustus Heinze, Alfred Frank, and Josiah H. Trerise were each and all guilty of contempt of this court in violating the

said injunction as charged in the affidavit of the said H. V. Winchell, and that the said contempts were committed with full knowledge of the facts that the said injunction was being violated, and that the said violation was willful and without excuse.

"It is therefore ordered and adjudged that the said defendant F. Augustus Heinze is guilty of the contempt of this court, as aforesaid, in violating the said order as hereinbefore set forth, and that, as a punishment therefor, he is hereby fined in the sum of twenty thousand dollars (\$20,000), and that he shall deposit, or cause to be deposited, the said sum of twenty thousand dollars (\$20,000) so assessed against him in the First National Bank of Butte, Mont., on or before 11 o'clock a. m. of Thursday, the 31st day of March, 1904, to the credit of George W. Sproule, clerk of this court, to be hereafter disposed of only by the order of this court or the judge thereof; and that, if he shall fail to comply with this order in so depositing the assessed fine, he shall be taken in custody by the United States marshal for the district of Montana, and confined in the county jail at Helena, in the county of Lewis and Clark, state of Montana, until he has made full compliance with this order, or until the further order of this court."

Similar orders were made against the other petitioners Trerise and Frank, but the fine imposed against each was \$1,000. The fines were paid, and it appears that during 1905 the suit in which the injunction order was made, and all matters connected therewith, were amicably settled, and that complainant makes no claim to the sum of \$22,000 deposited in the First National Bank of Butte to the credit of the clerk of this court by petitioners herein. On the 28th day of March, 1906, petitioners filed their petition, praying for an order returning the sums paid over by them in compliance with the order of the court, which adjudged them guilty of contempt. The principal grounds upon which petitioners make their application are substantially these: That at the time of the institution of the suit in which the injunction was issued, for a violation of which said aforementioned fines were imposed, and since then up to and including the month of March, 1904, the parties to said action, their assigns, agents, officers, and representatives had been engaged in extensive litigation; that at about the time of the hearing of said contempt proceedings efforts were being made to settle such controversies; that in arriving at a decision in said contempt proceedings the judge took into consideration such efforts for an amicable adjustment of the existing differences, and, in rendering the decision, stated that it was not his desire to inflict severe punishment on any one, but, if possible, to preserve the property. That, subsequent to the entering of said orders in said contempt proceedings, actions were brought in this court and the state courts to recover the value of the ores alleged to have been extracted from the Michael Devitt claim, in violation of said injunction, and that recently said actions, as well as the suit in which said injunction was issued, had been amicably adjusted and settled and dismissed. That petitioners believe that it was the intent and purpose of the judge of this court in requiring the deposit of the amount of the fine to the credit of the clerk of the court, subject to its further order, to relieve the petitioners of a forfeiture thereof, in the event the parties to the litigation should succeed in amicably adjusting their differences, and that, in requiring the deposit of such considerable sums of money, the judge believed that the loss of the interest thereon pending the final adjustment of the liti-

gation "would be just and proper punishment to be meted out to your petitioners, and, further, had in contemplation that any further attempt to violate the said injunction would result in the entry of an order forfeiting the full sums deposited to the government of the United States."

Petitioners filed with their application an affidavit by F. H. Drake, deputy clerk of the Circuit Court of the United States, in and for the District of Montana, in which affiant says:

"That he was present in said court in the city of Butte, Mont., on the 30th day of March, 1904, when the court, Hon. James H. Beatty presiding, rendered an order adjudging F. Augustus Heinze, Josiah H. Trerise, and Alfred Frank guilty of contempt of court for violating an injunction order entered in cause No. 70 in said court, entitled 'Butte & Boston Consolidated Mining Company v. Montana Ore Purchasing Company, et al.' That the said judge, in announcing his finding in open court, stated, amongst other things, that the amount of the fines, to wit, the sum of \$22,000, should be paid to the clerk of the court, to be thereafter disposed of only by the order of the court or the judge thereof. That, in the preparation by affiant of the journal entry concerning said order, he consulted the Honorable James H. Beatty, judge, with respect to the form thereof, and, in view of the remarks made by the court in rendering said order, inquired of the said judge as to whether or not the word 'fine' should be included in the order. That said judge replied that he did not see how the use of the word 'fine' could be avoided, but that it was not his intention that the money should be paid into the treasury of the United States, and that the words in the order, to wit, 'to be hereafter disposed of only by the order of this court or the judge thereof,' would retain the money in the hands of the court subject to its order. That the inference gained by affiant from the remarks made by the judge in open court and by the conversation had with him as aforesaid was and is that the court and said judge intended that the money should remain in the hands of the court to abide the later decision of the court or judge as to the final disposition thereof, and that subsequent proceedings in the suit would determine whether or not the money should be returned to the parties against whom the fines were imposed."

In June, 1907, the United States, by the United States district attorney, for the district of Montana, obtained leave to file an answer to the petition of the petitioners, and denied that it was the intent of the judge who fined the petitioners to relieve them of a forfeiture of the sums in which they were fined in the event of amicable adjustment of their legal controversies, and alleged that the contempt was with full knowledge of the facts that the injunction was being violated, and that the fines were imposed as a punishment, and that, upon payment of the amounts of the fines in satisfaction of the judgments pronounced by the court, the United States became then and there entitled to the amounts paid by the petitioners. An order was therefore asked, requiring the clerk to turn over to the United States the full amount of the fines in the same manner as other fines due and payable to the United States are disposed of.

It is to be borne in mind that these petitioners were not parties to the suit wherein the injunction order was issued by Judge Beatty. They can only be regarded as strangers, not primarily interested in securing to the defendants Montana Ore Purchasing Company, Chile Gold Mining Company, John MacGinniss, E. L. Whitmore, and Carlos Warfield any rights to which they were entitled as against the Butte & Boston Consolidated Mining Company, complainant. It was while they were in such an attitude that the court, after hearing was had,



made and entered its several orders that each was guilty of contempt, as charged, in violating the injunction, and that the contempts were committed with full knowledge of the fact that the injunction was being violated, and that the violation was willful and without excuse. Therefore it was adjudged that each was guilty of contempt in violating the order, and, as punishment therefor, each was fined. It was further ordered as to each that he should deposit the amount of his fine so assessed against him in the First National Bank of Butte, on or before a day fixed, to the credit of the clerk of the court, to be thereafter disposed of only by the order of the circuit court or the judge thereof, and that, if he failed to comply with the order in so depositing the assessed fine, he should be taken into custody by the marshal, and confined in jail until he complied with the order, or until further order of the court. The contention of the petitioners is that the fines imposed were for the benefit of, and in the nature of indemnity to, the complainant in the main suit; while the position of the government is that the court imposed a punishment, and at this time is without power to make any order refunding the moneys paid as fines. The one contention rests upon the argument that the action of the court was had to preserve and enforce the rights of the litigants in the injunction suit, and to compel obedience to the injunction order which was issued to enforce rights to which the court had found the Boston & Montana Company was entitled; while the other finds its basis in the principle that the proceeding was had to preserve the power and to vindicate the dignity of the court, and to punish for disobedience of the injunction order as for an offense.

It is unnecessary to consider at length the main distinctions which enter into the law of contempt. It is enough to recall that their existence is thoroughly well established, and to quote the clearly stated definition of them made by Judge Sanborn of the Court of Appeals of the Eighth Circuit in *Nevitt's Case*, 117 Fed. 448, 54 C. C. A. 622, affirmed by the Supreme Court in *Bessette v. Conkey*, 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997:

"Proceedings for contempts are of two classes: Those prosecuted to preserve the power and vindicate the dignity of the courts and to punish for disobedience of their orders; and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are individuals whose private rights and remedies they were instituted to protect or enforce. \* \* \* A criminal contempt involves no element of personal injury. It is directed against the power and dignity of the court, and private parties have little, if any, interest in the proceedings for its punishment. But if the contempt consists in the refusal of a party or a person to do an act which the court has ordered him to do for the benefit or the advantage of a party to a suit or action pending before it, and he is committed until he complies with the order, the commitment is in the nature of an execution to enforce the judgment of the court, and the party in whose favor that judgment was rendered is the real party in interest in the proceedings."

The language of the judgment of the court in the present case signifies that the principal purpose of the order was to punish for a con-

tempt, and not to protect a private right. Action was had to vindicate the authority of the court, and punish those who defied its order. Petitioners are in a very similar position to that of Bessette in *Bessette v. Conkey*, supra. There Bessette was adjudged guilty of contempt in having violated a restraining order in a suit to which he was not a party. The Supreme Court, speaking through Justice Brewer, said:

"In the case at bar the controversy between the parties to the suit was settled by final decree, and from that decree, so far as appears, no appeal was taken. An appeal from it would not have brought up the proceeding against the petitioner, for he was not a party to the suit. Yet, being no party to the suit, he was found guilty of an act in resistance of the order of the court. His case, therefore, comes more fully within the punitive than the remedial class. It should be regarded like misconduct in a courtroom or disobedience of a subpoena as among those acts primarily directed against the power of the court, and in that view of the case we pass to a consideration of the questions presented."

See, also, *Christenson Engineering Co. v. Westinghouse Air Brake Co.*, 194 U. S. 458, 24 Sup. Ct. 729, 48 L. Ed. 1072; *Doyle v. London Guaranty Co.*, 204 U. S. 599, 27 Sup. Ct. 313, 51 L. Ed. 641.

Where one is punished as for an offense in having willfully defied the power and authority of a court of the United States by knowingly disobeying an injunction order, he stands as one who has been found guilty of an offense against the United States. The court, in adjudging him guilty, acts as the instrument of the government in upholding the power of its judicial authority. One so found guilty may be ordered into the custody of the marshal of the United States. He may be imprisoned in one of its jails; or, if fined, the money which is paid goes to the United States. Petitioners, by appropriate steps, could have had the judgment holding them guilty of contempt reviewed by writ of error, as final decisions are reviewed in what are more strictly known as "criminal" cases. They took no steps, however, looking to such review, and the judgment of the circuit court stands unreversed.

Stress is laid upon that part of the judgment whereby, after deposit of the fine, the money paid in was to be thereafter disposed of only by order of the court or the judge thereof. But, as the terms of the judgment in each case expressly imposed the fine assessed as "a punishment" for having willfully and without excuse violated the injunction order, the law of its own force required the clerk of the court to deposit the money forthwith in the name and to the credit of the court. Section 995, Rev. St. U. S. 1878 [U. S. Comp. St. 1901, p. 711]. Thereafter the clerk remits the money to the treasurer. Upon what correct principle can the court at this late day consider the recollection of Mr. Drake, the deputy clerk of the court, of a conversation concerning a journal entry which he had with the judge, who had theretofore solemnly adjudged petitioners guilty of a contempt and fined them as a punishment? Surely the stability and effect of judgments upon which parties have acted cannot be disturbed upon such slight testimony as that. If it were assumed, however, for the mere sake of argument, that the affidavit were admissible under any rule, still it could not avail petitioners, for it shows that the direction of Judge Beatty to the deputy clerk to retain the word "fine" in the contemplated journal entry is not

only consistent with, but fully confirmatory of, the view that the judge had expressed what he had in his mind when he rendered his judgment, namely the imposition of a pecuniary punishment of an offense, inflicted by sentence of the court in the exercise of a penal jurisdiction. It is not necessary to go to the extent of deciding that the court was wholly without power to have modified or set aside its judgment, and to have relieved the offenders therefrom, if proper showing therefor had been made at the same term of the court where the judgment was rendered, for no such case is before the court. But where a court has found a person guilty, and punished in contempt, as for a criminal offense, by imposing fine for willful disobedience of an injunction order, and such person has paid the fine and has taken no steps toward a review of the judgment, and has even allowed the term of the court whereat the judgment was made to pass without seeking any revision of the order, or rehearing, or modification thereof, it is perfectly clear, in my opinion, that words in the judgment whereby continued control over the money when paid is attempted are invalid, and cannot be considered as of any force. They are repugnant to the law which, pursuant to the judgment of punishment, has provided for the disposition of the fines paid. No further judicial order can be made in the premises other than to enforce such prescribed disposition. I do not question the authority of a court for good cause to suspend the making of its judgment in a case of contempt, or other punishable or criminal offense, and as long as such suspension is operative, for the court to retain full control of the proceeding; but, after the rendition of its judgment by way of punishment, the case is ended and execution of the judgment can only be stayed by proper legal methods. Remission of a sentence is not within judicial authority.

In *State v. Voss*, 80 Iowa, 467, 45 N. W. 898, 8 L. R. A. 767, the Supreme Court of Iowa considered a question very like the one at bar. Certain persons willfully disobeyed an injunction of the court, and each was fined and ordered committed to jail for 30 days unless the fine and costs were sooner paid. In its judgment the court used this language:

"The execution of this judgment is to be suspended during the pleasure of the court, but whenever the court \* \* \* so directs execution and warrant of commitment are to issue. \* \* \*"

The validity of this condition was examined. The court said:

"The condition of the judgment puts its execution wholly within the discretion of the court below, whether that discretion be exercised with or without justice or reason. If it be the pleasure of that court, process may never be issued upon the judgment. The case is this: We find a judgment for a fine against defendant, which can only be enforced at the pleasure of the court. The judgment is thus suspended, and the state is defeated of the remedy provided by law upon the exercise of the pleasure of the district court. If the power to do this exists in a case of contempt, it must exist in all cases punishable by fine and imprisonment. The law is no respecter of persons. One violator of law possesses no rights or immunities not held by another. It follows, then, that all fines and penalties prescribed by law may be collected only when it accords with the pleasure of the court in which judgment is rendered therefor. The claim of the validity of the condition of the judgment leads to the most absurd results. It is hardly necessary to say that it is based upon no statute."

To the same effect is *Neal v. State*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 190.

In conclusion I hold that the judgment was a conviction of an offense against the United States, and sentence therefor; that the fine passed into the custody of the United States; that the court has no power whatever to order the money repaid to petitioners, as to do so would be the remission of a sentence for an offense against the laws of the United States. In *re Mullee*, Fed. Cas. No. 9,911.

Until the clerk has remitted the money as required, petitioners may seek relief under the pardoning power which is exclusive in the President; but they are without remedy in the courts.

The petition is dismissed for lack of jurisdiction.

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WAHA-LEWISTON LAND & WATER CO. v. LEWISTON-SWEETWATER IRRIGATION CO., Limited.

(Circuit Court, D. Idaho, N. D. December 19, 1907.)

1. REMOVAL OF CAUSES—AMOUNT OR VALUE IN DISPUTE—AVERMENTS OF PETITION.

An allegation in a petition for the removal of a suit to determine the right to take water from a public stream for irrigation or other purposes that the value of the matter in dispute exceeds \$2,000, where not denied, is sufficient to authorize the federal court to take jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 132.

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.]

2. SAME—RIGHT OF REMOVAL—SUIT AT LAW OR IN EQUITY.

The statutes of Idaho provide that one desiring to appropriate water from a stream must apply to the state engineer and obtain a permit; that, in case a stated part of the works has not been completed within a certain time, an after appropriator from the same stream may petition the state engineer for a revocation of the permit, and that officer, after investigation, shall either cancel the permit and notify the holder or refuse to do so and notify the petitioner; that, in either case, the party feeling himself aggrieved may appeal to the district court of the county in which the point of diversion is situated, making the other party defendant, and filing a petition and a copy of the petition to and decision of the state engineer. There is no further provision as to pleading or procedure. *Held*, that, after such an appeal has been taken, the proceeding in the district court is a "suit of a civil nature at common law or in equity," of which a Circuit Court of the United States is given concurrent jurisdiction with the state courts by section 1 of the judiciary act of March 3, 1875 (18 Stat. 470, c. 137, as amended by Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508]), and therefore removable under section 2 where the other requisite jurisdictional facts exist.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 11.]

On Motion to Remand to State Court.

Geo. W. Tannahill, W. B. Heyburn, W. H. Batting, and Alfred A. Fraser, for plaintiff.

James E. Babb, for defendant.

DIETRICH, District Judge. The Idaho statutes, establishing a system for the appropriation and distribution of water for irrigation and other useful purposes, provide that one desiring to divert water from a natural stream shall make application for a permit to the state engineer. Upon receipt of such an application, if the same is in proper form, the state engineer indorses his approval, and a public record thereof is made. The application so indorsed constitutes a license authorizing the applicant to divert water in accordance with its terms. It is further provided by law that if the holder of a permit, at the expiration of one-half the time set for the completion of the diverting works, shall not have completed at least one-fifth of the work of construction as contemplated in the application for such permit, any person holding any permit for the diversion of water from the same stream postdating the permit for the diversion of waters through such unfinished works may, on or before the date set for the completion of one-half of the work of construction, petition the state engineer to cancel the prior permit. This petition must set forth the facts in relation to the condition of the unfinished work, and must be certified to by a competent engineer. On receipt of such petition, it is the duty of the state engineer to make or cause to be made an examination of the works in question, and, if he is satisfied that less than such one-fifth of the work of construction has been done on such date, it is his duty to cancel the permit, and he must thereupon at once notify the holder of the permit by registered mail of such action, stating the reason of the cancellation. If, upon the other hand, he refuses to cancel the permit, he must in like manner notify the person filing the petition. Either party feeling himself aggrieved by the action of the state engineer may take an appeal to the district court of the county in which the point of diversion of the works in question is situated. "Such appeal shall be within sixty days from the receipt of the notice of such action of the state engineer, and if the petitioner to such state engineer shall file the appeal the holder of the permit in question shall be the defendant, and if the holder of such permit which has been canceled shall be the appellant, the party who petitioned for such cancellation shall become the defendant in such appeal, and such appeal shall be perfected when the appellant shall have filed in the office of the clerk of such District Court, a copy of such petition to the state engineer and a copy of the decision of such engineer, certified by such engineer as true copies, together with the petition to such court setting forth the appellant's reason for appeal." I have quoted in full the statutory language relative to appeals; and it will be observed that no provision is made for pleadings in court after the appeal is perfected, and there is also an entire absence of any regulation of the mode of procedure or specification of the questions to be tried.

On August 6, 1904, the state engineer approved an application of Mary E. Godard to divert a certain amount of water from Soldiers' Meadow creek, in Nez Perce county, Idaho. This permit was afterwards transferred to the appellant, Waha-Lewiston Land & Water Company, a corporation, organized under the laws of the state of Idaho, and hereinafter referred to as the "Idaho Corporation." There-

after, on the 25th day of October, 1904, the state engineer approved the application of one Lafe Pence to divert water from the same stream. This permit was by assignment transferred to the defendant, Lewiston-Sweetwater Irrigation Company, Limited, a corporation, organized under the laws of the state of Oregon, and hereinafter called the "Oregon Corporation." On February 28, 1907, this last-named company filed with the state engineer a petition for the cancellation of the permit first referred to, owned by the Idaho corporation. Acting in compliance with the statutes, the state engineer caused investigation to be made, and thereafter, on March 12, 1907, canceled the permit of the Idaho corporation, duly notifying the holder of the permit of his action. Thereupon, in pursuance of the statutes, the Idaho corporation appealed to the district court of Nez Perce county, Idaho, and caused the statutory record to be filed with the clerk of that court on the 26th day of April, 1907. On May 13, 1907, the Oregon corporation filed with the clerk of the district court of Nez Perce county a petition for the removal of the cause to this court, accompanied by bond, both petition and bond being in the usual form, and at the same time filed a demurrer to the "Petition on Appeal" of the Idaho corporation. Thereafter an order was made by Hon. Edgar Steele, judge of said court, approving the bond, and directing that no further proceedings be taken in the state court. A transcript of the record was filed in this court upon September 9, 1907, and the Idaho corporation has made a motion that the cause be remanded to the state court, upon the grounds: (1) That this court has no jurisdiction to hear and determine the cause; (2) that the amount in dispute is not of a value in excess of \$2,000; (3) that the record does not affirmatively show facts essential to confer jurisdiction; and (4) "that this action involves a controversy under a state statute, and is statutory in its nature, and does not involve any question sufficient to confer jurisdiction upon the above entitled court, either by direct suit or by removal of this cause from the state court to the United States Circuit Court." Substantially only two questions were discussed at the argument, namely, the amount in controversy, and the question whether or not a proceeding of such peculiar origin and form is removable.

The first question may be summarily disposed of. The petition for removal in express terms alleges the jurisdictional amount. That the cancellation of the prior permit may be not only of great pecuniary loss to the Idaho corporation, but of great pecuniary value to the Oregon corporation, is obvious. It is to be assumed that there is not enough water to supply both permits, or the Oregon corporation would have no interest in attacking the validity of the permit of the other party; and, it being alleged that the value of the matter in dispute exceeds \$2,000, and there being no denial of such allegation, the court, for the purpose of entertaining jurisdiction, must assume the allegation to be true.

The real question involved is the removability of a proceeding of this nature. By section 2 of the act of March 3, 1875 (18 Stat. 470, c. 137) as amended by the act of March 3, 1887 (24 Stat. 552, c. 373),

and Act of August 13, 1888 (25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 510]), it is provided that:

"Any other suit of a civil nature at law or in equity of which the circuit courts of the United States are given jurisdiction by the preceding section \* \* \* may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein, being nonresidents of the state."

Section 1 confers upon the Circuit Courts original jurisdiction concurrent with the courts of the several states "of all suits of a civil nature at common law or in equity \* \* \* in which there shall be a controversy between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value" of \$2,000.

(1) Is this a "suit of a civil nature at common law or in equity?" (2) If it be deemed to be such a suit, does it fall within the class defined in the language above quoted from section 1, and of which the Circuit Courts are thereby given original jurisdiction? (3) If the foregoing questions are answered in the affirmative, does the fact that the proceeding was in a sense initiated before the state engineer and came into the state district court by "appeal" present an insurmountable obstacle to the removal?

The phrase, "suits at common law and in equity," cannot be construed to embrace only ordinary actions at law and ordinary suits in equity; but it was doubtless intended thereby to include all the proceedings carried on in the ordinary law and equity courts as distinguished from proceedings in military, admiralty, and ecclesiastical courts. *Gaines v. Fuentes*, 92 U. S. 10, 23 L. Ed. 524. In the majority opinion (page 20 of 92 U. S. [23 L. Ed. 524]) it is said:

"And a controversy was involved in the sense of the statute whenever any property or claim of the parties capable of pecuniary estimation was the subject of litigation, and was presented by the pleadings for judicial determination."

See, also, Justice Bradley's dissenting opinion on page 24 of 92 U. S. (23 L. Ed. 524).

In *Weston v. City of Charleston*, 2 Pet. 464, 7 L. Ed. 481, Chief Justice Marshall said:

"The term 'suit' is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. Modes of proceeding may be various; but, if a right is litigated in a court of justice, the proceeding by which a decision of the court is sought is a suit."

In *Upshur County v. Rich*, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196, the earlier cases decided by that court are collocated and commented upon, and the principle was deduced therefrom that a proceeding not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as, for instance, the valuation of property for the purpose of taxation, is purely administrative, and cannot be regarded as a "suit," and that an appeal in such case to a board having no judicial powers is not a suit; "but that such an appeal may become a suit if made to a court or tribunal having power to

determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other." See, also, *Parsons v. Bedford*, 3 Pet. 433, 7 L. Ed. 732; *In re Stutsman County (C. C.)* 88 Fed. 337; *Kirby v. Chicago & N. W. R. Co. (C. C.)* 106 Fed. 551; *Union Terminal Ry. Co. v. Chicago R. Co. (C. C.)* 119 Fed. 209. It seems clear to me that, when the Idaho corporation took this proceeding by appeal into the state district court for Nez Perce county, it was brought within this principle and became a "suit." There are parties litigant. There are questions of law and fact to be decided. These are to be determined by a tribunal whose functions are strictly judicial. It is true that the statute is very meager, if it is not entirely silent, as to the mode of procedure, and in this respect it may be regarded as defective; but the jurisdiction of the federal court is not thereby necessarily defeated. Perhaps no greater difficulty would be experienced by the federal court in providing the mode of procedure than would be found to exist in the state court if the controversy were left to be tried out there. But is the suit within the class of which the United States Circuit Courts have original jurisdiction? The jurisdictional amount is involved and the requisite diversity of citizenship exists, and the party upon whose petition the cause was removed is a nonresident of the district. The question now is not whether the act is sufficient to confer jurisdiction upon the state courts, but, assuming it to be effective for that purpose, is such a proceeding in the state district court a "suit," as contemplated by the federal removal act? I am of the opinion that it is. But the Idaho statute provides that the inquiry shall be commenced before the state engineer, and, in case of appeal, the appeal shall be taken "to the district court of the county in which the point of diversion of the works in question is situated." In other words, the cause of action is a statutory right, and the tribunal to which the controversy is to be taken is specified in the statute. In *Railroad Company v. Davidson*, 157 U. S. 201, 15 Sup. Ct. 563, 39 L. Ed. 672, referring to section 2 of the act of 1887-88, authorizing the removal of causes, Mr. Chief Justice Fuller said:

"The jurisdiction of the Circuit Courts of the United States on removal by the defendant under this section is limited to such suits as might have been brought in that court by the plaintiff under the first section."

See, also, *Tennessee v. Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *In re Cilley (C. C.)* 58 Fed. 977.

This language is sweeping, and, considered apart from the facts involved in the case, it might very well be taken to mean that, unless the plaintiff might have originally instituted the proceeding in question in the United States Circuit Court, a nonresident defendant could not remove it; but it will be observed that the language of the statute is not that "cases may be removed which could have been commenced" in the circuit court, but it is that suits "of which the circuit courts are given jurisdiction by the preceding section" may be removed; and the court in using the language quoted doubtless had reference, not to matters of procedure, but to those facts or features specified in the first section of the act as being jurisdictional. These essential elements are that the controversy must involve more than \$2,000, that it



must exist between citizens of different states, and that it must be a suit of a civil nature at common law or in equity. In the Stutsman Case, above referred to, the precise question is very ably discussed, and it is there concluded:

"So, notwithstanding the proceeding under the North Dakota statute for the collection of taxes is of such character, owing to its procedure, that it could not be commenced in the federal courts, the controversy which has been removed by the petitioners presents every element mentioned in the first section of the judiciary act as essential to its original jurisdiction, and jurisdiction on removal is therefore complete."

In *Union Terminal Ry. Co. v. Chicago* (C. C.) 119 Fed. 209, the exact question was again considered, and, after most careful consideration, the same conclusion was reached; the Stutsman Case being referred to with approval. I am constrained to take the same view.

But can removal be had after the proceedings before the state engineer and after an appeal has been taken to the state court? Questions of a similar nature have not infrequently arisen in connection with proceedings in eminent domain. Such a case is *Boom County v. Patterson*, 98 U. S. 403, 25 L. Ed. 206. Patterson was the owner in fee of some land which the boom company sought to condemn for public use under the statutes of the state of Minnesota. Condemnation was initiated by the appointment of commissioners, whose function it was to appraise the value of the property sought to be condemned. If the award of the commissioners was not satisfactory, the aggrieved party could appeal to the district court, and thereupon it was the duty of the court to "proceed to hear and determine such case in the same manner that other cases are heard and determined in said court." Both the boom company and Patterson appealed from the award of the commissioners, and, when the case was brought before the district court, Patterson, who was a citizen of the state of Illinois, removed the cause to the Circuit Court of the United States. There the case was tried; and to review the resulting judgment the company took the case to the Supreme Court upon writ of error. The Supreme Court says:

"The proceeding in the present case before the commissioners appointed to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms; but, when it was transferred to the District Court by appeal from the award of the commissioners, it took, under the statute of the state, the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. \* \* \* The case would have been in no essential particular different had the state authorized the company by statute to appropriate the particular property in question and the owners to bring suit against the company in the courts of law for its value. That a suit of that kind could be transferred from the state to the federal court if the controversy were between the company and a citizen of another state cannot be doubted. And we perceive no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed."

See, also, *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319.

The rule thus stated seems to be almost decisive of the question under consideration. In *City of Terre Haute v. Evansville R. Co.* (C. C.) 106 Fed. 545, it is said:

"Nor does the fact that the law of the state requires the questions of law and fact involved in the case to be brought into a court of the state by appeal, instead of by summons or other process, affect the defendant's right of removal. The method of procedure by which a suit is brought or instituted in a court of the state is merely formal and modal, and in no wise affects the right of removal, if in other respects the defendant possesses that right. *In re Jarnecke Ditch* (C. C.) 69 Fed. 161, 163."

To the same effect is *Kirby v. Chicago & N. W. R. Co.* (C. C.) 106 Fed. 551.

The proceedings prescribed by the Idaho statutes to be taken before and by the state engineer are essentially nonjudicial in their character, and are purely administrative, and in no sense do they constitute a suit at law or in equity. However, under the system of water appropriation obtaining in Idaho, when a later appropriator asserts the claim that a prior appropriation has lapsed or has been forfeited, or for any other reason has become invalid, a controversy arises involving property or a claim capable of pecuniary estimation, and, when such controversy is brought into a judicial tribunal for determination, a suit is initiated, whatever may be the means of bringing it into court or the mode of procedure thereafter followed by the court, culminating in a judgment finally determining the claims and rights of the parties litigant. In the arid region litigation between persons claiming to have appropriated water from the same stream, for the purpose of determining the amounts and the dates of their appropriations, is familiar both to the state and the federal courts. By reason of the prevailing principle that priority of appropriation confers superiority of right, each claimant to the waters of a stream, the amount of which is not sufficient to satisfy all claims, as is not infrequently the case, is directly and vitally interested, not only in establishing the validity of his own claim, but in having it determined that other claims are either invalid, or are subsequent, for his own claim would be rendered entirely worthless, even though valid, should all the water of the stream be required to satisfy other prior claims. While the questions of fact and of law to be found and determined in a case like that at bar are different in detail from those involved in the ordinary water case, still the matter in controversy is essentially the same. It is a property right, of a certain value if the earlier licensee's rights have lapsed, and of a radically different value, or of no value, if such rights are still in force; and hence a property right capable of pecuniary estimation is clearly involved.

The state engineer's proceedings are *ex parte*, and are neither in form nor substance judicial in their nature. The Legislature may have contemplated that in some, if not many, instances licensees would not resist cancellation of permits, and that the proceedings before and by the engineer would furnish a simple and inexpensive mode for formally and publicly declaring the termination of the licenses, and of clearing the public record of an apparent, though nonexistent, right. In case, however, the holder of the permit has not abandoned his right, and claims that the same is not forfeited, having notice of the action of the state engineer, he may institute a judicial inquiry. Other modes might have been provided for instituting the action, but the

Legislature in its wisdom saw fit to call the proceedings an "appeal." Whether the means and method prescribed are sufficient to enable the state court to acquire jurisdiction of the parties is not a question now under consideration. It simply need be said that the Legislature intended and attempted to confer jurisdiction upon a judicial tribunal, and whether its intention in that regard has been rendered effectual is for the court in which such question is raised, be it state or federal, to determine. In support of its motion, counsel for the Idaho corporation have referred to section 20 of article 5 of the Constitution of Idaho, which provides that "the District Court shall have original jurisdiction in all cases both at law and in equity and such appellate jurisdiction as may be conferred by law"; but upon reflection I am unable to see how this section is pertinent. It surely will not be contended that the jurisdiction thus conferred upon the state district court is exclusive, for, if such a view were adopted, removal could be had to the federal court in no case on the ground of diversity of citizenship.

Further reference is made to section 10 of article 11, which, among other things, provides that "no company or corporation formed under the laws of any other country, state or territory shall have or be allowed to exercise or enjoy within this state any greater rights or privileges than those possessed or enjoyed by corporations of the same or similar character created under the laws of this state"; and, in connection therewith, the case of *Security Mutual Life Insurance Company v. Prewitt*, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, is cited. By the majority opinion in this case it is held that, it being within the power of a state to prevent a foreign corporation from doing business at all within its borders, the state has a right to impose as a penalty for the removal of a case from the state to the federal courts the forfeiture of the corporation's license to do business in the state. It is not decided that it is competent for a state, either by its Constitution or by Legislative act, to prohibit the removal of a proper case to the federal courts; indeed, just the contrary rule is recognized.

It follows that the motion must be denied.

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#### CROSBY v. CUBA R. CO.

(Circuit Court, D. New Jersey. January 2, 1908.)

1. EVIDENCE—FOREIGN LAWS—JUDICIAL NOTICE.

Courts do not take judicial notice of foreign laws, which, when relevant, must be pleaded and proved as facts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence § 52.]

2. SAME—PRESUMPTIONS—FOREIGN LAWS.

Where a servant sued his master in a federal court in the district of New Jersey for an injury sustained in Cuba, plaintiff was not required to allege that the Cuban law conferred a right of action for such injury; the burden being on the defendant to specially allege and prove the contrary if there was a conflict between the *lex loci* and the *lex fori*.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 102.]

### 3. MASTER AND SERVANT—ASSUMED RISK—DEFECTIVE MACHINERY.

Where a servant complains of a defect in the master's machinery, and the master promises to repair, and requests the servant to continue with his work, the master assumes the risk, unless the peril is so grave and imminent that the servant cannot continue his work without being chargeable with negligence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 638-640.]

Assumption of risk incident to employment, see note to *Chesapeake & O. P. Co. v. Hennessey*, 38 C. C. A. 314.]

### 4. TRIAL—INSTRUCTIONS—APPLICATION TO EVIDENCE.

Where a defect in machinery because of which a servant was injured did not render the machinery so dangerous that the servant was bound to abandon his work notwithstanding his master's promise to remedy the defect, or be chargeable with negligence, the court did not err in omitting to charge that the master would not assume the risk of injury from such defect if the danger was so imminent that no prudent man would continue to work with the machine in the exercise of ordinary care.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 596-612.]

### 5. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff had charge of an engine equipped with a defective governor, which defendant had promised to repair. Just prior to the injury plaintiff was standing some distance from the engine, when it began to race, and plaintiff, seeing that another was unable to stop it, ran to his assistance, and was injured just as he got to the engine by the bursting of the pulleys above. *Held*, that plaintiff was not negligent in leaving his place and going to the engine.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 749.]

### 6. DAMAGES—PERSONAL INJURIES—EXCESSIVENESS.

Where plaintiff, an engineer 30 years of age, earning \$1,500 a year, was so injured as to necessitate the amputation of his right hand, a verdict allowing him \$6,000 was not excessive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 372-396.]

### 7. MASTER AND SERVANT—INJURIES TO SERVANT—NEGLIGENCE.

In an action for injuries to a servant by the bursting of a pulley caused by a defective engine which the master had promised but failed to repair, evidence *held* to require submission of the question of defendant's negligence to the jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010-1031.]

### 8. COURTS—FEDERAL COURTS—CITIZENSHIP—PLEADING.

Plaintiff's declaration alleged that he was a resident of the city of Dickson, in the state of Tennessee, and that defendant was a corporation organized under and by virtue of the laws of the state of New Jersey. *Held* that, while such averment sufficiently alleged defendant's citizenship to sustain the jurisdiction of the federal court, the allegation of plaintiff's residence was not a sufficient allegation of citizenship.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 878.]

Averments of citizenship to show jurisdiction of federal courts see notes to *Shipp v. Williams*, 10 C. C. A. 261; *Mason v. Dullaghan*, 27 C. C. A. 303.]

### 9. SAME—AMENDMENT.

Where plaintiff's declaration filed in a federal court merely alleged that he was a resident of D., in Tennessee, and he testified that he lived "at present in Cuba," he might be granted leave after verdict to take depositions to establish his citizenship, and then amend the declaration so as to sufficiently show diversity of citizenship on which federal jurisdiction depended.

## 10. SAME—OBJECTIONS—WAIVER.

Where a federal court's jurisdiction depended on diversity of citizenship, and plaintiff's declaration did not sufficiently aver his citizenship, the court was bound to take notice thereof, though no objection was made thereto.

At Law. On rule to show cause why the verdict should not be set aside and the action dismissed or a new trial granted.

Benjamin M. Weinberg, for plaintiff.

Howard Mansfield, Henry De Forest Baldwin, and Charles E. Miller, for defendant.

LANNING, District Judge. The plaintiff in his declaration avers that on June 16, 1906, he was an employé of the defendant in its planing mill in the republic of Cuba; that the mill was furnished with an imperfect and defective steam engine; that on the date above mentioned the engine "ran away," thereby putting a severe strain upon the shafting and pulleys with which it was connected, and causing the pulleys to break and fly apart, and that one of the broken parts struck and injured the plaintiff's right hand so that it had to be amputated. He claims damages for the injury thus sustained, charging the defendant with negligence in supplying the mill with an imperfect and defective engine. The only plea filed is that of the general issue.

In the first place, the defendant insists that the court should set aside the verdict and dismiss the action because the plaintiff has neither alleged nor proven that under the law of Cuba he acquired any right of action against the defendant. Courts do not take judicial knowledge of foreign laws. When necessary to be considered, they must be proven as facts in the case. In *Chartered Mercantile Bank of India v Netherlands India Steam Navigation Co.*, 10 Q. B. Div. 521, Lord Justice Brett, at page 536, in referring to the case of *The M. Moxam*, said:

"In that case, whatever the cause of action was, it arose entirely in Spain, and the action was an action in tort; and the well-known rule applies that for any tort committed in a foreign country within its own exclusive jurisdiction an action of tort cannot be maintained in this country unless the cause of action would be a cause of action in that country, and also would be a cause of action in this country. Both must combine if the tort alleged was committed within the exclusive jurisdiction of a foreign country."

The same rule is expressed by Dicey in his work on *Conflict of Laws*, p. 659. In *Scott v. Lord Seymour*, 1 H. & C. 219, and 1 English Ruling Cases, 533, Wightman, J., declared that since the case of *Mostyn v. Fabrigas*, Cowp. 161 (copiously annotated in 1 Smith's *Leading Cases* [8th American Ed.] p. 1027), he was not aware of any rule of law that would disable a British subject from maintaining an action in England for damages against another British subject for assault and battery committed by him in a foreign country merely because no damages for such trespass were recoverable by the law of that foreign country, and without any allegation that such trespass was lawful or justifiable in that country. "By the law of England," said he, "an action to recover damages for assault and battery is maintainable; and whatever may be the case as between two

Neapolitan subjects, or between a Neapolitan and an Englishman, I find no authority for holding, even if the Neapolitan law gives no remedy for assault and battery, however violent and unprovoked, for recovery of damages, that therefore, a British subject is deprived of his right." Justices Williams and Crompton, however, expressly refrained from stating any opinion upon the point, for the reason that it was not necessary to the determination of the case, and Justice Blackburn expressed his doubt whether the rule had been correctly stated by Justice Wightman. Dicey, at page 662 of his work above referred to, says:

"It is hard to see why an Italian or an Englishman who assaults either an Italian subject or a British subject at Naples, and does not thereby incur, under the law of Italy, liability to the payment of damages, should become liable to pay them when an action is brought against him in England. Italian law imposes no such liability; and English law does not extend to Italy."

An action brought in one of our states for damages resulting from a common-law tort committed in another of our states may doubtless be maintained without proof of the *lex loci*; but, where an action to recover damages for a wrongful act committed in another state is maintainable solely under some statutory authority of that state, and not under the common law, there the statutes of the state conferring the right of action must be both pleaded and proven by him who asserts the right. See *Wooden v. W. N. Y. & P. R. R. Co.*, 126 N. Y. 10, 26 N. E. 1050, 13 L. R. A. 458, 22 Am. St. Rep. 803, and *Keep v. National Tube Co.* (C. C.) 154 Fed 121. In the present case the right of action is not based on any statute of Cuba, and the defendant insists that the common law cannot be presumed to exist in Cuba, inasmuch as that country was formerly a Spanish colony. But, as above stated, the defendant has filed the plea of the general issue only. The declaration alleges what, according to the *lex fori*, is actionable negligence on the part of the defendant. The defendant by pleading the general issue has not denied the legal sufficiency of the allegations of the declaration. If the *lex loci delicti* does not give to the plaintiff a right of action, that defense should have been presented by a special plea, and supported by proofs offered by the defendant. I do not think it was obligatory on the part of the plaintiff to set forth in his declaration in express terms what the special law of the republic of Cuba on the subject of actionable negligence may be. He had the right to set forth a cause of action which, according to the law of the forum, would be complete, and, in the event of a conflict between the *lex loci* and the *lex fori*, the defendant ought to have shown by a proper plea that, under the *lex loci*, the plaintiff acquired no right of action.

In *Scott v. Lord Seymour*, *supra*, the declaration alleged that the defendant assaulted and imprisoned the plaintiff. The defendant pleaded, first, that the trespasses were committed at Naples, out of the jurisdiction of the court, and that, according to the law of Naples, the defendant was not liable to be sued by the plaintiff in any other civil action or other proceedings to recover damages for the alleged trespass. The second plea was to the effect that the trespasses were committed at Naples; that penal proceedings had been taken there; that

by the law of Naples the plaintiff could not recover damages in a civil action, or other proceeding in respect of the trespasses until the defendant had been condemned and found guilty of those trespasses; that at the time of the commencement of the suit the proceedings in Naples were still pending and undetermined; and that the defendant had not been condemned or found guilty of the trespasses or any part thereof. On a demurrer to the pleas they were held to be insufficient. Mr. Justice Wightman, concerning the first of these pleas, said:

"My learned Brethren are of opinion that the plea does not contain any averment that damages might not be recovered by the law of Naples for the alleged trespass in some form of proceeding or other, and that it may be taken as against the defendant in the action that the pleas admit that they might be recovered; and that, if that be so, the question is one of procedure merely and governed by the *lex fori*, and that there is nothing to oust the jurisdiction of an English court to entertain an action to recover damages in such a case. I agree with the rest of the court, if the construction of the first plea is that which they suggest."

It will be observed that it was not suggested that it was the duty of the plaintiff to allege and prove the *lex loci*; that is, the law of Naples. That seems to have been regarded as matter of defense to be averred and proven by the defendant. It is a well-settled rule of pleading that, if a court has not general jurisdiction of the subject-matter of an action instituted before it, the defendant ought to plead to the jurisdiction, and that he cannot take advantage of it upon the general issue. It was so declared by Lord Mansfield in the leading case of *Mostyn v. Fabrigas*, *supra*.

In *Dainese v. Hale*, 91 U. S. 13, 23 L. Ed. 190, it appears that an action *ex delicto* was brought in the Supreme Court of the District of Columbia to recover the value of chattels which the defendant, as consul general of the United States in Egypt, there caused to be attached. The defendant pleaded that as such consul general he was invested with judicial functions and power in the case, and that in the exercise of those functions he took cognizance of the cause referred to in the declaration, and issued the attachment complained of. To this plea there was a general demurrer. The demurrer was overruled. The parties to the action before the consul general were all citizens of the United States. Mr. Justice Bradley, after reviewing the acts and treaties relevant to the questions involved, and after reaching the conclusion that under those acts and treaties the consul general had such jurisdiction in civil causes between citizens of the United States as was permitted by the laws of Turkey, or its usages in its intercourse with other Christian nations, said:

"But here we are met by a difficulty arising from the extreme generality of the defense set up in the plea. What are the laws of Turkey and its usages in its intercourse with other Christian nations in reference to the powers allowed to be exercised by their public ministers and consuls in judicial matters? The plea does not inform us. It leaves the court to infer or take judicial knowledge of those laws and usages. But can it do this? Foreign laws and usages are, as to us, matters of fact and not matters of law. \* \* \* As the power of the consuls of the United States, according to the treaties and laws as they stood in 1864, depended on the laws or usages of Turkey, those laws or usages should have been pleaded in some manner, however briefly, so that the court could have seen that the case was within them; for, fail-

ing to do this, the plea was defective in substance, and judgment should have been rendered for the plaintiff on the demurrer."

In *The Scotland*, 105 U. S. 24, 29 (26 L. Ed. 1091), Mr. Justice Bradley said that if a collision between British ships should occur in British waters, and the injured party should seek relief in our courts, we would administer justice according to the British law, so far as the rights and liabilities of the parties were concerned, provided it were shown what that law was, and that, if it were not shown, we would apply our own law to the case.

In *Ackerson v. Erie Railway Co.*, 31 N. J. Law, 309, the action was brought in the New Jersey Supreme Court by the plaintiff against the defendant to recover for injuries received in a railroad accident on the defendant's railroad in the state of New York. The declaration was in the usual form, and, being demurred to, the question raised was whether the plaintiff could maintain his action in New Jersey. The right of action was sustained on the settled principle that "personal injuries are of a transitory nature and sequuntur forum rei."

In my judgment the objection that the plaintiff did not plead or prove what the law of Cuba is, is an invalid objection.

In the next place, it is urged that the verdict should be set aside and a new trial granted because of error in the charge of the court to the jury. In the course of the trial the plaintiff testified that, shortly after he entered the employment of the defendant, he noticed that the governor of the engine sometimes failed to work properly, and allowed the engine to run too fast. The first time he noticed it was probably three or four weeks after he entered the defendant's employment. He notified Mr. Knight, the master engineer and superintendent of the defendant's mechanical department, of the defect. The same trouble with the governor was observed by the plaintiff some three or four times within the period of six or seven months before the date of the accident. Each time the defect was reported by him to Mr. Knight. He says he explained to Mr. Knight on these different occasions that the governor was not working properly, and that it allowed the engine to run too fast. On Friday morning, June 15, 1906, the same difficulty occurred again. The governor failed to cut off the steam supply at the proper time, with the result that the engine "ran away," causing a vibration of the machine, and the raising of dust. The plaintiff says he notified Mr. Knight on that morning that the governor was not working right. Being further examined as to what took place on that morning, the record shows the following questions and answers:

"Q. Now, come down to Friday, this Friday after you noticed something the matter with the engine you say you notified Mr. Knight. What did you tell Mr. Knight? A. I told Mr. Knight that the governor was not working properly, and I was afraid it would cause trouble and an accident, and the shafting and pulleys would not stand from the speed it was running, I was afraid.

"Q. And what reply did you get to that, if any? A. He said he thought there was no danger, that the governor was worn out, and that they would replace it with a new governor.

"Q. Tell us all that you said to Mr. Knight, and that he said to you on this Friday, the day before the accident. Where did you find him in the first



place? A. I found him over in the engine house at 9 o'clock or 10 o'clock in the forenoon. \* \* \*

"Q. Tell us all that you said to him and he to you, as near as you can recall it. A. Well, I told him that the governor was not working right this morning again, and that I was afraid that it would cause trouble or an accident, and that the shafting and pulleys would not stand the speed when it was turned loose that way, and he said that the governor was worn out, and he would have it thoroughly overhauled or replace it with a new one as soon as possible; that the governor would have to do until they could do that, or had time to repair it. He told me to go on and do the work, that he didn't think there was any danger, and that he thought the pulleys and shafting would stand until they replaced the governor.

"Q. Go ahead, tell us the whole story. Was there anything further? A. No, sir; I think that was all.

"Q. What did you do then? A. I went back to my work.

"Q. You went back to your work? A. Yes, sir."

In the course of the charge to the jury, after referring to the above testimony, I said:

"If you believe that that statement of the plaintiff is free from error, that there is no mistake about it; if you think he is telling the truth, the exact truth, and made no mistake in that respect, then the law is that the obvious risk which up to that moment had been his was lifted from his shoulders, because the man in charge of the business, who was the representative of the defendant company, to whom he was authorized to report, said to him, 'You go back to your work, and I will have the thing attended to.' If this was what took place, and what Mr. Knight said, then the defendant company assumed the risk and lifted it from the plaintiff's shoulders for a reasonable period—that is, for such a period as would be a reasonable time for the defendant to make repairs to the governor—and after the expiration of that reasonable period, if the plaintiff continued to work there without repairs, then the risk was revived as against him, and he assumed it again. You therefore have to settle on this branch of the case the question as to whether a reasonable time for repairing that governor had expired before the accident happened. You remember that the plaintiff says that he reported to Mr. Knight the defect in this governor on Friday morning, I think it was about 9 o'clock, and it appears that the accident happened about 2 or 3 o'clock the next afternoon, which was something over 24 hours afterwards. Ought the governor to have been repaired within that time? Had the reasonable time expired? If so, then no matter if Mr. Knight did make the promise that the plaintiff said he made on Friday morning, the obvious risk had revived as against the plaintiff, and he cannot recover, and you must conclude that he is guilty of contributory negligence."

Abstractly considered, the language of the charge above quoted stated too broadly the rule as to the shifting of the risk of obvious danger from the servant to the master where the servant continues to work with a defective machine after a promise by the master to have it repaired, and a request by the master to the servant to continue with his work. It is true that, even where a master requests his servant to continue his employment with a machine rendered dangerous by reason of its defects, the danger may be so grave and so imminent that no prudent man can continue to work with the machine without being guilty of contributory negligence. But, after reflection, I have reached the conclusion that the language of the charge above quoted, as applied to the facts of the case in hand, is not objectionable. Ordinarily a servant assumes the risks of danger which are obvious to him because of an implied agreement between him and his master. But if those obvious risks are due to defective machinery, and he complains of the

defect to his master, and the master promises to have the defect remedied, and requests him to continue with his work, the implication is that until the promise is executed, or until the time within which it should be executed has expired, the master assumes the risks, unless, indeed, as above stated, the peril is so grave and imminent that the servant cannot continue his work without being guilty of contributory negligence. But, while it is true that the plaintiff in the present case had the day before the accident said to Mr. Knight that he was afraid there would be "trouble or an accident," the engine had run away several times before without injury to any one. The testimony shows that he was charged with the duty of starting and stopping the engine. It also shows, and on this point there is no dispute, that Mr. Knight requested him to continue with his work, and that Mr. Knight did not think there was any danger in his doing so. I think the case is barren of any evidence showing, or tending to show, that the peril to the plaintiff was so great that he was either bound to abandon his work, and thereby, perhaps, cause the operations of the mill to be suspended until some other person could be secured to fill his place, or, in the event of injury to himself, be held remediless because of his contributory negligence. As I view the case, the rule of *Andrecsik v. New Jersey Tube Co.*, 73 N. J. Law, 664, 63 Atl. 719, 4 L. R. A. (N. S.) 913, and *Dowd v. Erie Railroad Co.*, 70 N. J. Law, 451, 57 Atl. 248, was properly applied. I think, also, that there was nothing in the charge, as applied to this case, that can be held to be contrary to *District of Columbia v. McElligott*, 117 U. S. 621, 6 Sup. Ct. 884, 29 L. Ed. 946; *Roccia v. Black Diamond Coal Mining Co.*, 121 Fed. 451, 57 C. C. A. 567; *Cincinnati, etc., v. Robertson*, 139 Fed. 519, 71 C. C. A. 335; or *Crookston Lumber Co. v. Boutin*, 149 Fed. 680, 79 C. C. A. 368.

It is also urged that the court erred in not charging the jury, as requested by the defendant, that:

"If the jury find that the plaintiff put himself in the way of the racing engine with knowledge of its character, the verdict must be for the defendant."

There was no evidence that the plaintiff put himself in the way of the racing engine, unless it be his own testimony. He says that on the afternoon of June 16th he was in the filing room when the engine broke loose and began to run away. His place in that room was about 70 feet distant from the engine, and he could see it from where he stood. He says that as he looked over to the engine he saw Mr. Bonet standing by it, evidently trying to stop it, and that, as Mr. Bonet did not seem to be succeeding in his efforts, he, the plaintiff, ran over to see if he could stop it. Just as he got to the engine, the pulleys overhead burst, and a piece of one of them struck his hand, causing injury which necessitated its amputation. To hold the plaintiff guilty of contributory negligence in such circumstances, it seems to me, would be most unreasonable. He was the man who had charge of the engine, and in his effort to protect property and life he rushed to the engine to stop it. His action was commendable, and in the discharge of a plain duty, and under no circumstances could there be from such conduct the inference of contributory negligence.

The defendant contends, too, that the verdict is excessive. It was for \$6,000. The plaintiff is 30 years old. At the time of the accident he was earning \$125 per month, or \$1,500 a year. In *Dowd v. Erie Railroad Co.*, supra, the plaintiff lost his right hand. He was 38 years old and earned only between \$8 and \$9 a week. The verdict was for \$5,500. The court said:

"We cannot say that the damages are excessive. It is said that \$5,500 paid to a man 38 years old and invested at 5 per cent. would produce an annuity for his life of \$379, an amount about equal to his earnings. It is not contended that \$5,500 would buy an annuity of that amount, and, in view of the prevailing rate of interest, it is hardly likely that the plaintiff could count upon as high a rate as 5 per cent. This calculation leaves out of account any compensation for pain and suffering. The loss of a right hand to a laboring man in the prime of life is a very serious loss, and an award of \$5,500 does not, to say the least, seem so extravagant that the court would be justified in interfering with the verdict."

My conclusion is that the verdict cannot be disturbed on the ground that it is excessive.

Lastly, it is said that the verdict is contrary to the weight of evidence and to the law. I have said all that need be said on the point, as to whether it is contrary to law. As to whether it is contrary to the weight of evidence, I am satisfied that the case was a fair one for the jury, and that the verdict cannot be disturbed on that ground.

But the jurisdiction here depends upon proper diversity of citizenship. It is essential that such citizenship be affirmatively averred. In his declaration the plaintiff avers that he is a "resident of the city of Dickson, in the state of Tennessee," and that the defendant is "a corporation organized under and by virtue of the laws of the state of New Jersey." There is no other averment as to the citizenship of either of the parties. The plaintiff testifies that he lives "at present in Cuba." There is no other proof on the point of his citizenship. The averment that the defendant is "a corporation organized under and by virtue of the laws of the state of New Jersey" has been held to be in legal effect an averment that it is a citizen of the state of New Jersey. *Block v. Standard Distilling & Distributing Co.* (C. C.) 95 Fed. 978. But the averment that the plaintiff is a "resident of the city of Dickson, in the state of Tennessee," is insufficient. An averment of residence is not the equivalent of an averment of citizenship for the purpose of securing jurisdiction in the courts of the United States. *Wolfe v. Hartford Life Insurance Co.*, 148 U. S. 389, 13 Sup. Ct. 602, 37 L. Ed. 493. Although this defect in the declaration was not referred to on the argument of this rule, the court cannot overlook it. In *Horne v. George H. Hammond Co.*, 155 U. S. 393, 15 Sup. Ct. 167, 39 L. Ed. 197, where the allegation was in substance the same as in the declaration in the present suit, the judgment of the trial court was reversed on the sole ground that the transcript of the record did not show that the trial court had jurisdiction of the suit. But I do not think I ought to dismiss the case at present on this ground. I have no reason to believe that proper diversity of citizenship does not in fact exist. Opportunity should be given to the plaintiff to show such diversity, and to amend his declaration if the facts will warrant the amendment. The court has the power, at any stage

of the case, to make inquiry concerning the citizenship of a party. *Hartog v. Memory*, 116 U. S. 590, 6 Sup. Ct. 521, 29 L. Ed. 725. The plaintiff may enter a rule to take depositions on this point, with leave to the defendant to take answering depositions thereto. After such depositions are taken, application may be made to the court, for leave to amend the declaration. Instead of adopting this course, however, if the defendant shall, after inquiry, be satisfied that such diversity of citizenship exists as gives jurisdiction to the court, the declaration may be amended on the defendant's consent, and thus save the time and expense of taking depositions.

The entry of judgment upon the verdict must be postponed until after the question concerning the amendment of the declaration shall have been decided.

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In re H. L. EVANS & CO.

(District Court, D. Delaware. December 13, 1907.)

No. 143.

**BANKRUPTCY—EXEMPTIONS—PARTNERSHIP—WEARING APPAREL.**

The existing laws of Delaware (volume 14, p. 652, c. 562, § 1) providing that "every person residing within this state shall have exempt from execution or attachment process \* \* \* all the wearing apparel of the debtor and his family," *held*, that the two members of a bankrupt firm having their domicile in Delaware were entitled to exemptions in accordance with the laws of that state, and that the words "all the wearing apparel," being without restriction or qualification, included, in the case of one of the partners, a gold watch, a watch chain, a set of cuff links, two watch fobs, a gold ring, a gold ring with diamond setting, a gold ring with sapphire setting, a pearl scarf pin, a ruby scarf pin, and a set of shirt studs, of the aggregate value of \$444.50, and in the case of the other a gold watch, a chain and cutter, a watch fob, a scarf pin, two sets of cuff links, a set of shirt studs, and a set of cuff buttons, of the aggregate value of \$110.50.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 659, 678.]

(Syllabus by the Court.)

In Bankruptcy. Petition for review of order of referee.

C. L. Ward and David J. Reinhardt, for Thomas F. Bayard.  
Ward & Gray and John F. Neary, for bankrupt.

BRADFORD, District Judge. Harry L. Evans and John H. Evans, members of the bankrupt firm of H. L. Evans & Co., presented their petition to the referee, setting forth that the trustee in bankruptcy held possession of certain personal effects alleged to be wearing apparel belonging to them, and praying, in effect, that the same be delivered to them as exempt from the claims of creditors under the operation of the bankruptcy act. All the facts alleged in the petition are admitted by the trustee. Part of the property of which delivery was sought belonged to the estate of Harry L. Evans, and consisted of a gold watch, a watch chain, a set of cuff links, two watch fobs, a gold ring, a gold ring with diamond setting, a gold ring with sapphire setting, a pearl scarf pin, a ruby scarf pin, and a set of shirt studs, appraised in the

aggregate at \$444.50, and the rest of the property of which delivery was sought belonged to the estate of John H. Evans, and consisted of a gold watch, a chain and cutter, a watch fob, a match safe, a scarf pin, two sets of cuff links, a set of shirt studs, and a set of cuff buttons, appraised in the aggregate at \$110.50. The referee denied the prayer of the petition, save as to the set of cuff links and the set of shirt studs claimed by Harry L. Evans, and the two sets of cuff links, the set of shirt studs, and the set of cuff buttons claimed by John H. Evans. Whereupon an order of review was applied for and obtained by the petitioners, and the matter is now before this court for determination.

Section 6 of the bankruptcy act of July 1, 1898 (30 Stat. 548, c. 541 [U. S. Comp. St. 1901, p. 3424]), provides that the act "shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months or the greater portion thereof immediately preceding the filing of the petition." By reason of the domicile of both of the members of the bankrupt firm their right to exemption must be determined with reference to the laws of Delaware. Section 1, c. 562, p. 652, 14 Del. Laws, provides that:

"Every person residing within this State shall have exempt from execution or attachment process \* \* \* all the wearing apparel of the debtor and his family."

Theretofores the exemption as far as it related to apparel was restricted to "necessary wearing apparel." Section 2, c. 111, p. 828, Rev. Code. The point to be decided is whether the words "all the wearing apparel of the debtor and his family" as they occur in the exemption law in force now and at the time of the filing of the petition in bankruptcy, are, when legitimately construed or interpreted, sufficiently comprehensive to include all or any of the articles which were disallowed to the bankrupts in the order now under review. There is much conflict in the cases on the subject, and frequently, even where decisions are harmonious, the grounds upon which they are based are variant and unsatisfactory. Further, the cases disclose material differences in phraseology in the exemption acts which have received judicial construction. It is well settled that statutes exempting portions of a debtor's property from liability to be applied to his debts should receive a liberal construction. *O'Gorman v. Fink*, 57 Wis. 649, 15 N. W. 771, 46 Am. Rep. 58; *Fink v. O'Neil*, 106 U. S. 272, 1 Sup. Ct. 325, 27 L. Ed. 196; *Richardson v. Buswell*, 10 Metc. (Mass.) 506, 43 Am. Dec. 450; *In re Hindman*, 104 Fed. 331, 43 C. C. A. 558; *Kuntz v. Kinney*, 33 Wis. 510; *Stewart v. Brown*, 37 N. Y. 350, 93 Am. Dec. 578; *Bevan v. Hayden*, 13 Iowa, 122; *Bashinski v. Talbott*, 119 Fed. 337, 56 C. C. A. 241; *Good v. Fogg*, 61 Ill. 449, 14 Am. Rep. 71.

But, notwithstanding this canon of construction, it is obvious that the statutory exemption in Delaware of wearing apparel cannot in all cases have full operation according to the literal import of its terms. "All the wearing apparel of the debtor and his family," if the words

be taken literally, would apply as well to a stock of wearing apparel owned and held by him for sale as to wearing apparel personally worn or to be worn by him. The avoidance of such an absurd result requires that the generality of the language of this express statutory provision be restricted to all wearing apparel belonging to the debtor and worn or intended to be worn by him and his family; but with respect to all such apparel so worn or intended to be worn the statute must receive a liberal construction. Unlike the pre-existing law restricting the exemption of wearing apparel to such as was necessary, it does not expressly or by implication limit either the value or amount or the character of the wearing apparel intended to be exempt. It covers all wearing apparel of the debtor worn or intended to be worn by him and his family. While the answer of the trustee concedes the truth of all allegations of fact in the petition of the bankrupts, there is no express admission, nor is there evidence to show, that the articles claimed to be exempt were, in fact, worn or intended to be worn by them or their families. But the case has been argued on both sides on the assumption that the articles in question were so worn or intended to be worn, and for the purpose of reaching a decision I shall treat the matter assumed as a fact. If on this point I be in error it will be corrected on proper application to the court. The Delaware statute now in force, unlike those of many of her sister states, contains, as above mentioned, no limitation of the value or amount of the exempt property. No sum of money is specified as the maximum value of the exempt apparel, nor is the term "necessary" or any other expression employed which by implication might carry with it a restriction as to its amount or character. Therefore the value or amount of the articles in any given case falling within the class of property designated in the exemption clause is wholly irrelevant to the question whether they are or are not exempt, save in so far as such value or amount may be indicative of mala fides on the part of the debtor or an intent to defraud his creditors. If the wearing apparel claimed as exempt be so excessive in amount or value as, due regard being had to the circumstances of the particular case, including condition and style of living, to create a conviction that the demand is made for the purpose of defrauding creditors, such claim will be disallowed in whole or in part by reason of the fraud. Nor is it to be tolerated that one should invest inordinately large sums of money in wearing apparel with an intent to hinder and defraud his creditors, and effectuate his wrongful purpose by resorting to the expedient of wearing or intending to wear it, in whole or in part. But fraud must be strictly proved; and here no fraud is charged against either of the bankrupts with respect to the exemption claimed. Nor is the value of the articles they seek to recover such as to show a wrongful intent against creditors; the appraised value of the articles by the admission of counsel being in one case \$444.50, and in the other only \$110.50, and by the finding of the referee being, respectively, \$322 and \$99.10. If it be said that it is unjust to creditors that the bankrupts should as against them retain property of such value, the answer is to be found in the consideration that the state statute contains no limitation, and the courts of the United States in administering the bank-

ruptcy act are bound by state statutes of exemption. If the amount of an exemption to a debtor be unwise, the remedy should be found in state legislation, and cannot be supplied by the courts in the absence of such legislation. The inquiry is thus presented whether the articles claimed by the petitioners as exempt constitute wearing apparel within the meaning of the Delaware statute.

It is clear on the authorities that wearing apparel may include articles worn on the person, other than hats, shoes, and what is commonly understood by the term "clothing." It would, however, be difficult, if not impossible by precise definition to furnish an unfailing test to distinguish under all circumstances between what things would and what things would not constitute wearing apparel within the intent of such an exemption law as that of Delaware. But, while in the decision in any case of the question whether given articles are wearing apparel due regard should be had to the particular circumstances and blind reliance should not be placed on any rigid rule of supposed universal application, there are nevertheless considerations of a general character which will shed light on the subject. Articles intended and adapted to be worn on the person and necessary to or promotive of protection of the person against the elements, or personal comfort or decency, or serving to ornament the person, may be wearing apparel; for the principal, if not only, objects to be attained through such apparel are such protection, comfort, decency, and ornamentation. If the articles be such as are customarily worn and conducive to the above ends, or any of them, it is, on principle, wholly unimportant, under an exemption act like that of Delaware, whether their texture or material be silk, wool, cotton, or linen, or gold, silver, brass, or iron, or what their form and size may be, or whether they are intended to be worn next to the skin or on the surface of other articles of apparel, or on what portion or portions of the person they are to be worn, or whether, if for ornamentation, they are intended to be continuously displayed on the person during all the time they are worn. Such a statutory exemption. I have no doubt, includes badges, medals, and, generally, insignia and regalia intended and adapted to be worn on the person indicative of rank, office, title, honor, or distinction, though not useful in the sense of conducing to bodily comfort or decency, but only ornamental. The confusion in the cases undoubtedly has arisen from a failure to distinguish between "wearing apparel" and "necessary wearing apparel." The latter phrase may well exclude articles which answer no useful purpose, but are merely ornamental. So, while including such articles of jewelry as are usefully employed in connecting or fastening together parts of one's clothing, it may exclude jewelry not so used. So, further, it may operate to impose a reasonable limit upon the amount or value of the wearing apparel to be exempted by excluding so much as is not necessary.

Purely ornamental articles for the person properly can be excluded solely because they are not necessary within the meaning of the above phrase. But the phrase "all the wearing apparel" does not carry with it or permit any such restriction. Occurring in a statutory exemption, it includes, among other things, articles usually or customarily worn

on the person solely for ornament. The fact that they are worn and adapted to be worn for that purpose imparts to them the character of wearing apparel; for ornamentation of the person is one of the legitimate uses and ends of such apparel. The buttons on the back or sleeves of a coat are worn solely as ornaments, answering no useful end whatsoever. Yet they are wearing apparel, whether consisting of cloth, bone, gutta-percha, composition, mother of pearl, brass, silver, or gold. They may or may not be inseparably attached to the garment they adorn. If buttons of mother of pearl or other delicate or precious material be so adjusted to the back or sleeves of a coat as to be removable in order to avoid injury when the garment is pressed or cleaned, they do not by such removability or removal cease to be part and parcel of the wearing apparel, although intended and used purely for adornment. A thin lace collar on a woman's neck may not be necessary to decency or promotive of physical comfort. It may be worn solely for ornamentation; yet undoubtedly it is part of her wearing apparel. If, instead of a lace collar, a band or necklace of pearls is worn for precisely the same purpose, it is equally wearing apparel, unless a distinction is to be recognized based wholly upon a difference of material. But such a distinction is clearly unsound. Similar considerations are applicable to the substitution of a jeweled bracelet for a purely ornamental wristband or of a brooch for a bow of ribbon on the breast. So, in the case of men, there can be no doubt that gold-fringed epaulets, or shirt studs, stick pins, cravat rings, cuff buttons, watch chains, fob chains, or ribbons, cigar cutters attached to ribbons or chains, and worn as charms, and other articles customarily worn on or in connection with the clothing by way of ornamentation, whether conducive to physical comfort or other useful ends or not, may properly be treated as attire or wearing apparel under the general language of the Delaware statute. Nor am I able to distinguish in principle between kid gloves worn merely for the sake of appearances and metal rings worn on the fingers for the same purpose, or between such rings so worn and ornaments of gold, silver, and precious stones displayed on other parts of the person. The fact that articles worn on the person solely for ornamentation may be detached from or unconnected with the clothing or other articles of attire cannot exclude them from the category of wearing apparel. A small triangular piece of lace, or a bow of ribbon, worn on a woman's head for ornamentation alone, is none the less wearing apparel because unconnected with other parts of her dress. A narrow velvet ribbon worn around her throat above and separate from a necklace of jewels or precious metal, and equally unconnected with her clothing, and, like the necklace, worn only for display, is undoubtedly wearing apparel, and as such would be exempt under the Delaware statute. The necklace is equally wearing apparel, and one is irresistibly led to the conclusion that a bracelet of jewels or precious metal and a finger ring of gold or precious stones equally come within the same category. It is impossible to discriminate between the necklace, the bracelet, and the finger ring. They are all worn solely as ornaments, and are unconnected with other portions of the dress or attire. If finger rings and other articles worn by women solely for display and



unconnected with their clothing be wearing apparel, I can perceive no reason to justify the court in holding that finger rings and other articles worn by men for the same purpose and so unconnected are not wearing apparel, within the general unrestrained language of the statutory exemption in Delaware. The notion that articles usually worn for ornament only must serve to connect the clothing of the person in order to be wearing apparel has no sound or reasonable basis. It certainly is not warranted by the express terms of the statute. Nor is there any legitimate implication or presumption that the phrase "all the wearing apparel" was used in such a restricted sense.

To the contention that it cannot be supposed that the Legislature intended that a debtor should continue to hold free from the claims of his creditors jewelry and precious stones of great value unconnected with his clothing, and serving no useful purpose, there are several answers. First. It is wholly immaterial, so far as hardship to creditors is concerned, whether a ring of great value be worn on the finger, or around the ends of a necktie to hold them together, or whether gold or precious stones are contained in shirt studs or the removable buttons of a white vest, or are worn on the hand. Second. The contention essentially involves the wholly fallacious idea that the relative extent of surface of the person covered by the ornament or the garment to which it is attached or connected may furnish the test whether the article is or is not wearing apparel. Third. The Legislature has not deemed it proper either to establish a maximum value for exempt wearing apparel or to require that such apparel should be "necessary." Finally, as before stated in substance, in case of fraud on the part of the debtor toward his creditors with respect to wearing apparel, the claim of exemption on a proper showing may be disallowed in whole or in part. It is admitted in this case on the part of the trustee in bankruptcy that cuff links, cuff buttons, and shirt studs properly may be held to be wearing apparel under the Delaware statute, "being used for the purpose of holding together the breast and cuffs of a shirt just as ordinary buttons are used." But a distinction is drawn between such links, buttons, and studs on the one hand, and finger rings and scarf pins on the other; the latter being "purely and simply articles of ornament." This distinction is utterly unsound when attempted in a case governed by such an exemption statute as that in question. Further, it is difficult to perceive how a scarf pin used not only for ornament, but also to fasten together and keep in proper form a scarf or cravat, which unquestionably is an article of wearing apparel, can be distinguished in principle from cuff links or buttons and shirt studs. Again, the distinction is based on an assumption, the falsity of which has already been shown, that under the Delaware statute articles customarily worn on the person solely for ornament cannot constitute wearing apparel. Further, the attempted distinction leads to a palpable absurdity. If only such studs as are used to fasten together the bosom of a shirt opening in front can be considered as wearing apparel, what shall be said of the same studs if used for ornament only on the bosom of a shirt not opening in front? for such studs frequently are so made as to be capable of use indifferently in both kinds of shirts.

Are precisely similar shirt studs to be held wearing apparel if owned by a debtor who wears shirts opening in front, and not wearing apparel in the case of one whose shirts open only behind? And, if the debtor wears shirts of both kinds, how is the question to be determined? It is unnecessary further to pursue this *reductio ab absurdum*.

Articles of ornament may or may not be useful, and it is not in the least necessary under the broad language of the Delaware act that they should serve a useful end in order to be wearing apparel. If usually or customarily worn on the person for display or adornment they are exempt. If this involves hardship to creditors, the remedy is with the Legislature, and not the courts. Judicial legislation is to be shunned as juridical disease. Undoubtedly there are many articles of a useful nature frequently, if not customarily, worn about the person which cannot in any sense be deemed wearing apparel, such, for instance, as penknives, match safes, pistols, pedometers, and other implements carried in pockets or otherwise concealed. Such articles are not required by considerations of decency, nor are they necessary to ornament the person or protect it against the elements, or to serve any other purpose usually or customarily associated with one's attire or apparel. But a watch, whether worn on a chain as a charm or in a fob, cannot properly be treated as a mere instrument or implement in contradistinction to apparel. Watches are customarily worn by those who can afford to acquire them, and, wholly aside from their value as pieces of time-keeping mechanism, usually tend, either constantly when displayed as charms, or intermittently, if carried in a fob, to adorn or ornament the person. Those who are in the habit of wearing watches do not feel completely dressed without them. I am satisfied that they fall within the exemption of the Delaware statute.

This court will not attempt to thread the labyrinth of confusion and unreason presented by many of the decisions and dicta relating to the exemption of wearing apparel. To do so is as unnecessary as it would be tedious. A few cases and dicta, however, will be referred to which strongly support the views above expressed. In *Sellers v. Bell*, 94 Fed. 801, 36 C. C. A. 502, it was held by the Circuit Court of Appeals for the Fifth circuit that under an Alabama statute exempting from execution process "all necessary and proper wearing apparel" of the debtor a gold watch was included in the exemption allowable in bankruptcy; the court stating:

"We have not found in the statutes of Alabama or in the decisions of the Supreme Court of that state a definition of the phrase 'wearing apparel,' as it is used in this section. The only limitation which the section puts upon the meaning of the words is that the apparel shall be necessary and proper for the wearer or his family. This includes what is merely proper, as well as what is necessary. And, subject to this qualification alone, there is no limitation put on the quantity, quality, or value of the property which the words used describe. \* \* \* The phrase 'wearing apparel,' as used in exemption laws, has its popular sense, and includes all the articles of dress generally worn by persons in the calling and condition of life and in the locality of the residence of the person claiming the exemption. It includes whatever is necessary to a decent appearance and to protection against exposure to the changes of weather, and also what is reasonably proper and customary in the way of ornament."

In the case of *In re Jones* (D. C.) 97 Fed. 773, the District Court for the Eastern District of Wisconsin held that under the statute of that state exempting "all wearing apparel of the debtor" the bankrupt should be allowed to retain his gold watch and chain and also a Masonic uniform worn only on special occasions; Judge Seaman saying:

"The bankruptcy act adopts the exemptions of the state statute, which includes their construction by the Supreme Court of the state, and the rulings of that court are uniform in favor of the utmost liberality for such interpretation. *Heath v. Keyes*, 35 Wis. 668, 672; *Cunningham v. Brictson*, 101 Wis. 378, 383, 77 N. W. 740. In the well-considered case of *In re Steele*, 2 Flip. 324, Fed. Cas. No. 13,346, it is held that a watch usually carried upon the person of the debtor constitutes wearing apparel within the exemption statute; and this view is approved in *Stewart v. McClung*, 12 Or. 431, 8 Pac. 447, 53 Am. Rep. 374, and in *Brown v. Edmonds*, 5 S. D. 508, 59 N. W. 731. Without attempting to review the authorities one way and the other upon this point, I am of opinion that such construction is in accord with the Wisconsin doctrine, and should be adopted here. \* \* \* In reference to the 'Masonic uniform,' it appears to be owned for occasional wearing apparel, and the statute imposes no requirement of 'ordinary and usual' service. If so, held in good faith, the exemption applies."

In the case of *In re Steele*, 2 Flip. 324, Fed. Cas. No. 13,346, the District Court for the Western District of Tennessee held that under the exemption provided by the bankruptcy act of 1867 a gold watch could be retained by the bankrupt. Judge Hammond said:

"It would not be doing any great violence to the meaning of the term 'wearing apparel,' as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word 'apparel,' as given by lexicographers, is not confined to clothing. The idea of ornamentation seems to be a rather prominent element in the word, and it is not improper to say that a man 'wears' a watch or 'wears' a cane."

In *McClung v. Stewart*, 12 Or. 431, 8 Pac. 447, the Supreme Court of Wisconsin had under consideration a statute of that state exempting "necessary" wearing apparel to the value of \$100; Lord, J., after reviewing the authorities, saying:

"Upon the whole, our own judgment inclines us to the opinion that the phrase 'necessary wearing apparel,' as used in our statute, may include in it a watch of moderate value without doing violence to its meaning. We are not, therefore, prepared to say that a watch of moderate value is not a necessary article of wearing apparel, and as such exempt, when it is made to appear affirmatively that the watch and other articles of apparel selected or reserved do not exceed the amount limited by the statute."

The court held in that case that a watch was not exempt, because it did not appear that the property so claimed was not in excess of the limitation of \$100, but clearly recognized that a watch was included in the category of wearing apparel. In the case of *In re Smith* (D. C.) 96 Fed. 832, the District Court for the Western District of Texas, while leaning toward the untenable theory that an article "worn as a mere ornament, and intended simply for display, without serving a useful purpose, \* \* \* would scarcely be regarded as exempt," held that under a statute of that state exempting all "wearing apparel" of the debtor a diamond stud worth \$250 used by a bankrupt for the purpose of fastening his shirt could be retained by him. In *Mack v. Parks*, 8 Gray (Mass.) 517, 69 Am. Dec. 267, the Supreme

Court of Massachusetts held that a watch on a debtor's person was not liable to attachment; Judge Bigelow saying:

"The watch, at the time it was taken by the defendant, was in the plaintiff's actual possession and use, worn as part of his attire or apparel."

Reference is made to this case, not because it is in point, but as disclosing the opinion of the court that a watch may be worn as part of one's attire or apparel. In *Brown v. Edmonds*, 8 S. D. 271, 66 N. W. 310, 59 Am. St. Rep. 762, the Supreme Court of South Dakota held that under a statute of that state exempting "all wearing apparel and clothing of the debtor and his family" a watch and chain carried by him should be regarded as wearing apparel; the court saying:

"The exemption is not limited in value, nor by the word 'necessary,' found in most statutes. \* \* \* While the question is not free from difficulty, and one upon which courts may easily differ, we are inclined to hold that defendant's watch and chain were absolutely exempt as wearing apparel."

Chief Justice Redfield, it seems to me, expressed a just conception of wearing apparel in his dissenting opinion in *Sawyer v. Sawyer*, 28 Vt. 249, where the Supreme Court of Vermont had under consideration a statute providing that upon the death of a husband his widow should be allowed all her "articles of apparel and ornament" and the "wearing apparel" of her husband. A decedent left at his death, among other things, a sword, a sword belt, and epaulets, a watch and watch key, a gold watch chain, seals, a finger ring, and a breast or bosom pin. The question related to the distribution of these articles as between the widow and next of kin. The court by a majority decided that the widow was entitled only to the epaulets and bosom pin, as constituting wearing apparel. The Chief Justice in dissenting said:

"I could not therefore entertain any doubt in regard to the military dress, epaulets, and sword of the deceased. It was strictly dress, and nothing else. The sword was as strictly dress as the epaulets, and that as much as the coat. It was none of it worn exclusively for covering or for comfort, but chiefly for ornament. So, too, of the pin and ring. They are as strictly dress as one's sleeve buttons, or, indeed, as the buttons upon the back of the coat, or as anything, indeed, which is not strictly indispensable. But the watch, perhaps, is more questionable. And still it seems to me that a watch which one wears, and a chain and seals are dress and apparel, and, as such, should go to the widow."

In *One Pearl Chain v. United States*, 123 Fed. 371, 59 C. C. A. 499, the Circuit Court of Appeals for the Second Circuit held that Mrs. Dulles, a passenger on an incoming vessel from foreign parts, in failing to mention a pearl necklace worn on her neck in her declaration of dutiable articles as a pearl necklace, or as jewelry, understanding that it was included in the declaration as "wearing apparel," did not violate section 3082, U. S. Rev. St. [U. S. Comp. St. 1901, p. 2014], or subject the necklace to forfeiture. The blank form annexed to the baggage declaration and entry contained under or opposite the heading "wearing apparel" an enumeration of articles, namely, "Dresses, Wraps, Bonnets, Gloves, Underwear, Jewelry, Coats, Trousers, Waistcoats." Judge Lacombe, in delivering the opinion of the court, said:

"She testified that she 'certainly understood' that the phrase 'wearing apparel' covered her jewelry, and for that reason did not then specifically mention

it. As ordinarily used, that phrase is hardly so comprehensive. Nevertheless jewelry may fairly be called apparel, and it is worn on the person. If one chooses to classify jewelry as one variety of 'wearing apparel,' it cannot be held that he is making an improper and indefensible use of the English language. At any rate, the claimant's idea of classification appears to have been entirely in accord with that of the customs officers; for, in the schedule above set forth, jewelry appears as one of nine varieties of wearing apparel, being grouped between 'underwear' and 'coats.'

In *United States v. One Pearl Chain* (D. C.) 139 Fed. 510, which was a proceeding for the forfeiture of the same chain referred to in the last-mentioned case, a verdict was directed for the claimant; Judge Holt saying:

"Now, the court in this case held that Mrs. Dulles, having stated that she had wearing apparel the value of which was not known, had made a sufficient declaration of the fact that she was bringing in jewelry. She appears to have brought in other property, the value of which she computed under this declaration after they arrived at the dock. It is not claimed that that property was forfeited because she had only described it as 'wearing apparel.' It is claimed that this is forfeited, but it is covered by the same general description. Counsel criticises the term 'wearing apparel,' and the court says, in this opinion, that it is not an expression which would be usually used to designate jewelry; but at the same time the court says that jewelry is included in the list, because described as wearing apparel; and it seems to me, when you consider it, it is nothing but wearing apparel. It is apparel, and it is worn, and the real function of it is to be worn as apparel. It seems to me that a necklace of this kind is wearing apparel, and nothing else."

The judgment in the above case was on appeal affirmed in *United States v. One Pearl Chain*, 139 Fed. 513, 71 C. C. A. 500. This is not the case of a bequest of "wearing apparel," or of an exemption of "necessary" wearing apparel, or of an exemption to a specified maximum amount or value. Materially different considerations are applicable to such cases. Here the exemption is of "all the wearing apparel" without qualification or limitation. Such being the statute, I am satisfied that the order of the referee must be modified in such manner as to allow to the bankrupts all of the articles claimed by them except the match safe belonging to the estate of John H. Evans.

Let a decree or order in accordance with this opinion be prepared and submitted.

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#### UNITED STATES v. HOYT et al.

(Circuit Court, E. D. Washington, E. D. September 20, 1907.)

No. 1,181.

#### 1. UNITED STATES—INDIAN COMMISSIONS—EMPLOYMENT—CONTRACT FOR SERVICES—CONSTRUCTION.

Defendant was appointed by the Secretary of the Interior as the disbursing member of a board of three commissioners to negotiate Indian treaties at \$8 per day and traveling expenses, exclusive of subsistence, to continue at the pleasure of the Secretary of the Interior for the time being. Defendant was directed to proceed from his home in Nebraska to the agency in Washington without unnecessary delay, his salary to begin on the day of his departure from home. The instructions given the board required a study of the special needs of the Indians in each case, and the formation of agreements which would best promote their welfare and

weekly reports. Defendant paid himself and the other commissioners at the rate of \$8 a day for the time that they were under instructions, or were holding themselves in readiness to obey instructions on vouchers reciting actual employment during such period. These vouchers were uniformly accepted without question, except for periods during which the commissioners were absent from their post on leave. *Held* that, under the rule of contemporaneous construction, the phrase "actually employed" should not be construed as equivalent to "actively employed," and hence the salary was not limited to days on which the commissioners were actually engaged in the performance of active duty.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 172.]

## 2. SAME—ACCOUNTING.

Where a contract for the employment of Indian commissioners provided for a salary of \$8 per day and traveling expenses, exclusive of subsistence during the time the commissioners were actually engaged in the performance of their duties, the disbursing officer of the commission was bound to account to the government for charges paid on the account of one commissioner for subsistence and for salary paid to such commissioner during leave of absence from the field, but which was returned to such disbursing officer by the commissioner's heirs after his death.

A. G. Avery, for the United States.

Happy & Hindman and Fred Miller, for defendants.

DIETRICH, District Judge. This action is brought by the United States to recover from Charles G. Hoyt as principal, and his codefendant as surety, \$2,916.50 and interest, which it is claimed the defendant Hoyt has failed to account for and pay over, as was his duty to do. Hoyt was appointed by the Secretary of the Interior as one of three commissioners to negotiate treaties with the Crow, Flathead, and other Indian tribes, under the provisions of an act of June 10, 1896 (29 Stat. 341, c. 398) and of June 6, 1900 (31 Stat. 302, c. 785). He was made the disbursing agent of the commission, and was authorized to issue checks for the purpose of paying the compensation of his associates and of himself and other expenses. Some of his disbursements are claimed to have been unauthorized, and upon that ground plaintiff seeks to recover; and the controlling question is whether or not the commissioners were entitled to compensation for every day they were away from home acting or holding themselves in readiness to act under instructions during the period elapsing between the time they entered upon the discharge of their duties and the date of the termination of their commissions, or whether they were entitled to compensation only for the days upon which they were actually engaged in the performance of active duty. Hoyt from time to time paid himself and his associates at the rate of \$8 per day for each day elapsing during the existence of their commissions, and the amount in dispute is the aggregate of such payments for days upon which it is claimed by the government no services were rendered.

Under the provisions of the acts referred to, the Secretary of the Interior was authorized to appoint these commissioners, and to fix their compensation. Hoyt's commission is dated June 25, 1900, and by it Hoyt is authorized to act "at \$8.00 per diem and actual and necessary traveling expenses, exclusive of subsistence, to take effect July 1, 1900, or as soon thereafter as he shall file the oath of office and enter on duty,

and empower him to execute and fulfill the duties of that office according to law; and to hold the said office with all the rights and emoluments thereunto lawfully appertaining, to him, the said Charles G. Hoyt, during the pleasure of the Secretary of the Interior for the time being. Reinstatement." This commission, which is signed by the Secretary of the Interior, was transmitted to Hoyt by the Commissioner of Indian Affairs by letter dated July 14, 1900, in which the commissioner states that the compensation of the defendant is to be "a salary of \$8 per day and actual and necessary traveling expenses, exclusive of subsistence, the same to take effect upon filing of the oath of office and entering upon duty." There was inclosed in this letter, together with the commission, what is referred to as a copy of a draft of instructions for the guidance of the members of commission, the instructions being dated July 6, 1900, and to which reference will later be made. In this letter of July 14th the commissioner directs Hoyt to proceed from his home (which was at Beatrice, Neb.) to the Yakima agency (in the state of Washington), and to "take the oath of office and proceed to your field of duty without unnecessary delay. Your salary will be regarded as having begun on the day when you depart from your home for the Yakima agency, provided the oath of office shall have been taken and mailed to this office." The "instructions" of July 6th, above referred to, were in the form of a letter addressed to the three commissioners jointly—James H. McNeely at Evansville, Ind., Charles G. Hoyt at Beatrice, Neb., and B. J. McIntire at Kalispell, Mont. It is signed by W. A. Jones, Commissioner of Indian Affairs, and bears indorsement of the approval of the Secretary of the Interior dated July 9, 1900. After reviewing in detail previous negotiations with certain Indian tribes, and commenting upon existing conditions, certain specific and also general instructions are given to the commissioners for their guidance. In the closing paragraph is contained the language upon which the plaintiff principally relies for a recovery in this case. It is:

"You will be allowed compensation at the rate of \$8 per day while actually engaged in the performance of your duties; also actual necessary traveling expenses. Your salaries will begin on the date of taking the oath of office and entering upon discharge of your duties."

Abstractly, and considered apart from the circumstances disclosed by the record, the language should be construed in support of the claim of the government. But, on behalf of the defendant, it is contended that viewing it in the light of other portions of the general letter of instructions, and of the phraseology of the commission and the letter of July 14th, and of the subsequent action and acquiescence of the officers of the Department of the Interior, a literal construction should not be adopted, but it should be concluded that compensation at the rate of \$8 a day was contemplated for the entire time the commissioners were away from home, and were subject to the instructions of the department, and held themselves in readiness to obey instructions, whether they were actively or only passively engaged. From the general letter of instructions of July 6th, it appears that the performance of their official duties required of the commissioners the exercise of intelligence and discretion, and that no little responsibility was assumed in carrying out their instructions. Among other things the letter says:

"The most important part of your duties will be to study the special needs of the Indians in each case, in order that such agreements may be formulated as will best tend to promote their welfare."

And there follows many suggestions to be considered. The injunction is given that:

"The greatest care should be taken that the same (any agreements made) are perfect in every detail, including spelling, punctuation, etc., and that they clearly express the objects and purposes intended to be attained."

Commissioners are instructed first to take up the work with the Yakimas, and then "upon completion of your work on the Yakima reservation, or in case no agreement can be concluded, you will advise the office promptly and request further instructions. You will thereupon be directed to proceed to the Flathead Reservation and take up the work there." They are required to send all correspondence to the Commissioner of Indian Affairs, and to submit promptly at the close of each week a report showing the state of the work, the progress made, what was accomplished during the week passed, etc. It appears that the commissioners qualified and entered upon the discharge of their duties pursuant to these instructions, and were paid from time to time; no question now being made of the propriety of the payments covering the earlier period of their service.

From testimony of the defendant Hoyt, and, indeed, from his commission itself, it appears that he had been a member of a former commission engaged in the same kind of work, and he was made the disbursing agent because of his experience while upon the other commission. It further appears that during the existence of the former commission, while he was at Washington, at the suggestion of some officer of the Treasury Department, and with the approbation of the Commissioner of Indian Affairs, he was orally instructed that in paying the compensation of members of the commission a voucher should be taken indorsed with the certification of the payee and approved by the chairman of the commission, the certification being to the effect "that during the period covered by the within voucher I have been actually employed under the direction of the Secretary of the Interior in the duties enjoined by the statutes pertaining to my office"; and the defendant testified that, when he was appointed disbursing agent of this commission, he adopted the practice thus imposed upon and followed by the preceding commission, and as a matter of fact he did not wait until the end of the quarter to make payments of salaries, but paid in installments; usually at the end of the month, and then at the end of the quarter took a voucher with certification and approval as above indicated. These vouchers were sent by him to the Commissioner of Indian Affairs, and were audited and approved by the Interior Department and passed to the Treasury Department. There is no pretension on the part of the defendant that the payments which were made either to himself or to his associates were confined to the days upon which they were actually, and, in fact, rendering active service. Apparently from the beginning they proceeded upon the theory that they were entitled to compensation during all the time they were under instructions or were holding themselves in readiness to obey instructions. So far as the defendant is concerned, he paid him-



self at the rate of \$8 per day for the entire time from July, 1900, until June 30, 1902. The letter from the Secretary of the Interior to him advising him of the termination of his employment is as follows:

"No appropriation having been made for continuing the work of the commission to negotiate with the Crow, Flathead, and other Indians, since that made by the act of Congress approved March 31, 1901, 31 Stat. 104, which was for the fiscal year ending June 30, 1902, your services as one of said commissioners will be recorded as terminated on the 30th ultimo."

This is the first and only instruction he received relieving him from duty, and the language is significant. It further appears that he remained in the West during all of this period, making his headquarters at Spokane, in the state of Washington, and away from his home in Beatrice, Neb., and engaged in no other employment, but held himself subject to instructions from the department. For a large portion of the time he was not rendering any active service except to send in his weekly and other reports, and to answer a few letters; and it would be impossible from the record to determine with any degree of accuracy upon what days he rendered any services at all, or for what portion of the time he should be paid, if he is to receive compensation only for the days upon which he was actively engaged in the performance of duty. It appears that his vouchers were passed, his accounts were approved, and he was not advised that there was any question of the propriety of the payments which he made to himself on account of compensation until after he had been informed of the termination of his commission. With the exception of the certificate indorsed upon the vouchers, as above indicated, there is nothing in the record upon which a claim can be made that he misrepresented the facts to or concealed the facts from the department, and by his reports from time to time, certain of which were made weekly, the department was advised of his whereabouts and of existing conditions. It was well known that he was many miles away from his home. The record discloses no information or intimation from the department that he was relieved from duty, or that he was at liberty to return to his home or to give attention to his private affairs. Early in 1902 a question arose as to the propriety of certain disbursements which had been made by the defendant to his associate commissioner, McIntire, and the department apparently concluded that inasmuch as McIntire, at a time when he was directed to perform a certain duty, procured leave of absence on account of the illness of his wife, and after his wife had recovered returned to his home at Kalispell and rendered no further service, but remained at his home and was not reassigned, he was not entitled to compensation subsequent to the time he was granted leave of absence. Apparently the Secretary of the Interior was in doubt upon the point, for in his letter of August 6, 1902, it is said that upon a reconsideration the department withdraws its objections, and Hoyt should be allowed credit for the payments which he had made to McIntire. Assuming, however, that the objection was withdrawn only so far as Hoyt's responsibility was concerned, still it is clear from the letter of Secretary Hitchcock, dated February 10, 1902, that the conclusion that McIntire was not entitled to compensation was based solely upon the facts and conditions above stated, and it is reasonably to be inferred

that at this time—that is, when McIntire's compensation was being scrutinized—the conduct of the other commissioners and the nature of the services which they were rendering, and the fact that they were drawing pay for the full time, must have challenged the attention of the Secretary of the Interior. And yet, notwithstanding, it appears that Hoyt's vouchers disclosing the payments to himself and McNeely were approved by the Acting Secretary of the Interior, the vouchers for the quarter ending March 31, 1902, by letter of June 3, 1902, and the defendant Hoyt's voucher for the quarter ending June 30, 1902, by letter dated July 31, 1902, 30 days after the termination of the defendant's commission. And in the letter of approval by the Acting Secretary, dated June 3d, it is said:

“Although commissioner McNeely left Muskogee for Evansville, Indiana [his home], on March 8, his voucher is allowed in full for the whole quarter; it appearing that he was sick and died at his home April 6th last.”

Under all of the circumstances, I cannot escape the conclusion that both the defendant and the department acted upon the theory that while the defendant was acting under instructions, and was away from home holding himself in readiness for active service, he was entitled to compensation, and that, in the contemplation of the parties, the phrase “actually employed” was not equivalent to “actively employed.” It is a familiar rule that in construing contracts courts may look beyond the language employed, and may avail themselves of the light of the circumstances surrounding the parties at the time the contract was made. *Merriam v. United States*, 107 U. S. 437, 2 Sup. Ct. 536, 27 L. Ed. 531. Moreover, there is no safer construction of a contract than that placed upon it by the parties thereto before any controversy arises between them. *Lyman v. Railroad Co. (C. C.)* 101 Fed. 636; *Fitzgerald v. Bank*, 114 Fed. 474, 52 C. C. A. 276; *Topliff v. Topliff*, 122 U. S. 121, 7 Sup. Ct. 1057, 30 L. Ed. 1110. Applying these principles, it is hardly reasonable to suppose that either the Secretary of the Interior or the defendant contemplated that if the defendant should go hundreds of miles away from his home to perform a service entailing responsibility and the exercise of intelligence and good judgment, and should be under obligation to obey instructions, he would accept such employment, if while so absent, and while necessarily awaiting instructions, he would receive no compensation, and would have to pay his own subsistence. By the first letters above referred to, he was required to go to the Yakima reservation. Suppose that, when he arrived there, he received a telegram to remain inactive until he was further advised, and, complying with such instructions, he staid at the reservation for 30 days, and was then advised that it was regarded as impracticable to negotiate with the Yakimas, and his services would be dispensed with. Can it be possible that his commission and the letters accompanying it could be so construed as to deprive him of compensation while so remaining inactive under instructions? And yet under the conditions assumed he would not be “actually engaged” in the performance of his duties, as this phrase is now construed by the government. By the letter of July 14, 1900, the defendant was instructed to go to the Yakima agency without delay, and he was advised that his “salary will be regarded as

having begun the day when you depart from your home." It was his right, if not his duty, to enter and remain in the field until advised that his services were no longer needed. It would certainly have been intolerable for the defendant to act upon his own judgment in that regard, and to go back to Beatrice, Neb., whenever he concluded that there was nothing for him to do in the field. Such conduct on his part would have been reprehensible, and the pursuit of such course by him would doubtless have led to his removal. The right to assign to duty implied the obligation to relieve from duty. Defendant was entitled to notice of both. The department seems to have regarded defendant as being actually in the service and under instructions at all times; otherwise it would not have received and accepted reports from week to week from him.

Moreover, as late as November 7, 1902, some time after the question arose as to the propriety of the salaries paid, in a letter to the Secretary of the Interior from the Commissioner of Indian Affairs, the latter, after reviewing the history of this and the former commission, refers to the fact that, when the commissioners asked for and received "leave of absence, it was without pay and the office when it granted such leave invariably granted it without pay." If it was understood that the commissioners were entitled to pay only when they were actively engaged in the performance of duties assigned to them, what need was there for the express condition that, when they were off on a leave of absence, they should receive no pay? If they were entitled to pay only when actively engaged in the performance of duty, it follows, of course, and without express, specific instructions, that they could receive no compensation while absent. The implication is clear that, when they were not on leave of absence—in other words, when they were in the field awaiting instructions or executing instructions—they were entitled to pay. In this letter of November 7th the Commissioner of Indian Affairs was commenting upon the McIntire compensation, and, as above indicated, his compensation seems to have been disallowed principally upon the ground that he had secured a leave of absence and thereafter he had never been reassigned to duty, and that he had gone to his home and had remained there. The case is not like that where the duties and compensation of an officer are prescribed and fixed by law, and where, therefore, any action or any construction of the law by a superior officer is no protection to the inferior officer or employé. In such a case all parties are bound to know the law and to act accordingly, and one officer cannot invoke for his protection the mistakes or acquiescence of another. Here the Secretary of the Interior was invested with power to appoint commissioners and to fix their compensation. He had power to terminate the employment at any time, and he also had the right at any time to insist upon a modification of the compensation for future service. He also had the power to acquiesce in or ratify a compensation already paid; and he certainly had the authority to acquiesce in and ratify the construction put by the defendant upon the commission or the terms of his employment. In all essential particulars the relations between the defendant and the department were similar to those existing between ordinary employé and employer.

Under the circumstances the following language found in the

opinion of the court in *Wertz v. United States*, No. 22,829 (decided by the court of Claims May 1, 1905) 40 Ct. Cl. 397, is very much in point:

"When the compensation of an officer is by the day the government is entitled to the benefit of an ordinary employer, viz., that of being liable only for the days, when the officer is actually employed, but conversely the government, like an ordinary employer, is liable for days when its officers have required the employé to hold himself in readiness for employment, or when he is constructively employed by being placed in circumstances where he cannot find other employment and is awaiting work to be furnished him by the Government officers, or when they allow him to hold himself in readiness in the belief that his service is required, or to render service in the belief that it is necessary and proper for him to do so."

I do not wish to be understood as intimating that if the facts had been withheld from the department by the defendant, or if the defendant misrepresented the facts, any action on the part of the department taken by reason of its ignorance of the real facts would accrue to the benefit of the defendant; but I have scrutinized the record carefully for the purpose of detecting any fraud on the part of the defendant or any attempt to mislead the department, and my attention has been called to nothing which convinces me of bad faith on his part; and I cannot escape the conclusion that the nature and extent of the services which were being rendered by the defendant during the period in question must have been and were known to the department. The only feature of the record upon which it is possible to base the contention that the defendant misrepresented the facts is the certificate above referred to, indorsed upon the vouchers of defendant and his associates. But, construing the terms of his employment as he did, the defendant apparently in good faith also construed this certificate, not as meaning that he was "actively" engaged in the performance of his duties, but only that he was actually employed in the sense that he was in the field under instructions, and was holding himself in readiness for active service, and that he was rendering such active services as were required of him from time to time. It is true that such a certificate might have misled some other department of the government, but the defendant was an employé of the Interior Department, the officers of which presumably knew what he was doing, and whether he was rendering any active services; for he was supposed to act only under instructions from that department, and it is to be presumed that it was cognizant of its own instructions. It is incredible that the defendant, if he had regarded the certificate as false, would have made it and put it in the hands of the very persons who would know from the records of their offices that it was false. The defendant does not seem to have given very much thought to the purpose for which the certificate was intended or to the reasons why it was required. He seems to have had the impression that it was a requirement of the Treasury Department more than of the Interior Department. Assuming the correctness of the theory of the defendant as to his compensation, the certificate would not exclude days when he was in the field awaiting instructions, but it would exclude the time during which the defendant was upon a leave of absence, or when he was ill, or when he was otherwise not in readiness to render service; also periods, if

any, during which he was relieved from service by instructions from the department, and to that extent the certificate would subserve a useful purpose even under his view of the compensation to which he was entitled. However that may be, I have been unable to conclude that the department was misled by this certificate indorsed upon the defendant's vouchers, and I am therefore of opinion that so far as the claim now made involves compensation paid by the defendant to himself the government should not recover.

The total amount sued for involves a portion of the compensation paid by the defendant to his associate McIntire. Were this a suit to recover from McIntire the amount so paid to him, it is possible that under the circumstances indicated, although not fully disclosed by the record, the plaintiff should succeed. This I do not deem necessary to decide. Taking the view, as I do, that the defendant made payment to McIntire in good faith, having reasonable ground to believe that the latter was entitled to the compensation paid to him, I have concluded that it would be unjust to the defendant to require him to reimburse the government for moneys which he so paid out, and from which he received no benefit. He was not advised by the department that McIntire was not in actual service; and, assuming to be correct his understanding of the conditions upon which the commissioners were to be compensated, I am unable to find that he acted unfairly or unreasonably.

The balance of the government's claim consists of two charges in the accounts of Commissioner McNeely, one being \$4.50, the aggregate of several small items paid out on account of subsistence, for which clearly he should not have been reimbursed, and the defendant is chargeable therewith; also an item of \$192 on account of the last 24 days of the quarter ending March 31, 1902. It seems that McNeely left the field and went to his home in Evansville, Ind., on March 8, 1902, where he remained until he died in the following April. The defendant issued checks paying McNeely for the entire quarter, and this action on the part of the defendant was expressly approved by Acting Secretary Ryan by letter hereinbefore referred to, and from which extract is quoted above; he at the time apparently having full knowledge of the facts. However, I infer from the record that either McNeely, or, after his death, his heirs, returned to the defendant \$192 and this the defendant received and has not accounted for or turned over to the government. It does not appear why. Clearly he is chargeable with this amount.

It follows that plaintiff should have judgment against the defendants and each of them for \$196.50; and interest will be allowed upon this amount at the rate of 6 per cent. from April 1, 1902. All exhibits offered by the plaintiff and received conditionally, or with the understanding that a ruling would be made later as to their admissibility, are admitted in evidence, and defendants may have their exceptions.

## CIMIOTTI UNHAIRING CO. et al. v. AMERICAN FUR REFINING CO. et al.

(Circuit Court, D. New Jersey. January 3, 1908.)

## 1. INJUNCTION—LIABILITY FOR WRONGFUL INJUNCTION—LIMITATION BY BOND.

There is no statute or rule restricting the discretion of a federal court in fixing the amount of an injunction bond or in imposing terms as a condition of granting an injunction, and in the absence of such statute or rule, where the court in its discretion has fixed the amount of such bond which has been given, the liability of the complainant is limited to such amount which covers everything, including both damages and costs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, § 542.]

## 2. SAME—ENFORCEMENT IN INJUNCTION SUIT.

A federal court of equity, which has required a complainant to give a bond as a condition to the granting of an injunction, has power, in its discretion, on the dissolution of the injunction, to assess the damages recoverable on such bond.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 544-552.]

## 3. EQUITY—FINDINGS OF MASTER—PRESUMPTION SUPPORTING.

It is the settled rule that the conclusions of a master on matters of fact have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part.

## 4. INJUNCTION—ENFORCEMENT OF BOND IN INJUNCTION SUIT—SUMMARY DECREE AGAINST SURETY.

Where an injunction bond provides that the loss or injury and damages sustained by the defendants shall be "ascertained as the court shall direct," the surety becomes a quasi party to the proceeding, and the court may enter a summary decree, and award execution against it in the original suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 544-552.]

In Equity. On exceptions to master's report.

Louis C. Raegener and S. L. Moody, for complainants.

Henry Schreiter, for defendant American Fur Refining Company.

LANNING, District Judge. By their bill of complaint the complainants sought an injunction to restrain the defendant from an alleged infringement of patent No. 383,258 for a machine for removing the stiff hairs from seal skins and other furs. A preliminary injunction was issued under an order dated August 28, 1902, which contained this provision:

"This order is upon condition that complainants give a bond with good and sufficient surety or sureties, to be approved by the court, in the sum of \$15,000, to indemnify the defendant corporation until the entry of an interlocutory decree upon final hearing herein, against loss or injury due to the improvident or erroneous grant of this order, and provided the court finally dismisses the bill of complaint herein."

On September 1, 1902, the court approved an undertaking, presented by the complainants, but executed only by the Lawyers' Surety Company of New York, by which that company declares that it "hereby undertakes in the sum of fifteen thousand dollars to indemnify the defendant corporation in the above-entitled matter so enjoined until

the entry of an interlocutory decree upon final hearing herein against loss or injury, not exceeding the said sum of fifteen thousand dollars, due to the improvident or erroneous grant of this order, and provided the court finally dismisses the bill of complaint herein, such loss or injury and damages therefor to be ascertained as the court shall direct." The order for a preliminary injunction was sustained by the Court of Appeals. On final hearing a decree adjudging infringement was granted, and the Court of Appeals reversed the decree, and ordered the bill to be dismissed, and the Supreme Court affirmed the Court of Appeals. See (C. C.) 117 Fed. 623, 118 Fed. 838, 55 C. C. A. 513, 120 Fed. 672, 123 Fed. 869, 59 C. C. A. 357, and 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100. On February 9, 1904, this court made an order directing a master "to take proofs in the case, to ascertain and report to the court what loss and damages defendants have suffered, if any, by reason of the granting of the preliminary injunction against them on the 28th day of August, 1902, and until the entry of the interlocutory decree entered herein on the 21st day of February, 1903." By his report, dated June 7, 1907, the master finds that the defendant, the American Fur Refining Company, has sustained the following loss and damages:

1. Loss of profits from September 3, 1902, to February 21, 1903..	\$12,591 12
2. Trade lost during the same period.....	3,000 00
3. Expenses incurred solely by reason of the injunction.....	2,815 58
Total .....	\$18,406 70

To this report the complainants have filed exceptions, and the present hearing is on those exceptions.

The first and second exceptions raise the question whether the aggregate amount of loss and damages should not be limited by the \$15,000 for which the bond of the surety company was given. The damage arising from the grant of an injunction pendente lite, in the absence of any statute or rule of court regulating the practice, is *damnum absque injuria*. For this reason the court sometimes requires a bond of indemnification against damages to be given as a condition of the grant. As the court has discretionary power to grant an injunction without such bond, it has discretionary power to fix the amount of the bond in case one be required. When a bond is given, its penal sum is notice to the applicant for injunction of the maximum risk he must assume if the injunction be issued. He cannot be required to assume a burden greater than that which the chancellor in the exercise of his discretion has imposed. I think \$15,000, the sum mentioned in the court's order and the penal sum mentioned in the bond, fixes the maximum amount that can be assessed against the defendant company for the loss and damage sustained by the defendants. There is no statute or rule restricting the discretion of a federal court in fixing the amount of an injunction bond, or in imposing terms as a condition of granting an injunction. *Russell v. Farley*, 105 U. S. 433, 26 L. Ed. 1060; *Meyers v. Block*, 120 U. S. 206, 214, 7 Sup. Ct. 525, 30 L. Ed. 642. The master reports that he has ascertained the amount of damages sustained by the defendant corporation without reference to the penal sum mentioned in the surety company's bond, for the reason

that the order of the court required him so to do. In this I think he was right. The rule that was to guide him in the performance of his duty was contained in the order of reference, and in that alone. It required him to ascertain and report to the court what damages, if any, the defendant company had sustained. If the damages found by him exceed the amount of the bond, or the amount specified in the injunction order, the court must take that fact into consideration when the time comes for making its decree of assessment, and limit the amount to a sum not exceeding the penal sum mentioned in the bond.

No question is raised concerning the power of this court to assess the damages. In *Russell v. Farley*, *supra*, the Supreme Court, though not deciding the point, said it was inclined to think such power exists. It was so held in *Lea v. Deakin* (C. C.) 13 Fed. 514; *Coosaw Mining Co. v. Farmers' Mining Co.* (C. C.) 51 Fed. 107; and *Tyler Mining Co. v. Last Chance Mining Co.*, 90 Fed. 15, 32 C. C. A. 498. In *West v. East Coast Cedar Co.*, 113 Fed. 742, 51 C. C. A. 411, it was held that, in any event, the court has the power, in such a case as the present one, to ascertain the amount of damages. In my judgment there is no want of power in this court to assess the damages. As pointed out by Mr. Justice Bradley in *Russell v. Farley*, the court of chancery in England exercises it, and the practice of that court, except as it may be modified by acts of Congress or by rules of court, has been generally adopted in equity cases by our federal courts. What damages, then, shall be assessed? The injunction bond fixes the amount. It is all "loss or injury, not exceeding the said sum of fifteen thousand dollars, due to the improvident or erroneous grant of this (the injunction) order, and provided the court finally dismisses the bill of complaint herein." The grant of the injunction order was erroneous, and the bill of complaint has been dismissed. Speculative or remote damages, or those which are merely consequential, are not to be allowed. The bond covers only the damages that are the proximate and natural result of the injunction. High on Inj. § 1663; 2 Beach, Mod. Eq. Prac. § 771.

By the ninth exception the complainants insist that the master's allowance of \$3,000 for loss of trade is erroneous. I think it quite probable that the evidence upon which this allowance was made is too uncertain to furnish the basis of an award for damages. Whether that be so or not, however, is immaterial to the decision of this case. The other allowances—\$12,591.12 for loss of profits, and \$2,815.58 for expenses—notwithstanding the objections to them by the eighth and tenth exceptions, seem to be amply supported by the proofs. These two sums exceed \$15,000, and unless the master has clearly erred in ascertaining them, there should be an assessment for the sum of \$15,000. The well-settled rule is that the conclusions of a master on matters of fact have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part. *Tilghman v. Proctor*, 125 U. S. 149, 750, 8 Sup. Ct. 894, 31 L. Ed. 664; *Callaghan v. Myers*, 128 U. S. 666, 9 Sup. Ct. 177, 32 L. Ed. 547; *Crawford v. Neal*, 144 U. S. 596, 12 Sup. Ct. 759, 36 L. Ed. 552; *Davis v. Schwartz*, 155 U. S. 636, 15 Sup. Ct. 237, 39 L. Ed. 289; *Girard Insurance Co. v. Cooper*, 162 U. S.



538, 16 Sup. Ct. 879, 40 L. Ed. 1062. With this rule before me I cannot set aside the master's findings on these two questions of fact.

The other exceptions to the report have been considered, but they are deemed to be without merit. There will be an order fixing the amount of the damages at the sum of \$15,000.

#### Memorandum on Settlement of Final Decree.

The damages sustained by the defendants in this case have previously been assessed against the complainants at the sum of \$15,000. The defendants now apply for a decree that the defendant the American Fur Refining Company recover from the complainants the Cimiotti Unhairing Company and John W. Sutton, and also from the Lawyers' Surety Company, the amount of the damages, with interest and costs. I think interest cannot be allowed, for the reason that the sum of \$15,000 is the full amount of the penalty named in the injunction bond executed by the Lawyers' Surety Company as surety. Neither do I think that the decree should include costs in addition to the above-mentioned sum of \$15,000. The court, in the exercise of its discretion, exacted a bond from the complainants in the penal sum of \$15,000. That bond covers everything, including both damages and costs.

The defendants also ask that the decree shall award execution for the \$15,000, not only against the two complainants, but against the surety company. I have not had the aid of counsel in discussing the question as to whether the surety company can be regarded as a party or a quasi party to this proceeding in such a sense as that an execution can be awarded against it, or whether the defendants are left to their remedy against the surety company by an action at law on that company's undertaking. After a brief reference to the authorities, however, and in view of the fact that the undertaking of the surety company provides that the "loss or injury and damages" sustained by the defendants shall be "ascertained as the court shall direct," I have concluded that the defendants are entitled to such a decree. The cases that have led me to this conclusion are *Tyler Mining Co. v. Last Chance Mining Company*, 90 Fed. 15, 32 C. C. A. 498; *Empire, State-Idaho Mining & Developing Company v. Hanley*, 136 Fed. 103, 104, 69 C. C. A. 87; *Russell v. Farley*, 105 U. S. 445, 446, 26 L. Ed. 1060.

I will therefore modify the draft of the decree submitted to me by the defendants in accordance with the conclusion above expressed, and sign it as thus modified.

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#### GOUGH et al. v. HAMBURG AMERIKANISCHE PACKETFAHRT AKTIEN-GESELLSCHAFT.

(District Court, S. D. New York. November 13, 1907.)

##### 1. ADMIRALTY—JURISDICTION—RESTRICTIONS IN BILL OF LADING.

A court of admiralty of the United States has jurisdiction of a suit against the charterer of a foreign vessel to recover for damage to cargo where it obtains jurisdiction over the defendant, notwithstanding a provision of the bill of lading that any disputes arising thereunder shall be determined by the law of a foreign country and in a court thereof.

## 2. SHIPPING—DAMAGE TO CARGO—PERIL OF THE SEA.

Damage to cargo caused by sea water which entered through a hatch during a voyage across the Atlantic by a new steamer *held* not due to the unseaworthiness of the vessel or any defect in the hatch covers, but to perils of the sea, for which the vessel and owners were not liable under the bill of lading; it being shown that the tarpaulin hatch covers were new and sufficient and properly secured, but that the one above libellant's goods was injured by a cut through the breaking loose of a derrick at night during a very severe storm.

[Ed. Note.—Loss by perils of the sea, see notes to *The Dunbritton*, 19 C. C. A. 465; *Southerland-Innes Co., Limited*, v. *Thynas*, 64 C. C. A. 118.]

In Admiralty. Suit to recover for damage to cargo.

Black & Kneeland, for libellants.

Convers & Kirlin and Charles R. Hickox, for respondent.

ADAMS, District Judge. This action was brought by Richard Gough and another, composing the firm of Richard Gough and Company, against the Hamburg Amerikanische Packetfahrt Aktiengesellschaft, the charterer of the steamship *Neebing*, to recover the damage received through the wetting of 239 bags of rice, while being transported by that steamer from Hamburg to Montreal, Canada, in September, 1903. It is alleged by the libellant that the damage "was due to the improper, defective and insufficient condition of the hatch covers of said vessel, which permitted water to leak through said hatches upon the libellants' cargo." The respondent denied that the damages were caused by defective or insufficient hatch covers and alleged that they were due to a peril of the seas or to sweat, both being excepted causes in the bill of lading.

It is suggested by the respondent that the court should not entertain jurisdiction of the action but remit the parties to the Hamburg Courts, respecting which they have provided in the bill of lading: "All disputes regarding this bill of lading are to be settled according to the law of the Empire of Germany and decided before the Hamburg law court." Apart from the terms of the bill of lading, no reason has been advanced for a refusal by the court to proceed with the matter and that it will entertain jurisdiction in such a case has been settled by abundant authority. *Prince Steam-Shipping Company v. Lehman et al.* (D. C.) 39 Fed. 704, 5 L. R. A. 464; *Slocum v. Western Assur. Co.* (D. C.) 42 Fed. 235; *Mutual Reserve Fund Life Ass'n v. Cleveland Woolen Mills*, 82 Fed. 508, 27 C. C. A. 212; *Fairgrieve et al. v. Marine Ins. Co. of London*, 94 Fed. 686, 37 C. C. A. 190. In view of the authorities and the admission in the answer of the court's jurisdiction, I conclude that the action should be decided upon its merits.

It appears that the *Neebing* was a new ship built in England by contractors of experience and reputation under the classification of the British Corporation and when finished received from the latter the mark of the highest class. She was designed for use on the Great Lakes and was 256 feet long, about the limit of length to pass through the canal. She was of the usual lake type, with the engine aft, with six hatches and no bulwarks, so that in bad weather the seas necessarily washed over her hatches. There was no criticism upon the vessel

save with respect to the sufficiency of the tarpaulins that covered the hatches. The material thereof was hemp or jute, which are so much alike that it is difficult to distinguish them. There were two tarpaulins for each hatch, well tarred, which made them water tight for all ordinary purposes considering the type of the vessel and the fact that they were constantly exposed in bad weather to being washed by the sea. They were of proper material and well looked after with respect to fastenings upon starting and during the voyage. After the arrival in Montreal, the hatches were taken off and the tarpaulins examined. One set of them, that of No. 3 hatch, where the libellants' rice was stowed, was found to be damaged by a cut received on the night of the 15th, through a derrick, fastened to the main mast, getting adrift. This cut was not of great dimensions but sufficient to somewhat impair the efficiency of the tarpaulins, but, apart from the cut, they were found by subjecting them to a severe water test to be sound and water tight. This test was made by putting water in the tarpaulins and keeping it there for several hours. The tarpaulins were subsequently used on a voyage of the vessel through the Lakes when she met with several heavy storms, including rain, and they proved to be in all respects sufficient.

The vessel met with extraordinarily heavy weather on the voyage during which the libellants' rice was damaged. It can best be described by extracts from the testimony of the chief officer, himself a master mariner, and experienced in taking new vessels from England and Scotland across the Atlantic. He said:

"By Mr. Kirlin: Q. Are you a master mariner? A. Yes, sir.

Q. Where is your home? A. London.

Q. Have you come over here on purpose to give your testimony in this case? A. I have.

Q. How long have you been a master mariner? A. Since 1888, with one or two breaks for illness, etc.

Q. What length of time have you seen service on steam vessels? A. Twenty-eight years.

Q. Have you had considerable experience in taking over vessels from builders, and have you taken them and delivered them at the end of their trial trips and first voyages? A. Yes, sir.

Q. How many ships have you taken over from builders for owners' account in that manner? A. Eight or nine altogether.

Q. How many first voyages have you made? A. About twelve altogether.

Q. Have you done some of those as master and others as chief officer? A. Yes, sir.

Q. Have you had experience in taking over the equipment of vessels, such as ropes and tarpaulins? A. Yes, sir, I have had great experience in that.

Q. In this case, was it your particular duty for the owner of the vessel to examine and pass upon the sufficiency of the equipment that was furnished to the ship? A. Yes, sir.

Q. Did that include the tarpaulins? A. That included the tarpaulins.

Q. Did you make a special examination of the tarpaulins before you accepted them for the ship? A. I did, sir.

Q. What office did you discharge on the Neebing? A. Chief officer. \* \* \*

Q. Tell us what you did and what examination you made in connection with taking over the outfit, particularly the tarpaulins? A. One of the outside foremen asked me if I was ready to take the tarpaulins over, and I said 'yes.' He had them all stowed away in the fore end of the ship, and with that he got some men and spread the tarpaulins all over the hatches, and when they were all stretched over the hatches, I examined them all.

- Q. How many were there for each hatch? A. Two for each hatch.
- Q. Were they new? A. Perfectly new, yes.
- Q. What was your object in having them spread out over the hatches? A. So that I could see that they fitted properly and also the quality, the thickness.
- Q. How did you have them spread over? A. Two tarpaulins on each hatch. The reason I had them all spread over was more to see that they all fitted properly.
- Q. Did they fit properly? A. Yes, sir.
- Q. What examination did you make as to their quality and sufficiency in regard to weight and water proofness? A. I took hold of the corners of each tarpaulin, lifted them up and tested them that way, I could tell by the closeness of the weaving that they were sufficiently water-tight.
- Q. Did you examine the weaving? A. I examined the tarpaulins thoroughly.
- Q. Were they tarred? A. Yes, sir, well tarred.
- Q. What is the practice as to tarring tarpaulins on vessels of this class? A. In most cases they dip them in and hang them up and let them dry—in the tar.
- Q. What do you say as to the reasonable adequacy of the tarring of these tarpaulins for their purpose? A. They were quite good enough for their purpose.
- Q. What do you say as to the sufficiency of the number of tarpaulins that were provided for each hatch? A. Two new tarpaulins is quite sufficient, and it is recognized on the other side to be sufficient for any ordinary bad weather.
- Q. In your experience, what has been the usual number provided for new ships? A. Two new tarpaulins for each hatch; and no more.
- Q. What do you say as to whether these are or not of the usual quality provided for ships of this class? A. They are of the usual quality.
- Q. And weight? A. And weight; I have had experience from being on board—when I have been in ships belonging—that is, I have been on board of ships when their outfits have been taken on, and the quality of the tarpaulins was the same.
- Q. Were they canvas? A. They were canvas, yes. What they call tarpaulin canvas.
- Q. What number were they? A. I didn't see the mark, but judging from the weight of it, I consider it the No. 3 canvas, which is the usual thickness of canvas that they use for tarpaulins.
- Q. You then accompanied the ship from where she was delivered over by the builders to her owners, to Hamburg, and came on the voyage to Montreal? A. I did.
- Q. Did you go on with her from there? A. I went on up the Lakes with her, yes sir.
- Q. Through the Canal? A. Through the Canal, yes.
- Q. How long did you remain with her? A. I think it was—I went up as far as Port Arthur and looked after the discharging of that cargo and the loading of another cargo, and back to Buffalo, and left the ship in Buffalo.
- Q. During the entire time that you were with her were these tarpaulins in use? A. They were.
- Q. Were any other tarpaulins used? A. I don't remember any other.
- Q. Who overlooked the loading and stowage of the cargo in Hamburg? A. I did.
- Q. What do you say to the manner in which that work was done? A. It was done in a proper manner.
- Q. Who did the loading? A. The stevedore, under my supervision.
- Q. What stevedore? A. The Hamburg stevedores.
- Q. Stevedores of the Hamburg-American Packet Company in Hamburg? A. Yes sir. \* \* \*
- Q. What was done with regard to battening down the hatches after the completion of the loading in Hamburg? A. They were all stretched out and battened down in the usual way, with iron battens and hardwood wedges.
- Q. Did you see that done yourself? A. I supervised every hatch myself personally.
- Q. How many tarpaulins were put on each hatch? A. Two, sir.

Q. What do you say as to the manner in which they were battened down? A. They were battened down in the ordinary way; the tarpaulins were spread out \* \* \* the hatches were thwartship hatches and the tarpaulins were stretched out and doubled up underneath, and the iron battens put in, and the wedges put in after. \* \* \*

Q. What do you say as to whether they made the hatches water-tight or not? A. It was quite sufficient to make the hatches water-tight.

Q. What kind of weather did you experience on the voyage over from Hamburg to Montreal? A. Exceptionally heavy weather.

Q. About when did the rough weather begin, the exceptional weather? A. On the ninth; about three or four days after we left Hamburg. \* \* \*

Q. Describe the weather to His Honor, during the remainder of that voyage, as nearly as you can? A. On the ninth and eleventh there was very heavy gales, northwest, with beam seas; on the twelfth the weather was much finer; after that there was heavy weather the whole time, right up to the 20th, when we got to Bell Isle, blowing continuous heavy gales the whole time from the northwest.

Q. Were these the ordinary storms that you expect to encounter at that time of year? A. No sir; they were exceptionally heavy.

Q. Have you had a great deal of experience in the Atlantic? A. Yes sir; I have been across over a hundred and fifty times.

Q. What do you say as to the general character of the weather on that voyage, and of the sea? A. It was exceptionally heavy.

Q. What effect did it produce on your vessel? A. It made her roll violently, owing to the direction of the wind. Had the wind been easterly, the vessel would not have rolled so heavily, but, being from the northwest, there was a beam sea the whole way. The decks were flooded with water the whole time during the bad weather.

Q. Were they merely wet with spray, or was it solid water? A. It was dangerous to come along the decks. I had to have a life line stretched fore and aft for the men to go back and forth along the deck, to save them from being washed overboard.

Q. Were your tarpaulins affected, or were the battennings of the tarpaulins affected by the water? A. No. 4 and No. 5 on two occasions were washed off.

Q. What was the evidence that indicated that fact to you? A. The continuance of the wash of the water washed the wedges out.

Q. What effect did that have on the tarpaulins? A. The wind went underneath the tarpaulins and blew them up and the water washed underneath.

Q. When did the wedges wash out of No. 4 and 5 hatches? A. I can't say; on one occasion it was during the night, about midnight; and on another occasion when it had been blowing two days, we discovered it at daylight, in the morning.

Q. Did you give attention to the wedges of the battens during the voyage? A. I did; I went down and drove the wedges in, which is customary—when you have a carpenter, he does it, but when there is no carpenter, the chief officer does it, and there was no carpenter on those ships.

Q. Did you do it during the bad weather? A. Yes sir; continually, every evening before dark and every morning at daylight.

Q. And you found the wedges started on two occasions? A. On two occasions."

There is no apparent reason to doubt the truth of these statements and I think they convincingly show that the tarpaulins were of good quality and properly battened down with iron battens and hardwood wedges so that the hatches were water tight and that through the breaking of the clutch of the boom or derrick in a very severe storm, the tarpaulins covering No. 3 hatch were rendered useless for the time for keeping out water. Probably there was some damage in the compartments reached through the other hatches but whether that occurred by reason of the tarpaulins is not very important here. The

question is whether the tarpaulins of No. 3 were sufficient and that they were so is seemingly beyond the region of reasonable doubt.

The libel is dismissed.

DOWGATE STEAMSHIP CO., Limited, v. ARBUCKLE et al.

(District Court, S. D. New York. November 27, 1907.)

1. SHIPPING—SHORT DELIVERY OF CARGO—EVIDENCE CONSIDERED.

The prima facie case made by a bill of lading signed by the master of a vessel as to the number of bags of coffee received on board at a loading port, corroborated by the testimony of the charterer's agent and others having occasion to keep track of such number, *held* not overcome by testimony from the ship as to a mistake in the bill of lading, or that she delivered all taken on board so as to exonerate her from liability for an apparent shortage in delivery.

2. SAME—DAMAGE TO CARGO—IMPROPER STOWAGE.

A vessel *held* liable for damage to a cargo of coffee resulting from its having been by the master's orders stowed on the bottom of a hold without dunnage, and from a leaky water tank.

In Admiralty. Suit for charter hire.

Convers & Kirlin and John M. Woolsey, for libellant.

Butler, Notman & Mynderse, for respondents.

ADAMS, District Judge. This action was brought by the Dowgate Steamship Company, Limited, as owner of the steamship Ludgate, to recover from Arbuckle Brothers, certain hire said to be due under a charter party dated London, March 9, 1906, wherein the Ludgate was chartered "for a voyage from Rio de Janeiro and/or Santos and/or Victoria in order named to the port of New York." The steamer duly loaded at the respective ports and sailed therefrom April 20, April 28, and May 9, 1906 for New York where she completed discharging about June 15, 1906. The hire was duly paid except a sum of \$1,427.63 that was retained by the respondents to cover an alleged shortage and damage to the cargo as follows:

124 bags Santos coffee short delivered @ 131 lbs. per bag 16,244 lbs.	
@ 8¢.....	1,328.86
Labor cleaning 661 bags damaged coffee 200 hours @ 25¢.....	50.
661 new bags @ 5¢.....	33.05
Difference in value 8 bags skimmings owing to lack of dunnage....	15.72
	<hr/> \$1,427.63

There is no dispute between the parties excepting such as is indicated in the foregoing list of claims against the hire. These may be divided into two classes, first, with respect to the short delivery, and second, that relating to damaged coffee.

Short Delivery.

The claimed short delivery consisted of 124 bags. The shipments at Rio and Port Victoria were of bagged coffee and bulk coffee; at Santos it was, according to the bill of lading, 42,501 bags. The total bags claimed to have been shipped were 5,000 at Rio, 42,501 at Santos and 7,644 at Port Victoria, making 55,145 in all. It is now undis-

puted that 55,021 bags were discharged in New York, leaving the 124 bags to be accounted for.

The libellant claims that the steamer was not a common carrier but a special carrier. This being so, however, it does not tend to relieve the libellant from an obligation to pay for the cargo receipted for, unless it can show that all the cargo received was delivered and consequently that the receipt was erroneous. It seeks to sustain the burden by showing that at the port of Santos her master, owing to a clerical error or an obscure figure in the mate's receipt for the last day of shipment, signed a bill of lading showing a total of 42,501 bags received at that port, whereas it is claimed he should only have acknowledged 42,301. The difficulty in this claim is that, if accepted, the vessel must necessarily have delivered 76 bags more than she received, that being the difference between the alleged excessive receipt for 200 bags and the 124 bags actually short in the delivery.

It is well settled that a ship is liable only for the cargo received, but where a bill of lading states a definite quantity as having been received, it binds her for such quantity until it is proved that it was not received on board. *Goodrich et al. v. Norris*, 10 Fed. Cas. 609; *Smith & Co. v. Bedouin Steam Nav. Co., Ltd.*, Appeal Cas. 1896, p. 70.

Apart from the bill of lading, which is prima facie proof that the quantity contended for by the respondents was actually loaded on the vessel, there were various corroborating documents put in evidence by the respondents of the transactions at Santos, under a stipulation, of which the following is a copy:

"It is hereby stipulated between the proctors for the respective parties that the statements hereto annexed may be read by either party on the trial of this cause as the evidence of the persons who have signed the statements, with the same force and effect as if the signers thereof had testified thereto; subject, however, to objection by either party as to the materiality, relevancy or competency of the matters referred to in the said statements or any of them.

It is further agreed that the waiver of the right to cross-examine the persons who signed the annexed statements will not be taken as an admission by the libellant of the verity or correctness of the statements."

The documents, thus stipulated in evidence, consisted of a copy of the mate's receipt for 223 bags, and of statements and certificates sent to the respondents by their chief coffee shipper, their agent in charge of the Santos office; a clerk in charge of steamer's attendance; their general clerk in charge of office; some cables between the respondents and their agents at Santos; a statement from their junior clerk; a statement of the carters who transported the coffee that they delivered 2896 bags to the vessel; a certificate from the Santos Docks Company that it had receipts from the ship's mate in its possession showing that 39,605 bags (the above 223 bags were a part of this amount) were shipped from certain of its stores on the vessel; a certificate from the administrator of Export Revenue showing that according to the written declarations of the Fiscal Guard on the back of the notes of despatch 42,501 bags were shipped, also a certificate from the Companhia Docas de Santos showing that taxes were paid on 42,501 bags.

All the foregoing statements, certificates, etc., tend to show that the quantity placed on board the steamer at Santos was 42,501 bags. The first mentioned 223 bags were sent from Warehouse No. 4 by freight wagon; 1334 bags were carried on board from Warehouse No. 11; 38,048 bags were carried on board from Warehouse No. 12, and 2869 bags were from carts, carrying about 20 bags each, which made the quantity received and tallied into the steamer 42,501 bags.

The statement of C. W. Walker, the respondents' agent in charge of the Santos office, mentioned above, which is a summary of the Santos situation, was as follows:

"I am in charge of the Santos office of Arbuckle & Co.

The steamship Ludgate was lying opposite Warehouse No. 12 of the Companhia Docas de Santos during her loading, except upon the last day, when she was shifted and lay between Nos. 11 and 12 to facilitate the loading. Our records and the records of the Warehouse Company show that the coffee was shipped as follows:

From Warehouse No. 4, sent down by freight wagon.....	223
From Warehouse No. 11, carried on board direct.....	1334
From Warehouse No. 12 " " " " .....	38048
From carts carrying usually 20 bags each .....	2896

Total quantity shipped and tallied into the steamer.....42501B

The original receipts signed by the officers of the Ludgate were surrendered by us to them in exchange for the bills of lading signed by the captain. These receipts are not in our possession.

As to the statement of the captain that he demurred to signing the bills of lading, I can say that there was absolutely no discussion or question of the coffee on board not being correct. The captain waited in our office until the last receipt came from the steamer and then and only when he had it in his possession did he sign the bills of lading. The assertion that he had a question with our steamship clerk as to the tally is untrue in every particular. The final receipt was brought to our office by one of our clerks who was down at the steamer waiting for the last of the coffee to go on board. The first mate of the steamer Ludgate was aware how many bags of coffee were needed to complete the shipment. The captain was waiting in our general office and I would have been aware of any discussion. Furthermore, any such discussion would have taken place before the whole office staff. No such discussion took place.

As to the testimony of one of the mates of the steamer Ludgate that he had a conversation with me about shipping 200 bags aboard S S Tennyson, I say that it is absolutely false. We do not ship coffee from Santos by any steamer except such as we charter. That there could have been no such discussion is shown by the fact that the steamer was not taking a full cargo from Santos. We had instructions from our Rio house under date of 16 April 1906, that we were to leave the bunker space clear, calculated to take 6,000 bags, and put 5,000 bags in Hold No. 2, leaving the balance of space, calculated at 14,000 bags, for Victoria. We had positive instructions what space to leave and what to use, and we only shipped enough to fill our space allotment. Therefore, no such question could have arisen. We made no attempt to ship all the coffee which we had in store at this time, and when the Ludgate sailed we had 11,750 bags on hand in store.

The method of piling the coffee in the warehouses is as follows:

The coffee in the Docas is blocked out to suit the quantity which is to make that particular lot and piled 10 high. This is done with great regularity and it is impossible to make a mistake in tallying out the coffee as the total quantity of coffee in the pile is marked on the corner of the pile and then only one row is taken off at a time and then as the mate of the ship counts it he gives a receipt for it. Then only is that row broken into and



carried on board and the row behind is not touched until the first one has been carried on board.

The Companhia Docas de Santos are practically Government Stores, and once coffee is deposited there it cannot be withdrawn except to go on board steamers unless by special permission."

The second mate of the steamer who did most of the tallying at Santos, testified:

"Q. Now, after counting in the stack, how do you know they got in the steamer? A. There were too many people about the deck, seeing that they did come, for any mistake to be made; and they could not get off the dock.

Q. You watched them carried in? A. Yes. I was at the door of the shed most of the time, except when I was tallying the carts.

Q. So you are satisfied they got on board the steamer? Is that it? A. Yes."

The main reliance of the steamer in exculpation of herself is that she delivered all the cargo which she had received; that none had been stolen; that the master on the last day of loading, had signed for 2503 bags instead of 2303. If the latter were accepted, it would show, as above stated, that the steamer had delivered 76 more bags than she had received. These defences can not, in a case where the evidence of the quantity delivered is so persuasive as it is here, be overcome by a suggestion of mistakes in tallying at the place of loading on account of the extent of the cargo. If the claim for an excess receipt having been given for the quantity laden on board at Santos should be allowed, an unaccountable discrepancy would exist as to the 76 bags, above mentioned, which of itself would cast suspicion upon the 200 bag claim.

There are other circumstances which tend to overcome the libellant's claim.

The tally books of the steamer show an excess of receipts over either 42,301 as claimed by her or 42,501 as shown by the bill of lading. The last day's total entry was 2303 bags; this consisted of items 869, 300, 514 and 620. The mate could not account for the item of 620, although he could for the others, as well as in other instances, nor explain where he obtained it from. The entries, therefore, upon which the steamer depends to sustain the shortage are unreliable.

It appears that the mate's original receipt, which was returned to the steamer, when the bills of lading were signed, was destroyed two days after sailing subsequent to the delivery being completed here and she had sailed for Norfolk. The mate of the steamer was notified of the shortage of 124 bags while she was still here and the destruction of the receipt was probably two days later. The effect was that this important paper could not be produced for an examination by the court through the steamer's act.

No aid is given to the matter by any suggestion that a mistake occurred through some of the bagged coffee having burst or been emptied into the bulk cargo because a careful tally was kept of the bags and the steamer was given credit for all bags delivered, including torn and empty ones, and this was verified by the weights delivered which, after making some allowance for the drying out of the green coffee during the voyage, still was deficient to a considerable extent.

The greatest effect that can be given to the libellant's contention that when the cargo was discharged, the steamer had clean holds and actually delivered all that she had received, does not suffice for exculpation in view of the opposing evidence. If the contention were established, it would of course relieve the steamer, but unfortunately there is too much doubt of the fact to permit it to prevail. The case in principle is similar to *The Titania*, 131 Fed. 229, 65 C. C. A. 215, where the court said (page 231 of 131 Fed., page 217 of 65 C. C. A.):

"As before stated the bills of lading were prima facie evidence of the receipt of the hemp. We have, however, examined the testimony upon this question sufficiently to conclude that the weight of evidence, irrespective of the bills of lading, tends to show that the goods were actually on board at Manila."

#### Damage to Cargo.

The testimony shows that damage was done to some of the bagged coffee through its not having been dunnaged but stowed directly on the floors. It appears that at Santos the shippers had called the master's attention to the necessity for dunnage in the bottom of the hold on the floor and that he had agreed to take the responsibility for any damage that might arise from such want of dunnage. Damage also occurred from the unseaworthy condition of the fore peak tank, which leaked and permitted some water to run into the No. 1 hold. The libellants were responsible for the damage arising from these causes.

There will be a reference to ascertain the amount of the respondents' loss and when that is ascertained, a proper decree will be entered.

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#### THE PELICAN.

(District Court, E. D. Michigan, S. D. November 7, 1893.)

No. 4,024.

#### SALVAGE—AMOUNT OF COMPENSATION—RESCUE OF DISABLED SCHOONER IN LAKE SUPERIOR.

The schooner Pelican bound down Lake Superior in tow with a cargo of ore on the night of November 18th, broke her tow line in a gale, and, the towing steamer being unable to find her because of the darkness, she continued on under sail until the 21st, when, owing to the continued bad weather, she anchored to the north of Cariboo Island, 20 miles to the north of the usual course of vessels at that season. Late on the afternoon of the 24th her signal of distress was seen by the steamship Pope, also to the northward of her course, and the Pope started to her assistance, but, owing to a snowstorm, was compelled to lie by until the next day, when at the request of the master of the Pelican she was taken in tow and safely delivered that night at Sault Ste. Marie. The Pelican was partially disabled, and partly covered with ice, and, owing to her position and the lateness of the season, was in considerable peril. Her crew were also practically out of provisions. She was worth with her cargo and freight about \$16,000. The Pope with her cargo was worth about \$325,000. Her earnings were about \$700 per day gross, and her expenses about \$180 per day. She was subjected to no great danger, but, by reason of the service, was subjected to an additional delay of half a day in waiting her turn to pass through the lock, and also to an extra expense on account of insurance which expired on the 30th. *Held* that, in determining the amount of

salvage to which she was entitled, her time should be taken into account from the time she started to the assistance of the Pelican, and also the time lost in waiting to pass through the locks which might properly be considered as a proximate result of the service, and that under all the facts she was entitled to an award of \$1,300.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, §§ 57-66.

Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

In Admiralty. Suit for salvage.

Shaw & Wright, for libelants.

Harvey D. Goulder, for claimant.

SWAN, District Judge. The libel in this cause was filed by the owners of the steamship *E. C. Pope* to recover salvage compensation for the rescue and bringing into port of the schooner *Pelican*, which was found lying at anchor about a quarter of a mile to the northward and eastward of the northerly point of Cariboo Island, Lake Superior. The essential facts upon which the claim for salvage was based are succinctly as follows:

The schooner was in tow of the steamer *Wocokoken*, and was on a voyage from Two Harbors to Cleveland, laden with a cargo of 953 tons of iron ore, something over half her usual load. When off the Apostle Islands, near the west end of Lake Superior, when about abreast of Outer Island of that group, the wind, which up to that time had been very strong, increased to such a violent gale from the S. W. that the master of the steamer found it expedient to look for shelter. He accordingly sought to bring the tow into the wind and make a safe lee; and, while endeavoring to do this, the tow line parted. In the darkness and storm the steamer was unable to descry or pick up her consort, and was obliged to return without her. The accident occurred about 9:30 p. m. of November 18, 1891. After the parting of the line, the schooner went down the lake, but within a few minutes her foresail was blown from the bolt ropes, and, finding it impossible for the steamer to render her any assistance, the schooner kept on down the lake, and, for safe navigation, cut off the end of the tow line which was dragging in the water. The wind and sea continued heavy during the night and for two or three days following, shifting from S. W. to S. E., and around as far as N. W. by W. during that time. The course held by the schooner carried her within about 10 miles of Cariboo Island. On Saturday morning, November 21st, about daylight, the wind being then about S. E., the master of the schooner determined to make a lee under Cariboo Island, as the wind was not favorable, in her disabled condition, to make any attempt to make *Sault Ste. Marie*. About 10 o'clock a. m. of Saturday the *Pelican* came to an anchor to the northward and eastward of the Island, and about a quarter of a mile from the reef on its northerly end, where she was found by the *E. C. Pope*, and was thence taken to *Sault Ste. Marie*. The value of the *Pelican* was \$12,000, that of her cargo something over \$3,000, and half the freight \$471, making the total value of the property rescued a trifle less than \$16,000. When the *Pelican* left Two Harbors, she was provisioned

for four days. Her crew consisted of a master, mate, five seamen, and the cook. When she was taken in tow by the Pope, there remained of the provisions two loaves of bread, four or five pounds of corned beef, and perhaps two pounds of dried apples. The rescuing vessel, the E. C. Pope, is a steel steamer with a carrying capacity of about 4,000 tons and is valued at \$225,000. She was laden with a cargo of 96,000 bushels of wheat, worth at the time about \$99,000. The freight payable on this cargo was 7½ cents per bushel from Duluth to Buffalo. While on her voyage to Buffalo, her destination, and on the 24th day of November, about 4 o'clock in the afternoon, the wind being then W. N. W. and strong, with considerable sea running and the weather being cold with frequent and heavy snowstorms, the Pope then being to the northerly of her usual course, because of the direction of the wind and the character of the weather, her master discovered the Pelican, whose identity was not then known, lying at her anchorage north of Cariboo and flying a signal of distress. Before the Pope could make any material progress toward the Pelican, a heavy snowstorm set in, which shut her out of view. The locality in which the schooner lay is 20 miles out of the usual track of vessels at that season of the year, and is comparatively unfamiliar to navigators. Because of these conditions, the master of the boat considered it imprudent to make any attempt to approach the Pelican that night, and accordingly rounded to, headed his steamer into the wind, and held her in that position during the night, working as slowly as possible consistently with safety, and exhibiting her electric light during the night to make her position and purpose known to those on the schooner. The following morning, the wind and sea having moderated somewhat and the indications being more favorable for fair weather, the steamer came about, and went to the Pelican, which she reached about half past 1 p. m. of November 25th. The master of the Pelican desired to be taken in tow and brought to Sault Ste. Marie, stating that he would not delay the steamer to take up his anchor, but to slip his cable. This he did without buoying it, and within half an hour the Pelican was on her way in tow of the steamer, and delivered her in the canal about 10 o'clock the same night. The weather during all this time was very cold, although the temperature had moderated on the 25th. The Pelican was considerably iced up forward; her bows and forecastle deck being covered, as well as her windlass. Her jibs had been rolled up with salt to prevent their freezing. Her mainsail, while serviceable, was patched, and not in the best condition. The place at which she lay when found was exposed to winds from all quarters, except the south. While the wind on November 25th was favorable to a vessel bound to Sault Ste. Marie, no attempt had been made by the Pelican to leave her anchorage and proceed to that port, because the weather was not yet settled, and some hazard would attend her effort to get away unaided because of her proximity to the Island. The fact, also, that she lay there from Saturday morning until taken in tow by the Pope on Wednesday noon is persuasive that her condition as to navigation was not such, in the judgment of her master, as to warrant an attempt to proceed to Sault Ste. Marie with-

out aid. Having in mind the lateness of the season, the character of the weather, disabled condition of the vessel, and the danger of navigation in her crippled condition, especially in that part of Lake Superior, the probability that the ice might form and imprison the vessel, and the remoteness of her anchorage from the usual path of vessels then navigating the lake, she being so far to the northward of that course as to be invisible to passing vessels on the usual course, and because, also, of the danger of her going ashore if in her attempt to get away she would pay off in the wrong direction, it would seem that the master acted with good judgment in holding on to his anchorage, and that he recognized the dangers and needs of the situation. The evidence satisfies me that, although the Pelican had lain there in safety for four days, the character of the locality was such as to make her continued stay a source of great peril, and would prompt a master of a vessel thus situated to take the first assistance available to enable him to get away, and the proofs are also satisfactory that, if the schooner had been in good navigable condition, she would not have remained at so exposed an anchorage for so long a time. It must also be remembered that the season of navigation was rapidly drawing to a close. Most of the vessels, steam and sail, navigating that lake had made their last voyage for the season, which is generally understood to close on all the lakes, and especially on Lake Superior, November 30th, on which day marine insurance risks terminate, unless extended by special contract. It is true that the steamer performed the services for which compensation is asked in something less than half a day from the time she put out her tow line and took the Pelican in tow until she delivered her in the canal at the Sault; yet, as a matter of fact, she must be fairly regarded as having entered upon the work of rescue from the time she sighted the Pelican, about 4 p. m. of November 24th, when she turned about and lay to, for the purpose of going to her aid, as soon as the weather would permit. This would make the time of her actual services some 30 hours. In measuring the compensation to be awarded, the case has this unique feature, and the reward ought to be at least a fair compensation for the value of the rescuing steamer's time, even though the merit of the services was not of the highest order. It is a legal truism that salvage is not a compensation simply for work and labor, but should be rewarded liberally to encourage others to hazard life and property in the rescue of imperiled vessels and cargo and the preservation of life. It is generally held that to limit such compensation to the mere cost of performing the services by a less expensive agency would be to discourage the enterprise and efforts of those best equipped to render the necessary aid, and thus result in increasing losses from perils of the sea. While there was no hazard of life nor any great danger to the rescuing vessel in rendering aid to the Pelican, and while there was no immediate, imminent danger to the Pelican, the time of year and circumstances before adverted to nevertheless impress upon those services the right to salvage compensation. In the uncertainty of the weather and the condition of the schooner, together with the lateness of the season, while it is not certain, yet it

may be fairly assumed that there was no little danger before the Pelican could be reached by other aid, her provisions would give out, and it is not unlikely that she might have been locked in the ice beyond the possibility of rescue. The day after her arrival at her anchorage, the light on Cariboo Island had been extinguished for the season. There were no inhabitants on that island, and none nearer than Michipicoten, some 20 miles to the northward. The latter island was inhabited by a few fishermen, but it had no means of communication with the main land, except a small tug which had taken off the lighthouse keeper from Cariboo Island on the day of the Pelican's arrival there, and had gone to Michipicoten, where she lay storm bound for eight days after leaving Cariboo Island. After the Wocokoken's arrival at Sault Ste. Marie, her master had dispatched a tug to search for the Pelican and bring her in, and the tug left for that purpose on Monday noon. This tug, however, had not passed White Fish Point when she met the Pope having the Pelican in tow. This was on Wednesday evening, November 25th. Crediting the tug with having made all proper efforts to perform her duty under her employment, this would indicate that the weather was such as to prevent her going beyond White Fish Point, which is some 40 miles to the southward of Cariboo Island. It is argued that the tug would have brought the Pelican in for \$300, and that this was the value of the towage services. By the contract under which the tug went out, she was to have \$300 if she brought the Pelican in within two days, and \$150 per day for every additional day spent in the search and rescue. It would not be just to measure the value of the Pope's services by this standard. The tug's employment was in the line of business in which she was engaged, and, while she could perform that service profitably at the agreed rates of compensation, it is by no means certain that she would have found the Pelican at once, or would have been able to bring her in the weather then prevailing. It is claimed that the Pelican might safely have lain to anchor where she was until a favorable wind should come when she might have run unaided to the Sault. But I cannot bring myself to believe that her master regarded this as feasible, or he would have made the effort. The fact that he volunteered to slip his anchor to avoid detaining the steamer in order that he might insure her aid is suggestive that he regarded the situation of his vessel under all the circumstances as one calling for prompt assistance.

In performing this service the steamer actually lost during its rendition at least a full day of her time before she took the Pelican in tow. An immediate consequence of this loss of time was her detention at the Sault for at least half a day, as she had to await her turn in going through the canal, and was thrown behind other vessels in entering the locks. The direct result of this was to compel her to stay at the Sault to November 26th, since a snowstorm intervened before she could get through the locks, which prevented her from continuing her voyage. While ordinarily a subsequent detention of this sort is not regarded as a proximate cause in the sense of being an element for salvage compensation, yet this was so immediately con-

nected with the rescue of the schooner as to be fairly an incident of that service, and equitably entitled to consideration in measuring its value. The Pope's earnings were about \$700 per day gross. Her expenses were about \$180 a day. In towing the Pelican she supplied and used her own new hawser, as the Pelican had no tow line. The testimony is that the use of such a hawser in this service was worth from \$100 to \$150.

There is merit, also, in the claim made for the libelants that in deviating from her voyage to take the Pelican in tow the insurance upon the hull, at least of the Pope, was imperiled, and that this is a circumstance that ought to be considered in measuring the reward. While there was not an imminent danger of the loss of the lives of the Pelican's crew, and while the risk run by the Pope in these unfrequented waters was not great, and there was no peril to the lives of the crew in performing the service, yet, in view of all the circumstances narrated and the fact that the service was expeditiously performed and voluntarily rendered in response to a flag of distress, which called for it, and in view of the value of the property, some \$325,000, put at hazard in the work of rescue, the time necessarily lost by her in its performance and the value of the use of the hawser, \$1,300 would seem to me to be a fair though not a liberal, compensation, and that amount, with costs is awarded the libelants for salvage. The claim made by libelants that the Pope, by this detention, was subjected to storms which detained her, causing the loss of two days' time, which but for this detention would not have been suffered and that such detention, necessitated the extra insurance paid by her owners to cover the risk for the two days after the close of navigation, are consequences too remote and conjectural to be entertained as separate elements of compensation, and would seem to be fairly met by the allowance made.

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#### QUILHOT et al. v. HAMER.

(Circuit Court, N. D. New York. December 27, 1907.)

##### 1. JUDGMENT—DEFAULT—VACATION—TIME—TERMS.

Where judgment had been entered against defendant by default, the court had power to set aside the judgment and fix a time within which an answer might be served, on terms under Code Civ. Proc. §§ 783, 784, providing that after the expiration of the time within which a pleading must be made, or any other proceeding in an action after its commencement must be taken, the court for cause may in its discretion, and on such terms as justice requires, relieve the party from the consequences of the omission to do the act and allow it to be done, except as otherwise prescribed by law, on such terms as justice may require, at any time within one year after notice thereof, and may open the judgment taken against the party for his mistake, inadvertence, or excusable neglect.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 262-264.]

##### 2. REMOVAL OF CAUSES—TIME TO ANSWER—VACATION OF DEFAULT.

The New York Code of Civil Procedure requires the filing of an answer or pleading to be served within 20 days from the service of the summons and complaint, and authorizes the court by order to extend the time to answer. The statute regulating removal of causes provides that, when-

ever any party entitled to remove may desire to remove the suit to the Circuit Court of the United States, he may make and file a petition in such suit in the state court at the time or at any time before the defendant is required by the laws of the state or rule of the state court in which such suit is brought to answer or plead to the declaration or complaint. Judgment having been entered against defendant by default on December 12, 1906, more than 20 days after service, defendant on April 2, 1907, applied for an order opening his default, and vacating the judgment, tendering a proposed answer, which motion was brought on for hearing on April 13th, and the court ordered that the motion be granted, and that the answer tendered stand as defendant's answer in the action as served on the date of the service of the motion papers, on condition that defendant pay certain costs and disbursements within 15 days from the date of the order. *Held*, that the time to answer under such order within the removal act, expired on April 2, 1907, and that defendant after having complied with the conditions of the order was not then entitled to remove the cause.

Motion to Remand Cause from the United States Circuit Court to the Supreme Court of the State of New York on the Ground that the Removal from the State to the Circuit Court Was Not in Time.

H. V. Borst, for the motion.

Hotchkiss and Barber (H. J. Cookinham, of counsel), opposed.

RAY, District Judge. The summons was served on the defendant personally in the state of New York on the 15th day of November, 1906. As the defendant did not appear, judgment, as demanded in the summons, was entered against him on the 12th day of December, 1906, more than 20 days after such service. On the 2d day of April, 1907, the defendant served motion papers, asking a rule or order opening his default and vacating the judgment. The notice of motion stated that such motion would be brought on for a hearing on the 13th day of April, 1907, at a designated Special Term, and it was brought on to be heard and was heard on that day. With the notice of motion there was served a proposed answer which was duly verified on the 28th day of March, 1907, as required in such cases by the practice of the Supreme Court of the state of New York. On the hearing of the motion the court decided as follows:

"Ordered that the default of the defendant be, and it is hereby, opened and the judgment herein against the defendant entered and docketed in the Montgomery county clerk's office on December 12, 1906, be, and, it is hereby, vacated and set aside and the said county clerk is hereby directed to cancel of record said judgment; and it is further ordered that the defendant may appear and answer herein, and that the answer served with the motion papers herein may stand as the answer of the defendant in this action as served on April 2, 1907, the date when the motion papers herein were served, upon the condition that the defendant pays to the plaintiffs, or their attorney, the costs taxed in said judgment, the sum of \$29.68, and the sum of \$200, the amount expended by plaintiffs in attempting to collect said judgment since the entry thereof, also \$10 costs of this motion. This order is not to be entered by the clerk of this court, unless it is accompanied by a receipt showing the said sums aggregating \$239.68 have been paid within 15 days from the date thereof."

Excluding the 13th day of April, defendant had until April 28th in which to pay such costs, and, when the costs were paid, the order was to be entered, and not before. The language of the order was:



"The defendant may appear and answer herein, and that the answer served with the motion papers may stand as the answer of the defendant in this action as served on April 2, 1907, the date when the motion papers herein were served, upon the condition that the defendant pays to the plaintiffs \* \* \* the costs. \* \* \* This order is not to be entered by the clerk of this court unless it is accompanied by a receipt showing the said sums aggregating \$239.68 have been paid within 15 days from the date thereof."

On the 27th day of April, and within the 15 days, the defendant paid the costs and sums imposed, filed the receipt showing such payment, and the clerk entered the order. It then became effective, the order of the court. Having paid the costs, filed the receipt, and entered the order, the default was then, on the 27th day of April, 1907, opened, and on that day defendant became entitled to answer in the mode prescribed by the order, and on that day the proposed answer actually became the answer in the case, but it became, by the very terms of the order, the answer as served on the 2d day of April, 1907, and was to stand as the answer in the case as if served that day. There was, however, no answer, only a proposed or tendered answer, up to April 27, 1907. On the same day, April 27, 1907, the petition and other papers for the removal of the case to the Circuit Court of the United States were duly filed in the proper office.

One question is, in view of that order providing that "the answer served with the motion papers may stand as the answer of the defendant as served on April 2, 1907": Was the answer served April 2d and on that day did defendants' time to answer or plead expire, or did it expire on the day the order was entered and became effective, viz., April 27, 1907? Another pertinent question, in view of the language of the statute giving the right to remove and fixing the time when removal may be made, is: Did not the time to remove expire 20 days from the 15th day of November, 1906, or on the 6th day of December, 1906? Was not that "the time" when "the defendant was" required by the laws of the state "of New York" or the rule of the state court in which "the suit was brought to answer or plead to the declaration or complaint of the plaintiff"? Under the provisions of the Code, had defendant appeared December 6th by serving notice of retainer and demanding a copy of the complaint, the plaintiff would have had 40 days to serve the complaint, or until January 17, 1907, and, if served by mail, defendant would have had until February 27th in which to serve his answer. But, as he did not appear, I think his time to plead expired on his default. Having no right to appear and demand and require service of a copy of the complaint after December 6th, he had no right to answer. His time had expired. His rights thereafter depended on the special order of the court in opening his default.

There is no pretense of any stipulation of the plaintiff extending the defendants' time to plead or answer. There is no pretense of any order of the court expressly extending the defendants' time to plead or answer aside from the one granted opening the default. No application was ever made to the court or to a Judge thereof for such a rule or order. The only application made to the court was for a rule or order opening the default, and allowing the defendant to plead or

answer. The court had power to make such an order, and to fix the time within which the answer should be served, if allowed to be served. Section 783 of the Code of Civil Procedure provides:

"Sec. 783. After the expiration of the time, within which a pleading must be made, or any other proceeding in an action, after its commencement, must be taken, the court, upon good cause shown, may, in its discretion, and upon such terms as justice requires, relieve the party from the consequences of an omission to do the act, and allow it to be done; except as otherwise specially prescribed by law."

See, also, section 724, Code Civ. Proc., which reads:

"The court may likewise, in its discretion, and upon such terms as justice requires, at any time within one year after notice thereof, relieve a party from a judgment, order or other proceeding, taken against him through his mistake, inadvertence, surprise, or excusable neglect; and may supply an omission in any proceeding. \* \* \*"

The order made, when the costs were paid, of course, operated as an extension, was in effect practically an extension of the time; but did it in any way change "the time" when the defendant was "required by the laws of the state or the rule of the state court \* \* \* to answer or plead"? The language of the statute is:

"That whenever any party entitled to remove, any suit \* \* \* may desire to remove such suit from a state court to the Circuit Court of the United States, he may make and file a petition in such suit in such state court at the time or at any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff for the removal of such suit. \* \* \*"

The Code of Civil Procedure of the state requires the answer or pleading in such a case to be served within 20 days from the service of the summons and complaint, and also authorizes the court by order to extend the time, and the rules recognize a stipulation extending the time as equivalent to an order. *Simonson v. Jordan* (C. C.) 30 Fed. 721; *Mayer v. F. W. & D. C. R. Co.* (C. C.) 93 Fed. 601. I have already referred to cases where only the summons is served.

In this case we have no order or stipulation extending the time to answer or plead. We have an order of the court, made on granting a favor, or excusing a default, stating that the "answer served with the motion papers herein may stand as the answer of the defendant in this action as served on April 2, 1907, the date when the motion papers herein were served upon the condition," etc. This order did not give a single day beyond April 2, 1907, in which to serve an answer. The language "that the defendant may appear and answer herein" is immediately followed by the qualifying statement that the answer served April 2, 1907, is to stand as the answer and as served April 2, 1907. The order fixed what the answer was to be and the time when it was deemed to have been served, viz., the day when it was served, April 2d, and it seems to me the day when by law and the rules he was required to answer. Having been served April 2d, this answer was allowed as matter of favor to stand as the answer in the case and as served April 2d. This order granted no other right to put in any other answer or any answer on any day subsequent to April 2, 1907. Then,

how can it be said that the time when the defendant was required by the laws of the state of New York, or the rule of the state court, to answer or plead, did not expire on or as early as the 2d day of April? The 15 days related solely to the time when the costs were to be paid and the order entered. If not paid within 15 days, the order was not to be entered, and, if not paid within 15 days, there would be no answer in the case, no right to answer or to have the answer served with the motion papers stand in the case. If the costs were paid, the answer served April 2d was to be recognized as served in time, viz., April 2d, and was allowed to stand as served on that day. It seems to me clear that the proper construction of the order and its legal effect are at most that the time to answer was extended to and fixed as April 2, 1907, when, in fact, it was served. Defendant had no right on that day to serve it as an answer in the case, as his time had expired, but the court had power to open the default and permit the answer served with the motion papers to stand in the case as served that day and as defendants' answer, and that is what it did, and all it did, as to extending the time to answer. The court had the power to permit the service of this or some other answer at any reasonable time after making the order, but this it did not do or undertake to do. It is immaterial that the order was not entered until 15 days after April 13, 1907, or that it did not become effective until 15 days after that day. When it was entered and when it did become effective, it provided that the answer served April 2, 1907, should stand as the answer in the case, and should stand as served as such answer on April 2, 1907. This fixed the latest day on which he was permitted to answer even by order of the court, and this order also specified the answer he was allowed to serve. The order excused the omission or default in not serving sooner, and said it must be considered that defendant answered April 2, 1907.

The cases decided in the Supreme Court of the United States seem to limit quite strictly the construction to be placed on the statute allowing the removal of causes. Says Mr. Justice Gray in *Martin v. Baltimore & Ohio R. Co.*, 151 U. S. 687, 14 Sup. Ct. 538, 38 L. Ed. 311, *Harlem* dissenting:

"Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that Congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defence whatever in that court, so that, if the case should be removed, the validity of any and all of his defences should be tried and determined in the Circuit Court of the United States."

This was approved in *Wabash W. R. v. Brow*, 164 U. S. 277, 17 Sup. Ct. 126, 41 L. Ed. 431. Assume this to be the law, and we find that defendant having made default was allowed to interpose a defense by an answer served April 2, 1907, and which was to stand as served that day. Then was not that the day on which he was required to make his defense? That was the day on which he did present his defense, and the court said it should stand as served in time. If it was the day when the court actually permitted him to make a defense, April 13, 1907, or decided so to do, then that was the day for removal. True,

the order permitting the answer to stand as served on April 2d was not entered until April 27th, but defendant was at liberty to enter it, but not to file his petition for removal, on the 13th or on any day thereafter up to and including the 27th. This day, the 27th, was the day on which he was permitted by the court to have his defense already served, and already made on the 2d day of April stand as made, and presented that day.

But it is said that, as he was in default, he had no right to remove during his default, and that to give this construction to the order is to deprive defendant of the right to remove at all on or after the opening of the default. This may be so, but the defendant deprived himself of the right to remove the cause to the Circuit Court of the United States by his own negligence or omission in the first instance, and the Supreme Court of the state had no power to make an order simply reviving or renewing or extending the time for a removal of the cause. *Price v. Lehigh Val. R. Co.* (C. C.) 65 Fed. 825, where Coxe, D. J., now C. J., said:

"In legal contemplation it was as if a default existed after October 19th. and, although the state court was clothed with power to enlarge the time and even to open a default and receive defendants' answer, it had no power to 'revive a right once lost by noncompliance with the statute. The removal on December 13th was too late."

See, also, *Rock Island N. B. v. Keator Lumber Co.* (C. C.) 52 Fed. 897, and *Hurd v. Gere et al.* (C. C.) 38 Fed. 537.

I am not to be understood as holding, for I do not hold or intimate, that, had the defendant obtained an order opening his default and giving a certain number of days in which to serve his answer or interpose his defense, he would not have been entitled to remove the cause at any time after the default was opened, and before the expiration of the time within which he was required or permitted by the order to answer. Such an order, being lawful and made in compliance with and by the express authority of the statutes of the state, would fix the time within which he was required by the laws of the state to answer. The time would be fixed by the court in compliance with statute, and by its authority, and hence by the laws of the state. But here we find no extension of time in which to plead or answer beyond April 2, 1907, and, as the removal was made April 27, 1907, it was too late and the motion to remand must prevail.

Motion granted.

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M. C. KISER CO. et al. v. CENTRAL OF GEORGIA RY. CO. et al.

(Circuit Court, N. D. Georgia. December 21, 1907.)

COMMERCE—CARRIERS—INTERSTATE COMMERCE—ENJOINING INCREASE OF RATES—JURISDICTION OF COURTS.

By the interstate commerce act and its amendment (Act Feb. 4, 1887, c. 104, §§ 11–15, 24 Stat. 382–384 [U. S. Comp. St. 1901, pp. 3161–3165], and Act June 29, 1906, c. 3591, § 4, 34 Stat. 589 [U. S. Comp. St. Supp. 1907, p. 900]) general power over interstate rates to be charged by common carriers is given to the Interstate Commerce Commission, and the courts are without jurisdiction to determine what are reasonable or un-

reasonable rates. A court of equity, however, may properly enjoin carriers from establishing, or increasing to, a rate believed to be unreasonable, at the same time leaving the matter in such shape that the commission may ultimately determine the question of the reasonableness of the proposed rate and prescribe what will be a just and reasonable rate.

In Equity. On motion for preliminary injunction.

Wimbish, Watkins & Ellis, for complainants.

DuBignon & Alston, for defendant Atlantic Coast Line.

Dorsey, Brewster, Howell & Heyman, and C. B. Northrop, for defendant Southern Railway Co.

Brown & Randolph, for defendant Seaboard Air Line Ry. Co.

Lawton & Cunningham, for defendants Central of Georgia Ry. Co. and Ocean Steamship Co. of Savannah.

Edward Baxter, special counsel, for all respondents.

NEWMAN, District Judge. This bill is brought by the M. C. Kiser Company and J. K. Orr Shoe Company, Georgia corporations engaged in the boot and shoe business in Atlanta, against the Central of Georgia Railway Company, a Georgia corporation, the Southern Railway Company, a Virginia corporation, the Seaboard Air Line Railway, a corporation of Virginia and North Carolina, the Atlantic Coast Line Railroad Company, a Virginia corporation, the Ocean Steamship Company of Savannah, a Georgia corporation, and the Merchants' & Miners' Transportation Company, a Maryland corporation. The purpose of the bill is to enjoin the defendants from increasing the rate on boots and shoes from eastern ports (Boston, Providence, and New York) by water and rail to Atlanta, Ga. The rate at the time the bill was filed was 85 cents per 100 pounds, and the proposed increase was to \$1.05 per 100 pounds in any quantity, and 93 cents per 100 pounds by the car load. The proposed car load rate of 93 cents is immaterial in this investigation by reason of facts which will be hereafter stated. The bill was filed on April 29, 1905, and a temporary restraining order granted, which has been in effect since that time. The defendants answered the bill and considerable testimony was taken. The parties have agreed that the present hearing should be the final hearing in the case, and that final decree may now be entered on the pleadings and evidence.

The history of the matters leading up to the present controversy between the complainants and the defendant companies is this: Prior to February 1, 1905, boots and shoes were carried from the eastern cities named, by water and rail at a rate of \$1.14 per 100 pounds. The merchants of Atlanta engaged as jobbers in the boot and shoe business had tried for several years to have this rate reduced. During the argument of the case in this court seeking to enjoin circular 301, issued by the Railroad Commission of Georgia, Mr. Ed Baxter, counsel for the railroads, suggested to the opposing counsel in that case that, if circular 301 could be withdrawn, he believed that the various railroads operating in this territory would agree to a general reduction of their tariff of freight rates; at least, he would earnestly recommend the same, and he believed his recommendation would be followed.

Thereupon circular 301 was revoked, and a committee was appointed from the Atlanta Chamber of Commerce to meet representatives of the railroads interested to take up this matter. Meetings were held in Atlanta, and the whole subject of rates in the Atlanta territory discussed. Finally, at a meeting held by the railway representatives in St. Augustine, among other reductions of rates made to Atlanta was that of a reduction to 85 cents per 100 pounds on boots and shoes from the eastern points named to Atlanta by water and rail. The rate of 85 cents was to apply only to car load lots of not less than 24,000 pounds, and to be shipped at one time from one consignor to one consignee. This rate went into effect February 1, 1905. Soon after the rate went into effect, it developed that manufacturers did not ship to any one jobber at one time as much as 24,000 pounds. In order to diversify their stock, the jobbers buying from manufacturers of different classes of goods had shipments made from the various factories in much less quantities than 24,000 pounds. In order to avoid this, the Ocean Steamship Company allowed various shipments from the interior to be assembled on its docks in Boston until as much as 24,000 pounds had been collected, when the same was put on board a steamer, and shipped as a car load at the car load rate. The other transportation lines, not having the dock facilities of the Ocean Steamship Company at Boston, permitted some shipments to be made at the 85-cent rate in any quantity in order to meet the action of the Ocean Steamship Company. The Merchants' & Miners' Transportation Company, acting in conjunction with the Seaboard Air Line Railway, soon after announced an 85-cent any quantity rate. After this, the other lines interested submitted to this arrangement, and the 85-cent any quantity rate seems to have become general by all the water and rail companies operating from eastern ports to Atlanta. It seems that the lines of the defendants in this case, and perhaps others coming into Atlanta, are known as "eastern lines," whereas, there are certain lines known as "western lines," coming into Atlanta and surrounding territory from what are called "Ohio river points," bringing merchandise from Chicago, Cincinnati, St. Louis, Louisville, and other cities. These western lines, upon the adoption by the eastern lines of the water and rail rate of 85 cents per 100 pounds in car load lots, adopted an any quantity rate of 85 cents from these western points to Atlanta and surrounding territory. It is shown by the record that the business of manufacturing boots and shoes has of recent years developed and grown to considerable proportions in a number of western cities, and competition from that source appears to be an important consideration in the rate-making in question here. The result of all this was, whatever may have been the cause, that all the railway and transportation companies participating in the 85-cent rate from eastern points to Atlanta, by a circular issued April 12, 1905, gave notice that on May 1st the rate on boots and shoes would be increased to 93 cents in car load lots and \$1.05 in less than car load lots. This advance was simultaneous on the part of all the railroads interested in the rate. This, as was stated in the beginning, may be considered so far as Atlanta jobbers in boots and shoes are concerned as an advance of 20 cents per 100 pounds; the car load rate being entirely

impracticable. The testimony is convincing as to this. Mr. W. A. Wilburn, second vice president of the Central of Georgia Railway Company, and in charge of traffic, was one of the witnesses for the defendants, and he goes into this matter of the extent to which the car load rate could be of benefit to the complainants more thoroughly probably than the other witnesses. He made a personal investigation of the matter in Boston, and endeavored to arrange for assembling the goods in car load lots, but states in his testimony that the best plan that could be adopted would have cost the shippers as much as \$1.05 per 100 pounds. The whole record shows quite clearly that it is utterly useless for the Atlanta jobbers to try to utilize the car load rate, so that the proposed increase in rates may be considered as to the complainants an increase of 20 cents per 100 pounds; that is, from 85 cents to \$1.05.

The questions in this case, at least such as have been discussed, and need be considered, are, first, that of the jurisdiction of the court, and, in connection with it, that of the reasonableness of the proposed increase in rate. The jurisdiction of the court is challenged by the demurrer as follows:

"Because the granting of the injunction sought for by complainants in said bill of complaint would, in effect, fix the rate to be charged by this defendant and its connections in the future for the transportation of boots and shoes from Boston, Mass., Providence, R. I., and Philadelphia, Pa., to Atlanta, Ga., at the rates now prevailing as the maximum rates; and the right to fix such rates is a legislative power, and not a judicial one."

On this question of jurisdiction the two important cases at present are *Texas & Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 555, and *Southern Railway Company v. Tift*, 206 U. S. 428, 27 Sup. Ct. 709, 51 L. Ed. 1124. The former case was a suit by the Abilene Cotton Oil Company against the railway company to recover an excess charge over what would have been a reasonable rate for shipments of cotton seed from points in Louisiana to Abilene, Tex. There was a verdict for the defendant, and the case went through the Supreme Court of Texas, where the judgment to the trial court was reversed, to the Supreme Court of the United States, where the judgment of the state Supreme Court was reversed. The decision of the Supreme Court of the United States, as expressed in the opinion in that case by Mr. Justice White, is very broad and comprehensive in character. That case, it is true, was an action at law by one shipper to recover an excess freight charge; and it might be said with much force that a suit at law by one shipper to recover an overcharge is a very different thing from a suit in equity seeking to enjoin a rate for the benefit of all shippers of a particular class. In the first instance, a preference is obtained by the one shipper, if he succeeds, over others, and in the latter all of the same class share in the result of the court's action, if favorable. But the grounds on which the denial of the court's jurisdiction in the Abilene Case goes is such that it would seem to deny to the courts generally jurisdiction of all controversies as to the reasonableness of interstate rates. It is distinctly held that the power conferred upon the Interstate Commerce Commission in respect to rates by the interstate commerce act

is wholly inconsistent with the right of the courts to pass upon the reasonableness of an established rate. An extract from the opinion in the Abilene Case will show the reasoning adopted by the Supreme Court in that case:

"For if, without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission, and with the duty which the court casts upon that body of seeing to it that the statutory requirements as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction, and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old, or the filing of a new schedule conformably to the action of the commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the commission in the premises. This must be, because, if the power existed in both the courts and the commission to originally hear complaint on this subject, there might be a divergence between the action of the commission and the decision of a court. In other words, the established schedule might be found reasonable by the commission in the first instance, and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible."

The Tift Case, cited above, was a bill in the Southern district of this state seeking to enjoin an increase in freight rates by the defendant railway companies on yellow pine lumber. In that case a restraining order was granted in the Circuit Court, but the same was dissolved to allow application to be made to the Interstate Commerce Commission for relief. The action of the commission, holding the proposed increase in rates unreasonable, was brought before the Circuit Court, and the proceedings, including the evidence before the commission, were stipulated into the record before the Circuit Court. Thereupon, after hearing, a permanent injunction was granted. The case went on appeal to the Supreme Court of the United States, and the judgment of the Circuit Court was affirmed. The Supreme Court sustained the jurisdiction of the Circuit Court. Stating what might be the qualification or exception to the general rule announced in the Abilene Case, the court in the opinion by Mr. Justice McKenna said:

"In the case at bar, however, there are assignments of error based on the objections to the jurisdiction of the Circuit Court. These might present serious questions in view of our decision in *Texas & Pacific Railroad Company v. Abilene Cotton Oil Company*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 555, upon a different record than that before us. We are not required to say, however, that, because an action at law for damages to recover unreasonable rates which have been exacted in accordance with the schedule of rates as



filed is forbidden by the interstate commerce act, a suit in equity is also forbidden to prevent a filing or enforcement of a schedule of unreasonable rates or a change to unjust or unreasonable rates."

Other authority is cited bearing more or less upon the question of jurisdiction here, but the two decisions just referred to seem to be controlling when it is ascertained what is held by the court, considering the two cases together. From what is said in both cases, the ruling would seem to be that general power over interstate rates to be charged by common carriers is given to the Interstate Commerce Commission, and that for the courts to undertake to determine what are reasonable or unreasonable rates would interfere and conflict with the exercise of this power by the commission, although instances might arise in which it would be proper for a court of equity to enjoin the enforcement of unreasonable rates or a change to unjust or unreasonable rates; but that this action of a court of equity will not interfere with the final exercise by the Interstate Commerce Commission of the full powers granted to it by the act of Congress of 1887 to determine whether a given rate is an unjust and unreasonable rate, or under the act of June 1906 "to determine and prescribe what will be a just and reasonable rate or rates, charge or charges, to be thereafter observed \* \* \* as the maximum to be charged." This seems to be the clear meaning of these decisions. It appears, therefore, that the court might properly enjoin carriers from establishing, or increasing to, an unreasonable rate, at the same time leaving the matter in such shape as that the Interstate Commerce Commission may ultimately determine whether the contemplated increase is just and reasonable. Considerable testimony has been taken in this case as to the reasonableness of the present rate and of the proposed rate. Evidence has been offered as to the relative cost of transporting boots and shoes and other commodities; also evidence as to the increase in the volume of shipments of boots and shoes under the 85-cent rate; also evidence as to whether the existing rate of 85 cents was reached by competition between the carriers and was brought about as a legitimate result of such competition; also, whether the proposed increase in rate was the result of a combination between the carriers, or was the action of each carrier and its connections acting separately and independently. The evidence in the case fails to show that the present rate of 85 cents has worked injury to the carrier companies. The volume of business over the defendant companies' lines has increased largely since the new rate went into effect. The 85-cent rate became effective February 1, 1905, so that from one month to a month and a half's business of that year was done under the old rate of \$1.14 and 11 months under the new rate. The year 1905 showed some increase in business over 1904; but the first six months of 1906, the last period available when the testimony in this case was taken, showed such increase as that it could reasonably be expected that the amount of boots and shoes coming into Atlanta over the eastern lines during the entire year of 1906 with the 85-cent rate would be about double that of 1904 under the \$1.14 rate.

What the relative cost of it was cannot be determined on this record. It is shown on behalf of the defendant companies that the

amount of freight per car received on boots and shoes is less than that received on other classes of goods; on some classes very much less. Taking this whole record together and considering the manner in which the 85-cent rate was reached, and its effect upon the jobber, the carrier, and the volume of business since it became operative, comparing this rate with the rate on boots and shoes to other points, and considering as far as possible everything that would throw light on the question, I am satisfied the 85-cent rate may well remain of force until it can be properly determined what is a reasonable rate. Indeed, there is nothing in this record to show that the 85-cent any quantity rate would not have been continued by the eastern lines, defendants here, but for the action of the western lines, and its injurious effect as viewed by the representatives of the eastern lines, and the apprehension of still further and more injurious action by the western lines.

In my judgment the restraining order should remain in force a reasonable length of time to allow the complainants to present this matter to the Interstate Commerce Commission, and in the meantime the case here will be stayed until a determination by that body as to whether the proposed increase in rate is reasonable and proper, and as to what is a reasonable rate.

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MOSCOW HARDWARE CO., Limited, v. COLSON et al.

(Circuit Court, D. Idaho, N. D. December 19, 1907.)

GARNISHMENT—PERSONS SUBJECT TO GARNISHMENT—PUBLIC CORPORATIONS.

"The Regents of the University of Idaho," created a corporation by the laws of the territory and the Constitution of the state, is a public corporation and an agency of the state, and as such is not subject to garnishment in the absence of a statute clearly evincing the purpose of the Legislature to subject public corporations to such process; and the general provision that any "person" may be garnished is not sufficient for that purpose, although the word "person" is expressly defined by the statutes as including a corporation; such provisions being generally construed as restricted to private or business corporations.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5323-5335; vol. 8, pp. 7752-7753.]

At Law. On motion to dissolve attachment.

Geo. G. Pickett and J. C. Orland, for plaintiff.

Forney & Moore, for defendants.

DIETRICH, District Judge. "The Regents of the University of Idaho," a corporation, appears specially and moves to quash the notice of garnishment served upon it. The motion is resisted by the plaintiff. The sole question is whether or not the moving corporation is subject to garnishment, process issued and served pursuant to the laws of the state of Idaho.

The University of Idaho was established by an act of the Legislature of the territory of Idaho in 1889 (Laws 1889, p. 17). The gov-

ernment of the university was vested in a Board of Regents, which is specifically provided for in the act. By section 3 it is provided that:

"The Board of Regents and their successors in office shall constitute a body corporate by the name of 'The Regents of the University of Idaho,' and shall possess all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law," etc.

When the territory was admitted as a state, certain public lands were donated for the support of the university. By section 10 of article 9 of the Constitution of Idaho it was provided that:

"All the rights, immunities, franchises and endowments heretofore granted thereto by the territory of Idaho are hereby perpetuated unto the said university. The Regents shall have the general supervision of the university and the control and direction of all the funds of, and appropriations to, the university, under such regulations as may be prescribed by law."

My attention has been called by plaintiff to *State ex rel. Robinson v. Carr*, Auditor, 111 Ind. 335, 12 N. E. 318, and *Sterling v. Regents of the University of Michigan*, 110 Mich 369, 68 N. W. 253, 34 L. R. A. 150, in support of the contention that "the Regents of the University of Idaho" is not a "municipal" corporation; and it may be conceded that the first case mentioned is fairly in support of this view. Other courts have adopted a contrary view. See note to *State ex rel. Little v. Regents*, 29 L. R. A. 378. But it seems to me to be wholly unimportant to discuss the precise technical meaning of the phrase "municipal corporation," or to determine whether the Regents of the University of Idaho are, strictly speaking, a municipal corporation or a public corporation, or under just what head it should be classed. Its origin, maintenance, and purpose are all so distinctively public that, so far as the question under consideration is concerned, it is clear that the rules relating to municipal corporations and quasi municipal corporations should upon principle be made to apply to this corporation. It is distinctively and exclusively a public educational institution, brought into existence and maintained solely for the purpose of performing certain administrative functions of the state. The prevailing, although not universal, rule, is that, in the absence of a statute clearly expressing the intention of the Legislature to the contrary, the state, its officers, and its agencies, such as counties, school districts, municipal corporations strictly speaking, and other public bodies created for the purpose of performing administrative functions of government, are not subject to garnishment process. The rule is based upon considerations of public policy. The general rule is so familiar and the reasons supporting it have been so frequently and so generally stated, not only in the decisions originating in the jurisdictions where it prevails, but in the text-books, that no useful purpose would be subserved in restating them. See *Buchanan v. Alexander*, 4 How. 20, 11 L. Ed. 857; *Providence v. Virginia* (C. C.) 11 Fed. 284; *Pringle v. Guild*, 118 Fed. 655; *Keene v. Smith*, 44 Or. 525, 75 Pac. 1065; *Skelly v. School District*, 103 Cal. 652, 37 Pac. 643; *State ex rel. Summerfield v. Tyler*, 14 Wash. 495, 45 Pac. 31, 37 L. R. A. 207, 53 Am. St. Rep. 878; *Divine v. Harvie*, 7 T. B. Mon. (Ky.) 439, 18 Am. Dec. 194; 14 Am. & Eng. Enc. of Law (2d Ed.) 811, 812; 20 Cyc. 988.

It is undoubtedly true that every state has the right to subject all persons to garnishment process and to include in the term "persons" public as well as private corporations; but, by reason of the injury which the courts have generally held would accrue to public interests by permitting the state and its agencies to be garnished, the intention of the Legislature to confer such right of garnishment upon a creditor will not be inferred from general language, but the intention of the Legislature must clearly appear. This is a rule of statutory construction prevailing not only with regard to attachment statutes, but to all statutes which would operate to encroach upon what are commonly referred to as "sovereign rights," or interfere with the orderly performance of public functions by those agencies established for the administration of government. In *Savings Bank v. United States*, 19 Wall. 239, 22 L. Ed. 80, the court said:

"The most general words that can be devised [for example, any person or persons, bodies politic or corporate] affect not him [the king] in the least if they tend to restrain or diminish any of his rights or interests. \* \* \* The rule thus settled respecting the British Crown is equally applicable to this government, and it has been applied frequently in the different states and practically in the federal courts."

By section 915, Rev. St. U. S. [U. S. Comp. St. 1901, p. 684], the state attachment laws are made applicable to common-law causes in the Circuit Courts of the United States. By subdivision 5 of section 4307 of the Revised Statutes of Idaho of 1887, it is provided that debts and credits, etc., not capable of manual delivery, must be attached by leaving with the "person" owing such debts a copy of the writ of attachment and a notice that the debt owing by such person is attached, in pursuance of the writ. In section 4309 it is further provided that "all persons" having in their possession or under their control any credits or other personal property belonging to the defendant at the time of the service of garnishment process shall, under certain conditions, be liable to the plaintiff for the amount of such credits, etc. There is not anywhere in the statutes any specific reference to the state or its officers, or to any of its administrative agencies, or to municipal or public corporations; and hence the question is whether the word "person" as used in these and other statutory provisions relating to garnishment process was intended by the Legislature to include legal entities of a public character. There is no question that the word "person," as used in the statutes, is not limited to a natural person; for, by section 16, Rev. St. 1887, it is expressly made to include "a corporation as well as a natural person."

No case from the Idaho Supreme Court construing these statutes has been called to my attention. The statutes are, however, in all essential particulars identical with those of California, both relating to the subject of garnishment and the definition of the word "person." Indeed, the Idaho statutes may be said to have been adopted from California. In *Skelly v. School District*, 103 Cal. 652, 37 Pac. 643, the Supreme Court of California held that a school district was not subject to garnishment, notwithstanding the comprehensive language of the statutes. The reasons for the rule are very clearly and force-

fully stated. In *Wallace v. Lawyer*, 54 Ind. 506, 23 Am. Rep. 661, the court says:

"And the decisions are generally made upon statutes authorizing corporations in terms to be garnished; yet the courts hold that the general word 'corporation' must be restricted to mean private or ordinary business corporations, and not extended to embrace municipal corporations or bodies politic and corporate. The words used in the statute of this state are 'persons' or 'corporations' in general terms."

The only case called to my attention by counsel for the plaintiff is that of *Waterbury v. Board of Commissioners*, 10 Mont. 515, 26 Pac. 1002, 24 Am. St. Rep. 67, where the conclusion is reached that a board of county commissioners in the state of Montana could be garnished. The court there expressed dissatisfaction with the reasons usually given in support of the prevailing rule of public policy, and it may be that it intended to reject in its entirety that view; but it is to be observed that the statutes of Montana provide that "the word 'person,' may extend and be applied to bodies politic and corporate," and this language, different from that contained in the California and Idaho Codes, was regarded by the court as clearly indicating an intention of the Legislature to subject public corporations to garnishment. The court says:

"But the statute of Montana, as above noticed, goes further than to use the words 'persons' or 'corporation' in general terms as in Indiana, and the remarks of the judge in that case and the authorities to which he refers lose their force in this court. \* \* \*"

The question is what the Idaho Legislature intended by the general language employed in the statutes above referred to. It being the generally accepted doctrine that it is against public policy to permit public officers in their official capacity, or municipal or other public corporations, to be subjected to the annoyance and peril of garnishment process, I cannot avoid the conclusion that, if the Legislature intended to depart from this general rule, it would have employed language indicative of such purpose. Two striking illustrations in support of this view are found in the statutes. The rule of statutory construction which, in the case of garnishments, denies the application of general language to the state and its agencies, is likewise applicable to statutes limiting the time in which actions may be commenced; and also statutes creating what are usually referred to as mechanics' liens. Under title 2 of part 1 of the Code of Civil Procedure of the Revised Statutes of Idaho, the periods for commencing actions of various kinds are specified. The language used is of the most general and comprehensive character; and yet the Legislature apparently did not deem it sufficient to make the statutes applicable to the state; for by section 4061 it is expressly provided that:

"The limitations prescribed in this title apply to actions brought in the name of the state or for the benefit of the state in the same manner as to actions by private parties."

Again, by section 3335 of the Idaho Code of Civil Procedure (annotated), it is provided that "every person" performing labor upon any "building" has a lien upon the same, etc. The language is most

comprehensive and seemingly embraces all buildings of whatsoever character and by whomsoever owned. Yet in the following section—that is, section 3336—it is expressly provided that any person who performs labor upon any “building” for any county, city, town, or school district has a lien thereon.

In view of the prevailing doctrine of public policy, and in the absence of a statute clearly evincing the intention of the Legislature to subject public corporations to garnishment process, or an authoritative construction by the Supreme Court of the state of the general language of the statute, I do not think that I can properly recognize the validity of the attempted garnishment in this case; and the motion will therefore be allowed.

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HAMMETT v. CHASE, TALBOT & CO.

(District Court, S. D. New York. November 29, 1907.)

1. SHIPPING—DEMURRAGE—DELAY IN MOVING VESSEL.

A charter party gave the charterer the right to move the vessel from one discharging berth to another by paying towages. The master notified the charterer that the discharge at one place would be completed in the afternoon, and was directed to obtain a tug and move the vessel to another berth designated. He was unable to obtain a tug that night, and when the vessel reached the berth the next morning it was occupied, and several days' delay resulted. *Held*, that the fault for the delay was not that of the vessel, but of the charterer, who was responsible for moving the vessel in which matter the master acted as his agent, and that he was liable for demurrage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 570, 581.

Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

2. SAME—EXPENSES OF DISCHARGING—LIABILITY UNDER CHARTER PARTY.

A charterer bound by the contract to furnish the vessel with a berth for discharging *held* liable for extra wharfage which the master was obliged to pay at a designated berth, and also for overtime paid to a government inspector due to delay in discharging, for which he was responsible.

3. CUSTOMS AND USAGES—EXCLUSION BY TERMS OF CONTRACT—SHIPPING—EXPENSES OF LOADING.

Where a charter party provided for delivery of a lumber cargo alongside, within reach of the vessel's tackles, she cannot be charged with the cost of piling the lumber beyond the reach of her tackles, because of a custom of the port to pay such charges.

In Admiralty. Suit to recover demurrage and expenses incurred in discharging.

Arthur Lovell, for libellant.

Henry W. Goodrich, for respondents.

ADAMS, District Judge. This is an action brought by Hiram W. Hammett, master of the schooner *Carrie A. Norton*, to recover from Chase, Talbot & Company for 12 days' detention in discharging the said schooner of a cargo of laths and lumber in December, 1906, and

January, 1907, amounting to \$552; also \$25 paid to the United States for the services of an inspector for 5 days' overtime caused by such detention; also for \$23.35 paid for towage and extra wharfage; also a balance of freight of \$20.16, amounting altogether to the sum of \$620.51. The defendants denied any right to recover for the alleged detention and payments, and justified the retention of the balance of freight by alleging a disbursement for piling charges paid for the vessel's account.

The charter party of the vessel shows that the respondents chartered the schooner to bring a cargo of lumber and laths from Nova Scotia to New York, agreeing to give her customary despatch in discharging and to pay \$46 per day demurrage for each day she might be detained by the respondents' fault.

The vessel arrived and reported December 17, 1906, with 301,208 feet of lumber and 673,300 laths. The rate of discharge was stipulated to have been 25,000 feet of lumber and 125,000 laths per day. Allowing 48 hours for the charterers to provide a berth, according to the custom of the port, and deducting the holidays and Sundays that intervened before the final discharge, viz: Christmas, December 25th; New Years, January 1st, and Sundays, December 23rd, 30th and January 6th, the lay days would expire at noon of January 10th. The discharge was not completed until January 22d, 12 days later. The testimony shows that the respondents, availing themselves of their rights under the charter party, sent the vessel to four different places to discharge, viz: the Harlem River; 40th Street, Brooklyn; the Central Railroad Company at Jersey City; and Van Cleaf's lumber yard, Port Richmond, Staten Island. There was some detention at each of these places but the respondents do not now deny responsibility therefor, excepting at Staten Island, where they claim that delay was occasioned by the failure of the vessel to go to that place promptly on the 10th of January, when ordered by the respondents, but delayed proceeding until the 11th, in consequence of which she lost a berth which the respondents had provided for her and was delayed in discharging for that reason until the 19th when she obtained a berth and the discharging was promptly finished two days later, the 22d, at 9 o'clock.

The charter party, *inter alia*, provided:

"The cargo to be received and delivered alongside, within reach of the vessel's tackle. \* \* \* Vessel to report for cargo to ——. Vessel to move to such loading and discharging berth as the charterers may direct \* \* \*; they to have the privilege of moving her thereafter by paying towages."

The controversy respecting detention turns on the question of the responsibility for delay in getting to Staten Island.

It appears that the vessel finished discharging at Jersey City the 10th of January, and that the master then went to the respondents' office, probably in the morning, and having advised them that the vessel would be ready to move in the afternoon, received orders to go to Staten Island. He, therefore, in conformity with the respondents' directions, sought to obtain a tug to take the vessel but was unable to get one to go the 10th because it would be dark and there would be a dead tide. One was not obtained until the morning of the 11th, when

the schooner was taken to the place of discharge reaching there at 9 A. M. The discharging wharf was then found to be occupied.

Assuming that the respondents provided a discharging berth for the use of this vessel the 10th, as they claim, it does not appear to have been the vessel's fault that she did not get there to occupy it. It was the duty of the charterers to furnish a tug for the towage; they did not do so but deputed the master to obtain one. He endeavored promptly to perform the delegated duty but was unable to secure a tug at once, and when the vessel reached the place, the berth was found to be occupied. I do not see that this was a fault of the vessel. The failure to obtain the berth was due to the respondents' own fault and they are, therefore, liable for the whole demurrage.

The detention was 12 days and at the rate provided for demurrage, the libellant is entitled to recover \$552.

The other items, mentioned above, were established as follows:

\$10: Bill paid for towing from 135th to 138th Street. This was a necessary towage for which the libellant is entitled to recover.

\$13.35: Bill paid for extra wharfage. The master was obliged to pay for the same at 138th Street, because the wharf there was partly private property and partly city property. This was incurred through the failure of the respondents to furnish a proper berth and they should justly pay for same.

\$25: Bill of the United States for 5 days' overtime paid for the services of an inspector. This expense was caused by the delay in discharging and should be paid for by the respondents.

\$20.16: Amount deducted from the freight by the respondents upon an alleged custom for the vessel to pay for piling of the cargo beyond the reach of the vessel's tackles. The contract in this case provided for the delivery alongside within reach of the vessel's tackles, and can not be overcome by proof as to custom, which is opposed to the agreement. The libellant is also entitled to recover this amount.

The whole amount due the libellant is \$620.51, with interest, for which a decree may be entered.

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### Ex parte SAVAGE.

(Circuit Court, D. Kansas, First Division. January 7, 1908.)

No. 8,643.

#### 1. INDIANS—ALLOTTEES—CITIZENSHIP—EFFECT—OFFENSES—JURISDICTION.

Where lands have been allotted to Indians in severalty, as authorized by Act Cong. Feb. 8, 1887, c. 119, 24 Stat. 388, the Indians cease to be wards of the government, and become citizens of the United States and of the state in which they reside, and are therefore amenable to the criminal laws of the state and triable in the state, and not in the federal courts, unless the offense charged was committed within territory over which the United States has reserved the exclusive jurisdiction to its courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Indians, §§ 63-66.]

#### 2. HABEAS CORPUS—SCOPE OF WRIT—JUDGMENT—CONCLUSIVENESS.

Act Cong. March 3, 1885, § 9, c. 341, 23 Stat. 385, declares that all Indians committing certain crimes within any territory of the United States



and either within or without any Indian reservation, shall be subject to the laws of such territory relating to the crime specified, and shall be tried therefor in the same courts and in the same manner and be subject to the same penalties as all other persons charged with the commission of such crimes, and all Indians committing such offenses within any state and within the limits of any Indian reservation shall be subject to the same penalties as are all other persons committing any of the crimes within the exclusive jurisdiction of the United States. *Held*, that where petitioner was indicted in a federal court within the district of Oregon for an offense committed on an Indian reservation, and he was convicted and sentenced on a plea of not guilty, the judgment constituted a conclusive adjudication that petitioner was a nonallotted Indian, and therefore triable in the federal court, and hence he could not obtain his discharge on habeas corpus on the ground that both he and his victim were allotted Indians, and that the federal court had no jurisdiction to try him.

B. F. Jones, for petitioner.

J. S. West, for respondent.

POLLOCK, District Judge. This is an application for writ of habeas corpus presented by Louie Savage, an Indian, indicted, tried, and convicted in the Circuit Court of the United States for the District of Oregon November 16, 1905, for the crime of murder, and sentenced to the penitentiary of the state of Oregon at hard labor during the remainder of his natural life, and duly removed from that institution, under order of the Attorney General, to the United States penitentiary at Leavenworth, this state, where he is now undergoing his punishment.

The indictment presented against petitioner on which he was tried, convicted, sentenced, and now suffering punishment is in language as follows:

"In the Circuit Court of the United States for the District of Oregon.

"United States of America v. Louie Savage.

"Indictment. Violation of Section 5339, R. S., as Amended by Act of March 3, 1885.

"District of Oregon—ss.:

"The grand jurors of the United States of America, chosen, selected and sworn within and for the District of Oregon, in the name and by the authority of the United States of America, upon their oaths do find and present:

"That Louie Savage, an Indian, on the 24th day of April, 1904, upon the Grande Ronde Indian Reservation, within the state and district of Oregon, and within the exclusive jurisdiction of the United States, did then and there feloniously, and with premeditated malice and aforethought, wilfully kill and murder one Foster Wacheno, an Indian, by then and there shooting him the said Foster Wacheno with a loaded pistol, and thereby inflicting upon the said Foster Wacheno a mortal wound, from which said mortal wound so then and there inflicted by the said Louie Savage, he the said Foster Wacheno then and there dies; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

"Dated at Portland, Oregon, this 19th day of October, 1904."

To this indictment defendant demurred for want of jurisdiction of the court and on other grounds. The demurrer was overruled, and he was put upon his trial with the result above stated, as shown by the record of the trial and proceedings attached to his petition.

The ground of the petition for the writ in this case is that the Circuit Court of the United States for the District of Oregon had no jurisdiction to try or punish him for the offense, for that, as he claims in his petition for the writ, on the 24th day of April, 1904, the date the crime is charged in the indictment to have been committed, and long prior to that time, although he and the deceased lived on the Grande Ronde Indian reservation, in the state of Oregon, where the crime is charged to have been committed, yet that he was there born in the year 1879, and on the 25th day of January, 1881, he was allotted a quarter section of land out of said reservation in severalty, and that the deceased, Foster Wacheno, was at the date of the crime also an allotted Indian; that under and in pursuance of Act Cong. Feb. 8, 1887, c. 119, 24 Stat. 388, as such allotted Indians, he and the deceased were citizens of the United States and of the state of Oregon. Therefore petitioner was amenable to and triable under the laws of the state of Oregon, and not under the laws of the United States for the alleged offense. Therefore it is contended the court trying him was without jurisdiction, its acts void, and he is entitled to his discharge. There is no law reserving exclusive jurisdiction to the courts of the United States of offenses committed on the Grande Ronde Indian reservation. Therefore, generally speaking, crimes committed within the boundaries of that reservation are within the jurisdiction of the state courts of Oregon, and not the federal courts sitting in that state. Since the decision by the Supreme Court in the case *In re Heff*, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848, it cannot be doubted, I think, under act Cong. Feb. 8, 1887, c. 119, 24 Stat. 388, when Indians have been allotted in severalty and have received their patent, they are no longer wards of the government, but are citizens of the United States and of the state in which they reside, and are entitled to all the rights guaranteed to all citizens of such state, and are amenable to the criminal laws of such state, to the same extent and in the same manner as any other citizen of the state, and they are not amenable to the criminal laws of the United States or presentable or triable in the courts of the United States sitting in such state, unless the offense charged against them be committed within territory over which the government has reserved exclusive jurisdiction to its courts.

If, therefore, the allegations of the petition filed in this case for the writ are to be taken as true for the purpose of this hearing, or if the allegations of fact in regard to the allotment and consequent citizenship of the petitioner is open to inquiry in this court and may be proven upon a trial, he would be entitled to his discharge; but does this conclusion entitle petitioner to the writ demanded in this case? I think not, and for this reason. It is not the province of a proceeding in habeas corpus to review or retry the original case in which the petitioner was tried and convicted or to re-examine the issues of fact tried and determined in that case, or to call in question the existence of such facts as were essential to the judgment rendered in the case. If, as a matter of law, arising on the face of the record made in the trial of the case, the court rendering the judgment acted without jurisdiction, then its judgment is void, and such result may be declared in this

habeas corpus proceeding. Act Cong. March 3, 1885, c. 341, 23 Stat. 385, provides as follows:

"Sec. 9. That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

It was under this act as amendatory of section 5339 of the Revised Statutes [U. S. Comp. St. 1901, p. 3639], that Savage was tried, convicted, and sentenced. His plea of not guilty interposed to the charge there made against him of necessity put in issue the very question of fact here attempted to be relitigated on his petition; that is, the fact whether he and the deceased were allotted Indians at the time the crime was committed, and thus his crime was not within the jurisdiction of the court, or whether they were nonallotted Indians and subject to its jurisdiction, for the determination of this issue of fact inheres in and is essential to the judgment of conviction entered against him. In other words, in contemplation of law, the trial court was given jurisdiction over a class subject to certain exceptions. The fact that the court proceeded to judgment against defendant therein is a conclusive determination that the exception did not exist in such case, or, if it did in fact exist, that the fact was erroneously determined by the court and jury against the defendant. But errors of fact or errors of mixed fact and law must be corrected on appeal, not by proceedings in habeas corpus.

It follows the judgment of conviction is conclusive against the fact here sought to be drawn into litigation in this case, and that the petition must be denied. It is so ordered.

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JONES v. BARRY'S EX'RS.

(Circuit Court, D. Connecticut. January 6, 1908.)

No. 577.

1. GUARANTY—DISCHARGE OF GUARANTOR—ALTERATION OF CONTRACT.

Pending performance of a contract for the construction of a schooner, the dimensions were changed by increasing the depth of the hold six inches in the shallowest place, and by increasing the price \$300. *Held*, that such changes in the contract were material, and, having been made without the consent of the contractor's guarantor, he was discharged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Guaranty, § 64.]

**2. SAME—ADVANCE PAYMENT.**

Where plaintiff made an advance payment on the purchase price of a schooner without the consent of the contractor's guarantor to enable the contractor to procure additional help to hasten the work, so that there was not enough of the last installment of the price retained to finish the vessel, the guarantor was discharged.

James D. Dewell, Jr., for plaintiff.  
Brandegee, Noyes & Brennan, for defendants.

PLATT, District Judge. This is an action at law to recover upon a guaranty executed by Carlos Barry, the defendants' decedent. The defenses are that the money was not expended in completing the vessel according to the contract, and that the contract was altered by the parties after being made and guaranteed, and that the last payment was not according to the contract, and without the knowledge of Barry that it was so made. It was tried by stipulation to the court without a jury, and I therefore make the following findings of fact and conclusions of law:

Findings of Fact.

(1) The plaintiff at the time of the matters hereinafter mentioned was and now is a resident and citizen of the state of New York. Carlos Barry, named as defendant, was at said times and at the commencement of this action a resident and citizen of the state of Connecticut, but died since the commencement of this action, and his executors have entered to defend.

(2) On December 7, 1903, one M. B. McDonald entered into a contract in writing with the plaintiff for the construction of a four-masted schooner, a copy of which contract is annexed to the complaint and marked "Exhibit A."

(3) On December 23, 1903, the said Carlos Barry executed an agreement of guaranty, a copy of which is annexed to the complaint marked, "Exhibit B."

(4) After the execution of said contract ("Exhibit A"), the said McDonald commenced the construction and building of the said schooner, and continued to furnish labor and materials therefor until on or about January 9, 1905, when certain attachments were placed upon said schooner in certain actions brought against said McDonald, and thereafter the said McDonald performed no work and furnished no material for the construction of said schooner.

(5) On February 3, 1905, the said McDonald was adjudicated a bankrupt in the United States District Court for the District of Connecticut, and on February 23, 1905, Amos R. Chapman was appointed and duly qualified as the trustee of his estate, and said trustee, although requested, refused to complete said schooner; the same being then uncompleted.

(6) Said Barry had notice of the said attachments, of said adjudication in bankruptcy, and of the fact that the said trustee refused to complete said schooner.

(7) The plaintiff upon the trial presented testimony which satisfied me that he had expended a considerable amount of money in com-

pleting the schooner, over and above the contract price; but, in view of my findings under the defenses pleaded, it is unnecessary to fix the exact amount. The vessel had been painted according to contract and the dry dock, and repainting charge (\$321.82), caused by the long delay, ought to be deducted. The Sutton spar item, for value of one-sixty-fourth of vessel, was not cash paid on the spar account, and the amount \$689.96 was taken out of McDonald's contract price by the plaintiff. He cannot charge it over again and hold the guarantor therefor. These two items must be deducted from the claimed amount, \$1,669.34, leaving \$657.56 as the maximum possible claim.

(8) After the execution of said contract ("Exhibit A"), the plaintiff and said McDonald changed said contract by changing the dimensions of said schooner, to wit: by increasing the depth of the hold in the shallowest place from 13 feet to 13 feet 6 inches, and by increasing the price \$300.

(9) On or about December 5, 1904, the plaintiff, without the knowledge of the said Barry, paid to said McDonald the sum of \$1,784.34 on account of the final payment of \$6,000. At the time of this payment the said vessel was not completed, and she had not been delivered to the plaintiff. The plaintiff made such payment, so that said McDonald might procure additional men to hurry up the work on said schooner.

(10) About a month after such payment, the plaintiff's attorney met said Barry and told him that some payment had been made on account of the last installment, but he did not state the amount, nor did he know the amount at that time. Said Barry replied by asking the attorney whether enough had been retained to finish the vessel, and the attorney expressed the opinion that, if the spar had been paid for, sufficient had been retained for that purpose. The spar had not been paid for at that time.

#### Conclusions of Law.

1. Said contract was materially changed by the alteration of the specifications and price.
2. Said Barry, as guarantor, was discharged by the change in the specifications of the contract.
3. Said contract was materially changed by the advance payment of the last installment of the contract price.
4. Said Barry was discharged by the advance payment of a part of the last installment of the contract price.
5. Said Barry never waived his discharge arising from the alterations in the contract.
6. Judgment should be rendered for the defendants.

## PROCTOR COAL CO. v. UNITED STATES FIDELITY &amp; GUARANTY CO.

(Circuit Court, N. D. Georgia. December 23, 1907.)

## REMOVAL OF CAUSES—RESIDENCE—JURISDICTION.

Complainant, a corporation and citizen of Kentucky, sued defendant, a corporation and citizen of Maryland, in a Georgia state court. Defendant removed the cause to the United States Circuit Court for diversity of citizenship, where the cause was permitted to remain more than five years, during which complainant had the cause set down for hearing on demurrer, and twice filed amendments to its pleadings, and then moved to remand the cause to the state court on the ground that neither complainant nor defendant was a resident of the district. *Held*, that such objection had been waived by both parties, and that the court had jurisdiction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 216.]

Dorsey, Brewster, Howell & Heyman, for complainant.  
Smith, Hammond & Smith, for defendant.

NEWMAN, District Judge. This motion to remand and the determination of the question raised on the motion depends upon the effect to be given *In re Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. The complainant is a corporation and a citizen of the state of Kentucky. The defendant is a corporation and a citizen of the state of Maryland. This case was removed by the defendant to this court from the state court March 10, 1902, and no objection whatever has since been made as to the jurisdiction of the court by the complainant. On the contrary, the complainant has twice filed amendments, and had the case set down for hearing on the demurrer. Counsel have thoroughly argued the demurrer, and there has been a decision and an opinion filed on the questions raised (124 Fed. 424, July 11, 1903). If the right of the court in this district to retain this case and to continue and conclude it can be waived, it has been by the complainant's action.

Since the decision in the *Wisner* Case several courts have considered its effect. In *Yellow Aster, etc., Co. v. Crane Company*, 150 Fed. 580, 80 C. C. A. 566, the Circuit Court of Appeals for the Ninth Circuit apparently treated the *Wisner* Case as determining that the Circuit Court was entirely without jurisdiction as to a removed case where neither party at action was a citizen or resident of the state of California. Judge Saunders in the Circuit Court for the Eastern District of Louisiana entertained a similar view in *Goldberg et al. v. German Insurance Company*, 152 Fed. 831. He cites the *Yellow Aster* Case, *supra*. Of the same purport is a decision by Judge Van Fleet of the Northern District of California in *Baxter v. Hammond Mfg. Co.* (C. C.) 154 Fed. 992. He also cites the *Yellow Aster* Case as having been decided by the Circuit Court of Appeals of his circuit. A contrary view is entertained by Circuit Judge Lowell in *Corwin Mfg. Co. v. Henrici Washer Company* (C. C.) 151 Fed. 938. His decision and his opinion of the extent and effect of the *Wisner* Case, which he cites and discusses, is shown by a headnote in the case as follows:

"The objection to the jurisdiction of a federal court of a cause brought into such court by removal, on the ground that neither party is a resident of the

district, is waived where after removal the plaintiff enters a general appearance in the federal court."

Judge Lowell quotes an expression from the Wisner Case, which has caused much doubt as to the effect of the decision, as follows:

"But it is contended that the defendant was entitled to remove the case to the Circuit Court, and, as by his petition for removal he waived the objection, so far as he was personally concerned, that he was not sued in his district, hence that the Circuit Court obtained jurisdiction over the suit. This does not follow, inasmuch as in view of the intention of Congress by the act of 1887 to contract the jurisdiction of the Circuit Court, and of the limitations imposed thereby, jurisdiction of the suit could not have obtained, even with the consent of both parties."

Judge Lowell then proceeds:

"By the last clause quoted the plaintiff here argues the Supreme Court declared that, 'even with the consent of both parties,' this court cannot take jurisdiction of this proceeding, and so the case must be remanded to the state court. But this cannot be the correct interpretation of the dictum just quoted. As it stands, it is applicable alike to suits brought originally in the Circuit Court and to those removed there. Yet in the Wisner Case the Supreme Court went on to observe: 'In *Central Trust Company v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98, it was assumed, however, that the requirement that no suit should be brought in any other district than that of the plaintiff or of the defendant might be waived, where neither resided therein, because in that case the nonresident plaintiff had sued in the Circuit Court and the nonresident defendant had answered on the merits, which showed the consent of both parties and not unnaturally led to the result announced, while in this case there was no such consent.'"

*Gerling v. B. & O. R. R.*, 151 U. S. 673, 688, 14 Sup. Ct. 533, 38 L. Ed. 311, was then cited to the same effect.

Circuit Judge Lurton, in *Horn v. Pere Marquette R. Co.* (C. C.) 151 Fed. 626, after discussing *Central Trust Company v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98, refers to the Wisner Case as follows:

"In the later case of *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, it was held that a defendant sued in a state court in a district in which neither the plaintiff nor defendant was an inhabitant might remove the case and rely upon that objection. The case was distinguished from *Central Trust Company v. McGeorge* upon the ground of consent in the one case and no consent by the removing defendant in the other."

And in *Railway Company v. Fisher*, 155 Fed. 68, 83 C. C. A. 584, the Circuit Court of Appeals for the Sixth Circuit again considered the question, and in an opinion by Circuit Judge Lurton disposed of the matter in this language:

"A question of jurisdiction of the court below was suggested by the court growing out of the fact that the plaintiffs were citizens of the state of Mississippi, the Louisville & Nashville Railroad Company a corporation of the state of Kentucky, and the Pullman Palace Car Company, a corporation of the state of Illinois. The suits were brought in the circuit court of Shelby county, Tenn., and removed into the Circuit Court of the United States for the Western District of Tennessee upon the application of two defendant corporations solely upon diversity of citizenship. Thus the suits were not brought within either the district of the plaintiff or that of the defendants, and, not being a suit which might have been originally brought in the court to which it was removed, was not properly removable to that court from the state court. *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. But the defendant corporations might and did waive any objection which they might

have made to being sued in a district of which neither they nor the plaintiff were inhabitants by themselves removing the suits, and the plaintiff submitted to the jurisdiction thus invoked by failing to object in any way to such removal and by submitting to a trial upon the merits. This consent by both parties to the jurisdiction takes the case outside the authority of *Ex parte Wisner*, and brings it under *Central Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98, which is recognized in the former case as an authority when both parties have submitted to a suit in the district of neither; federal jurisdiction otherwise appearing. *Corwin Mfg. Co. v. Henrici Washer Co.* (C. C.) 151 Fed. 938."

My own view coincides with that expressed in the latter cases, and I cannot add anything to what has been said by Judge Lowell and Judge Lurton on this subject. Here the Proctor Coal Company did not deny, but acquiesced in, the jurisdiction of the court, amended its declaration, and proceeded upon the hearing of the demurrer in the case, which really to a large extent involved the whole controversy between it and the defendant company. The case has remained here so long—more than five and a half years—and the hearing in the case has gone to such extent that the plaintiff has lost its right by its non-action in failing to object to the jurisdiction and by pleading to the merits, to now challenge the jurisdiction of the court in this district. Immediately upon the decision of the *Wisner Case* being brought to the attention of the court here, a number of cases were remanded where there had been failure for some time to make the motion to remand, and where there had been some waivers by appearance and pleading. This was done, however, because grave doubt was entertained as to whether under that decision the right to have the case remanded could be waived. I am satisfied now that it can be waived, and has been in the present case, and that the motion to remand in this case comes too late, and should be denied, and it is so ordered.

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## SMYTHE v. INHABITANTS OF NEW PROVIDENCE TP.

(Circuit Court, D. New Jersey. December 26, 1907.)

### 1. BONDS—ACTIONS—PLEADING—ALLEGATIONS AS TO SEAL—TOWNSHIP RAILROAD AID BONDS.

Where a declaration on certain railroad aid bonds of a township alleged that the bonds were made by and under the hands and seals of the commissioners of the township, the declaration was not demurrable, in that it appeared thereby that the bonds were not sealed, as directed by the act authorizing them, though the declaration also averred that, when suit was brought, there was no formal seal or scroll on the bonds, but that they contained a recital that the commissioners had set their hands and seals thereon on a specified date, and that the township might not have had a seal, and that the individual seals of the commissioners would have had no legal efficacy, etc.

### 2. TOWNS—BONDS—EXECUTION—SEALS—AID TO RAILROADS.

Act N. J. April 9, 1868 (P. L. p. 915), authorizing the issuance of township bonds in aid of a railroad company, and providing that township commissioners should execute the bonds "under their hands and seals respectively," did not require that the bonds be sealed with the corporate seal of the township.



3. BONDS—ACTIONS—PLEADING—ALLEGATIONS AS TO SEAL—TOWNSHIP BONDS.

An averment in a declaration on certain railroad aid bonds, executed by township commissioners, that the individual seals of the commissioners would have had no legal efficacy, was the expression of a legal conclusion, and not the averment of a fact, and therefore did not destroy the effect of a previous allegation that the bonds were executed by and under the hands and seals of the commissioners.

4. PLEADING—DECLARATION—DUPLICITY—MODE OF MAKING OBJECTION.

An objection to a declaration for duplicity should be taken by motion to strike out, and not by a general demurrer.

At Law. On demurrer to declaration.

Edmund Wilson and Isaac P. Runyon, for plaintiff.  
McCarter & English, for defendant.

LANNING, District Judge. The demurrer presents the question whether the averments of the plaintiff's declaration are sufficient to show the liability of the defendant upon five certain instruments described in the declaration. The averments are that the five instruments were made as directed by the provisions of the act of the Legislature of New Jersey entitled "An act to authorize certain towns in the counties of Somerset, Morris, Essex, and Union to issue bonds and take stock in the Passaic Valley and Peapack Railroad Company," approved April 9, 1868 (P. L. p. 915). That act, in its first section, authorized the circuit court of any county in which a township proposing to issue bonds under the act should be situated to appoint "not more than three freeholders, residents of such township, to be commissioners for such township to carry into effect the purposes and provisions" of the act. The second section provided:

"That it shall be lawful for said commissioners to borrow on the faith and credit of their respective townships such sum of money, not exceeding ten per centum of the valuation of the real estate and landed property of such township to be ascertained by the assessment rolls thereof respectively for the year eighteen hundred and sixty-seven, for a term not exceeding twenty-five years, at a rate of interest not exceeding seven per centum per annum, payable semiannually, and to execute bonds therefor under their hands and seals respectively," etc.

Concerning one of the five instruments sued on the declaration contains the following averments:

"And whereas, also, the said defendant, on the said first day of January, eighteen hundred and sixty-nine, in the county of Union aforesaid, by and under the hands and seals of the said Jonathan Bonnell, Jarvis Johnson and John Littell, commissioners of said township, duly appointed and sworn, as directed by the provisions of the said act of the Legislature of New Jersey, entitled 'An act to authorize certain towns in the counties of Somerset, Morris, Essex and Union, to issue bonds and take stock in the Passaic Valley and Peapack Railroad Company,' approved April 9, 1868, did then and there make their certain other bond, bearing date the same day and year last mentioned, numbered ninety-four \* \* \* and said bond signed and sealed as aforesaid, is shown to the court here," etc.

There are similar averments concerning each of the other four instrument sued on.

The causes of demurrer are all based on the objection that it appears by the declaration that the instruments sued on are not sealed,

and therefore that they are not such instruments as the commissioners were authorized to issue. Put in the language of the defendant's counsel, the objection is that the "defendant interposes a demurrer on the ground that it appears from the plaintiff's declaration that the requirements of the said act of the Legislature authorizing the issue of the township bonds have not been complied with, and that the alleged bonds declared on, not being sealed instruments, are not in fact bonds, and are invalid under the said act." Evidently the defendant has misconceived the purport of the declaration. The plaintiff has declared in express terms that the bonds were made "by and under the hands and seals of the said Jonathan Bonnell, Jarvis Johnson, and John Littell, commissioners of said township." Inasmuch as the averments above quoted from the declaration must, on the hearing upon this demurrer, be assumed to be true, it appears at present that the bonds are sealed.

The defendant was probably induced to file a demurrer, and to allege as its ground the absence of seals on the bonds, by the following averments of the declaration concerning each of the five instruments:

"The plaintiff avers: That at the present time there is no formal seal or scroll on said bond, although said bond contains the following recital: 'In testimony whereof, the undersigned, commissioners of the said township of New Providence, in the county of Union, to carry into effect the purposes and provisions of the said act, duly appointed, commissioned, and sworn, have hereunto set our hands and seals the first day of January, in the year of our Lord one thousand eight hundred and sixty-nine. [Signed] Jarvis Johnson. John Littell, Commissioners.' That the township of New Providence aforesaid might not have had a seal, and the individual seals of the commissioners would have had no legal efficacy. That the formal seal might have been affixed, as certified to by the commissioners aforesaid, and become detached since delivery of the bonds. In either event, the plaintiff avers the defendant is estopped from setting up any defense, by reason of the omission of the formal seal, by force of the recital in said bond to the effect that said bond was executed under the hands and seals of said commissioners of the said township of New Providence, in the county of Union, as hereinbefore set out, the plaintiff being a bona fide holder of said bond."

As to these last-mentioned averments, it may be said that the legislative act did not require the bonds to be sealed with the corporate seal of the township. It directed the commissioners to execute them "under their hands and seals respectively." The averment that "the township of New Providence aforesaid might not have had a seal" is therefore of no importance; for, if there were such a seal, the commissioners had no authority to use it. The averment that "the individual seals of the commissioners would have had no legal efficacy" is the expression of a legal conclusion, and not the averment of a fact. However irregular these last-mentioned averments may be, they do not destroy the effect of the other averments in which it is expressly alleged that the bonds were sealed. That the declaration is objectionable because of duplicity may be true; but duplicity must be objected to on a motion to strike out, and not by a general demurrer. *Karnuff v. Kelch*, 69 N. J. Law, 499, 55 Atl. 163; *Peter v. Middlesex & Somerset Traction Co.*, 69 N. J. Law, 456, 55 Atl. 35; *Hendrickson v. Pennsylvania R. R. Co.*, 43 N. J. Law, 464. On this point alone, therefore, the demurrer must be overruled.

In the argument before me, counsel on both sides assumed that the bonds were never sealed. In view of the averment in the declaration that they were sealed, and that they were sealed in the exact manner prescribed by the act, judgment on the demurrer cannot be founded on any such assumption. If the bonds were in fact never sealed, and such a defense shall hereafter be set up, the point may demand careful consideration. The present is not the time for the decision of that question.

The defendant may have leave to withdraw its demurrer and plead to the declaration within 20 days after service upon its attorney of a rule to that effect.

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LOCKE v. BOARD OF CHOSEN FREEHOLDERS OF ATLANTIC COUNTY.

(Circuit Court, D. New Jersey. January 2, 1908.)

1. BRIDGES—DEFECTS—DEATH OF TRAVELER—PUBLIC CORPORATION—LIABILITY.

No liability existed at common law in a civil suit for injury to or death of a traveler caused by the nonrepair of a bridge by a public corporation; the remedy being by indictment only.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Bridges, §§ 80-105.]

2. SAME—STATUTES—PLEADING.

Act N. J. March 15, 1860 (P. L. p. 285), provides that where the board of chosen freeholders of a county are chargeable by law with the repair of any bridge, and shall wrongfully neglect to repair the same, by reason whereof any person shall receive injury, he may bring an action of trespass against such board, and recover judgment to the extent of the damage. *Held*, that a declaration thereunder for the death of plaintiff's intestate by the nonrepair of a bridge, failing to allege facts showing that defendant board was "chargeable by law" with the repair of the bridge and that it "wrongfully neglected" to repair, was fatally defective.

On Demurrer to Declaration.

Carrow & Kraft, for plaintiff.

E. A. Higbee, for defendant.

LANNING, District Judge. The plaintiff, as administratrix of the estate of Joseph L. Locke, Jr., deceased, brings this action against the board of chosen freeholders of Atlantic county, N. J., to recover damages resulting from the alleged wrongful neglect of the defendant to repair a certain bridge in the highway known as "Meadow Boulevard," over which the deceased was riding in an automobile. The gravamen of the plaintiff's complaint is that the defendant wrongfully neglected to keep the bridge in repair, and that the plaintiff's intestate was killed by reason of that negligence.

It is conceded that no liability existed at common law in a civil suit for the nonrepair of a bridge by a public corporation. The remedy was by indictment only. In 1860, however, the Legislature of New Jersey passed the following act:

"That in all cases where a township or the board of chosen freeholders of a county are chargeable by law with the erection, rebuilding or repair of any bridge or bridges, and the said township or board of chosen freeholders

shall wrongfully neglect to erect, rebuild or repair the same, by reason whereof any person or persons shall receive injury or damage in his or their persons or property, he or they may bring his or their action of trespass on the case against said township or said board of chosen freeholders, as the case may be, and recover judgment against them to the extent of all such damage sustained as aforesaid, which said judgment shall be paid by the township or county, as the case may be." Act March 15, 1860 (P. L. p. 285).

It is not suggested by the defendant that the personal representative of a deceased person who has come to his death by the wrongful neglect of a board of chosen freeholders to repair a bridge may not maintain an action under the above act, and therefore no consideration has been given to that question. The most cursory reading of the section, however, shows that at least two things must exist to establish liability as against a board of chosen freeholders for failure to repair a bridge: First, that it is "chargeable by law" with such repair; and, second, that it shall "wrongfully neglect" to repair the bridge. In the declaration in the present action there are no facts alleged from which it may be inferred that the defendant, the board of chosen freeholders of Atlantic county, is in anywise "chargeable by law" with the repair of the bridge. Such chargeability should be not only proven in the case, but averred in the pleadings. Neither are there any averments from which it can be inferred that there was any "wrongful neglect" on the part of the defendant in the performance of the statutory duty imposed upon it by the section above quoted. The averments should be such as to show, not only that the bridge was out of repair, but that the board of chosen freeholders knew, or were chargeable with knowledge, of its want of repair. These two principles are settled by the construction given to the statute by the Supreme Court and the Court of Errors and Appeals of the state of New Jersey in *Spencer v. Freeholders of Hudson*, 66 N. J. Law, 302, 49 Atl. 483, *Creighton v. Freeholders of Hudson*, 70 N. J. Law, 350, 57 Atl. 870, and *Mattlage v. Freeholders of Hudson and Bergen*, 72 N. J. Law, 51, 60 Atl. 195.

The demurrer must be sustained. If the plaintiff desires so to do, she may have leave to amend her declaration within 20 days after the defendant shall have served upon her a copy of a rule to that effect; otherwise, final judgment *nil capiat* may be entered by the defendant.

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## THE MT. DESERT.

(District Court, E. D. Virginia. December 17, 1907.)

### MARITIME LIEN—REPAIRS—EFFECT OF CHARTER.

A provision of a charter party requiring the charterer to maintain the vessel in a thoroughly efficient state and to pay all charges incurred in her behalf cannot relieve the vessel from liability to one who repaired her after a collision, where the repairs were made under the supervision of the owners, who also sued for and recovered damages for the collision from the vessel in fault. A furnisher of supplies to the vessel, however, during the term of the charter, who had, or should have had, knowledge that she was under charter, is bound by the terms of the charter party, and cannot hold the vessel therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, §§ 4-12.]

In Admiralty. Libel to recover for repairs.

The steamer Mt. Desert, while under charter to the Tidewater Navigation Company for service on the Chesapeake Bay and tributaries for the transportation of passengers to and from the Jamestown Exposition, collided with the steamer Woodbury of the Old Dominion Line, necessitating the taking of the Mt. Desert to the shipyard of libelants for repair. This libel was filed to recover for the amount of such repair. Subsequent to the collision the owners of the Mt. Desert regularly libeled the Woodbury, and recovered for the damages sustained in the collision, and collected the same, and the amount thereof is now held by the Atlantic Trust & Deposit Company, which seeks to apply the same to the general indebtedness of the Tidewater Navigation Company: the last-named company having made an assignment of its assets to the Atlantic Trust & Deposit Company. The charter party contained the following provision: "That the charterer shall \* \* \* maintain her [the Mt. Desert] in a thoroughly efficient state in hull and machinery for the service; that the charterers shall provide and pay for all the coals, fuel, port charges, pilotages, agencies, and all other charges whatsoever;" also that "notice shall be given by charterers to all material and supply dealers that all supplies and materials furnished said steamer, during the period of this charter, are for account of charterers, and that the steamer and owners shall not be held responsible for same."

Harry E. McCoy, for libelants.

Riddleberger & Roper, for respondent.

WADDILL, District Judge (after stating the facts as above). It may be conceded that ordinarily the provisions of the charter party above recited would disentitle the libelants to recover against the Mt. Desert for the repairs put upon her, covered by the claim in suit. Still, under the facts and circumstances of this case, there can be no doubt of their right to recover. The owners of the Mt. Desert not only supervised the work done upon her, rendered necessary by the collision with the Woodbury, while in libelants' shipyard, but they subsequently libeled the Woodbury, and received damages for the very work now sought to be paid for; that is, for restoring the Mt. Desert to seaworthy condition. To take this money and turn it over to the general creditors of the Tidewater Navigation Company, leaving the libelants unpaid, and have the Mt. Desert escape liability because, forsooth, the provisions of the charter party may have been intended to protect her from responsibility such as is sought to be enforced here, would be unconscionable. The money awarded for the injury to the Mt. Desert that the libelants repaired is in the hands of the Atlantic Trust & Deposit Company, placed there by the owners of the Mt. Desert to await the determination of this controversy, and the same should be paid to libelants. If the owners of the Mt. Desert have placed the same beyond their control, these libelants should not be denied their right of recovery herein against the vessel which they repaired.

What has been said as to the libelants' claim applies with equal force to that of the petitioner the Norfolk Marine Railway Company, and also to that of the petitioner Hudgins, whose supplies were furnished upon the express order of the owners of the Mt. Desert.

The claim of the petitioner the Southern Supply Company was for supplies necessary for the operation of the steamer; and while it is

true they were furnished either upon the order of the master of the Mt. Desert, or her engineer, still it was under such circumstances as that her owners should not be held responsible for. The steamer was being operated by the Tidewater Navigation Company, regularly engaged under a charter party, for the carriage of passengers from the port of Norfolk to the Jamestown Exposition during the Exposition period, and the petitioner had such knowledge or opportunities of knowledge of the fact that the Mt. Desert was not owned by the Tidewater Navigation Company, and was operated under such charter party, as to put it upon notice of the terms and conditions thereof; and, having failed to exercise proper diligence in this respect, the Mt. Desert should not be held responsible for the petitioner's bills. The petition is accordingly dismissed.

A decree may be entered in favor of the libelants for the amount claimed by them; also for the petitioner the Norfolk Marine Railway Company, and also for the petitioner R. W. Hudgins, for the amounts of their respective claims.

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GRIFFITH v. BERKSHIRE POWER CO.

HUGHES v. SAME.

(Circuit Court, D. Connecticut. December 31, 1907.)

Nos. 1,208, 1,209.

1. ESTOPPEL--WATERS AND WATER COURSES--FLOODING LANDS--ABATEMENT OF DAM.

A landowner whose land is flooded by a dam on the stream below him may be estopped to assert his right to a mandatory injunction to abate the dam, even after its completion, by negotiations for a settlement which induced the owner of the dam to believe that damages would be accepted, in which belief it made settlements with other landowners and expended money in the extension of its plants, dependent on the dam for power.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 264-275.]

2. SAME.

Owners of riparian lands flooded by a dam on the stream below built by a company to furnish power for electric light plants, who induced representatives of the company to believe that, when the extent of the injury to their lands should be known, they would accept payment of damages therefor, and who made no objection to the building of the dam are estopped to demand relief by a mandatory injunction to abate the dam after it has been completed, and the company's plants have been built and put into operation, and will be left to their remedy by actions at law for damages or in equity by an assessment of damages as for a continuing trespass.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Estoppel, §§ 264-275.]

In Equity. Suits for injunction. On final hearing.

C. Walter Artz, Henry A. Parmelee, and Henry H. Townshend, for plaintiffs.

Henry Stoddard and Arthur L. Shipman, for defendant.

PLATT, District Judge. At the outset these cases and the Andrus Case, 145 Fed. 47, came up together seeking preliminary injunctions on affidavits.

After hearing them, I indicated an indisposition to grant the mandatory relief prayed for; but, to facilitate matters, offered to hear either one of the cases on the merits in open court, as our rules permit, giving counsel for the plaintiffs his choice as to which one he would select. His knowledge of the matter was as comprehensive then as now. He chose the Andrus Case, 145 Fed. 47, and, as soon as the hearing was concluded, injunctive relief was refused, after an offer to permit the usual procedure in damages to go forward had been rejected. This action was sustained by the Court of Appeals (147 Fed. 76, 77 C. C. A. 248) and certiorari denied by the Supreme Court (203 U. S. 596, 27 Sup. Ct. 784, 51 L. Ed. 333). Since that time the matters now passed upon have been vigorously pressed. After listening to the arguments, I am persuaded that counsel acted advisedly when he picked out the Andrus Case for the first final hearing. The obstacles in the Griffith Case certainly are greater, and the same thing may be said of the Hughes Case, unless it be admitted that negotiations as to the sale of the premises outright, or for a certain amount to be paid by way of damages, must have taken place before the trespass was committed to have any weight as an estoppel or waiver. I cannot so understand the law.

Such doings by the complainants after the trespass, as would lead the defendant to believe that a money compensation might be arrived at, would and did affect the defendant's position, both in regard to other settlements with landowners and in regard to the extension of its power for use in electric lighting and otherwise. From the standpoint of waiver alone, barring the question of a strictly equitable estoppel, the acts of the plaintiffs deprived them of the right to enforce by injunction their full original rights. The rule of greater convenience also had weight with me in the Andrus Case, and, although not specifically discussed by the higher court, must have operated there also. I think it is entitled to considerable prominence in reaching a final conclusion. Is it better that a dairy farmer should suffer travail of spirit, or that many people should endure darkness and be deprived of motive power? It is as plain as a pikestaff that an injunction would place the plaintiffs in a position where they could hold a pistol at the head of the defendant corporation, and demand what price they please for their lands. It is beyond imagination to picture them as insisting upon the removal of the dam, and resuming their dairy farming in pastoral seclusion and simplicity. If it were to be so, however, the removal, besides injuring the defendant and many other innocent people, might do a real harm to the farmers themselves; for it is fair to assume that, by accepting the alternative which is open to them, they would be in a better condition than would await them after the destruction of the dam had restored them to their primeval state of peace and good will.

The allegations in each of the three original bills were broad enough to sustain the demand for injunctive relief, but in each there has not appeared any proof to sustain the absolutely necessary charge that be-

fore building the dam the defendant corporation knew that after it had been built the water must flood the complainants' lands to their constant damage, and kept that fact concealed from the complainants. As the cases actually stand at this moment, the proper course to be pursued is so clear that further comment would be valueless. The plaintiffs have come into a court of equity, and are entitled to such relief as upon the facts shown such a court can grant. Injunctive relief is impossible. If the plaintiffs wish the damage to their premises to be ascertained in accordance with chancery practice, such relief is at their hands.

The acceptance of this alternative ought to be within a reasonable time. If such acceptance shall be filed within 60 days, a master will be appointed. If not, let the bills be dismissed.

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McNULTY v. WIESEN et al.

(District Court, E. D. Pennsylvania. January 2, 1908.)

No. 2.

EQUITY—REPORT OF MASTER—EXCEPTIONS—PRESUMPTIONS.

On exceptions to a master's report denying relief in an action by a bankrupt's trustee to recover certain book accounts alleged to have been transferred in fraud of creditors, such report must be taken to be *prima facie* correct.

Exceptions to Master's Report.

Edmund B. Seymour, Jr., and Greenwald & Mayer, for complainant.  
Julius C. Levi, for respondents.

J. B. McPHERSON, District Judge. An involuntary petition in bankruptcy was filed against Wiesen Bros. on October 6, 1903, followed by an adjudication on October 27th, and the appointment of a trustee in due course. In May, 1904, the trustee filed this bill in equity to compel the respondents to account for money received by them under circumstances that are thus set forth in the bill of complaint:

"(5) That on or about the 15th day of September, 1903, the said firm of Wiesen Bros. did assign or transfer to the said firm of Wiesen, Ingber & Wertheimer book accounts payable to the said firm of Wiesen Bros. to the amount of and in the sum of \$16,661.81.

"(6) That Elias Wiesen, one of the bankrupts aforesaid, has testified before the referee in the case of Wiesen Bros., that he knew between the 15th and 20th days of September, 1903, that the firm of Wiesen Bros. was in failing circumstances.

"(7) That Morris Wiesen, a partner in the said firm of Wiesen, Ingber & Wertheimer, is a brother of Leon Wiesen and the others forming the firm of Wiesen Bros. aforesaid.

"(8) That said transfer or assignment of book accounts to the value of \$16,661.81 was made within four months next preceding the 6th day of October, 1903, with intent to delay, hinder, and defraud the creditors of the said Wiesen Bros.

"(9) That your orator is informed and believes that the transfer aforesaid was not made for a present fair consideration, in that no money was paid for said transfer, nor were goods or merchandise given in exchange therefor."



To these averments the following answer was made:

"In answer to the averments of the fifth paragraph of complainant's bill, we say that between the 17th and 29th days of September, 1903, by a series of assignments, duly executed, the said firm of Wiesen Bros. did sell, assign, transfer, and set over unto the respondents all their right, title, and interest of, in, and to a number of book accounts to the amount of and in the sum of \$16,634.95, for which the said respondents paid the said firm of Wiesen Bros. the sum of \$12,100 therefor.

"In answer to the sixth paragraph of complainants' bill, we would state that we are in ignorance of the facts set forth therein; but, if it be material to the issue, we pray that the complainants may be put to proof of the same.

"We admit the facts contained in paragraph 7 of complainants' bill.

"We deny the facts contained in the eighth paragraph of complainants' bill, to wit, that the transfer or assignment of the book accounts to the value of \$16,661.81, as alleged in said paragraph, was made within four months next preceding the 6th day of October, 1903, with intent to delay, hinder, and defraud the creditors of the said Wiesen Bros. On the contrary, the respondents aver in answer thereto that the purchase of the said book accounts was made by the respondents from the firm of Wiesen Bros. for a present fair consideration without any intent or thought on the part of the said respondents to delay, hinder, and defraud the creditors of the said firm of Wiesen Bros. or any of them, and that we are the present holders of said book accounts for a good and valuable consideration without notice of any defect of title.

"We further deny that the transfer of the aforesaid book accounts of Wiesen Bros. was not made for a present fair consideration, in that no money was paid for said transfer, nor were goods or merchandise given in exchange therefor, but we aver that there was paid for the said book accounts by us the sum of \$12,100 in cash, which was a full, fair, present, and adequate consideration for the purchase of the said book accounts."

After replication, the issues thus raised were referred to a master, who took a large amount of testimony and reported in favor of the respondents, recommending that the bill be dismissed.

It will be observed that the questions for determination are purely questions of fact. It is not sought to set aside the transaction as a preference, but the ground of the bill is distinctly stated to be a transfer of property with intent to delay, hinder, and defraud the other creditors of the bankrupts. This intent is positively denied, and the respondents aver that the sale was made in good faith, and for a full, fair, present, and adequate consideration. In support of these conflicting averments, the testimony of witnesses was heard by the master, and, as already stated, he has come to the conclusion that the charge of fraud has not been established. I have read and considered all the evidence offered by the parties; and, while I think it must be admitted that the transaction was somewhat out of the usual course, I am unable to say that the master has erred in his important findings of fact. Assuming their correctness—and they must be taken *prima facie* to be correct—it follows that the bill must be dismissed.

A decree may be entered to that effect.

## In re RUDNICK &amp; CO.

(District Court, S. D. New York. May, 1907.)

## 1. BANKRUPTCY—SEIZURE IN REPLEVIN—VACATION—STATUTES.

Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], provides that all levies obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be void in case he is adjudged a bankrupt, and the property affected by the levy or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the bankrupt's estate, unless the court shall order that the lien be preserved for the benefit of the estate, etc. *Held*, that such section was sufficiently broad to vacate a seizure of garments under a writ of replevin requiring the officer to take certain designated cloth which it was claimed had been manufactured into the garments replevied; the levy having been made on the day prior to the filing of a bankruptcy petition against the debtor and the appointment of a temporary receiver of his property.

## 2. SAME.

Where, on the day prior to the institution of bankruptcy proceedings, a creditor sued out a replevin requiring the sheriff to take a specified quantity of cloth, under which writ the sheriff took possession of a quantity of manufactured clothing, on the theory that such clothing had been manufactured out of the cloth described in the writ, it was the duty of the bankruptcy court to vacate such levy and determine the creditor's claim in order that he should not appropriate more than the cloth or its proceeds, to the prejudice of other creditors.

## 3. SAME—TRIAL OF TITLE.

Where replevin is brought before bankruptcy proceedings, and no other question but that of title is to be litigated, the bankruptcy court may permit such question to be tried in the replevin action if there has been no excessive levy, and the bond given is ample for the protection of creditors.

## In Bankruptcy.

Upon petition of receiver for an order requiring the sheriff of the county of New York to show cause why he should not deliver 386 garments to petitioner, and that pending the determination of the application the sheriff be stayed from delivering said property to any person other than petitioner, and from otherwise interfering with the same except for the preservation thereof.

By the duly verified petition of Robert A. Inch, the receiver, it appeared:

"(1) That an involuntary petition was filed in this court against the above-named bankrupt on the 20th day of April, 1907, and on the same day an order was made appointing your petitioner temporary receiver in bankruptcy herein, and your petitioner has qualified by filing his bond as required by the order of his appointment, which bond has been approved; that petitioner has taken possession of the property of the above-named bankrupt.

"(2) Petitioner further alleges that in an action begun in the City Court of the city of New York by Simon Brinn and Louis Brinn, plaintiffs, against L. Rudnick & Co., the above-named bankrupt, defendant, which action was brought on behalf of said plaintiffs by Marcusson Bros., their attorneys, of No. 132 Nassau street, a writ of replevin was issued to the sheriff of the county of New York on the 19th day of April, 1907, requiring him to replevy in said action the following described property: 242¼ yards of blue cloth, known as 'Thibet goods,' attached to which is a tag bearing name, 'S. Brinn & Bro.' 451¼ yards of blue cloth, known as 'Thibet goods,' attached to which is a tag bearing name, 'S. Brinn & Bro.' 102¼ yards of red serge cloth, style number being 'R. 15,' which appears on a tag attached to the cloth. 158 yards of serge cloth royal color, style number being 'R. 15,' which appears on a tag attached to the cloth.

"(3) That, pursuant to said writ of replevin, the sheriff of the county of New York took into his possession on said 19th day of April, 1907, from the premises of the above-named bankrupt, 386 manufactured children's cloaks and suits, claiming that said cloaks and suits were made up of the cloth hereinabove referred to.

"(4) Petitioner further alleges that it is necessary, in order to protect the interests of the estate and the general creditors of the above-named bankrupt, that said sheriff deliver the property replevied by him as aforesaid to your petitioner, and that the plaintiffs in said replevin action be compelled to prosecute any claim that they may have for the recovery of the cloth replevied by them in said action in the City Court, in this court, according to the usual reclamation proceedings.

"(5) That the sheriff of New York county did not take into his possession in said replevin suit any of the cloth called for in his writ unmanufactured, but satisfied the same solely by receiving from the bankrupt the said 386 garments above referred to."

Stern, Singers & Barr and Wm. Jno. Barr, for receiver.  
Marcusson Bros., for replevying creditor.

HOUGH, District Judge. 1. In my opinion the language of section 67f, Act July 1, 1898 (30 Stat. 565, c. 541 [U. S. Comp. St. 1901, p. 3450]), is broad enough to vacate this seizure in replevin, and I further think that the reasoning of the decision in *Re Weinger* (D. C.) 11 Am. Bankr. Rep. 424, 126 Fed. 875, sustains that conclusion.

2. In this particular case the circumstances of the replevin are quite aggravated. The balance of evidence as contained in the affidavits is that the plaintiffs in replevin seized nothing that belonged to them, and nothing that fairly and honestly answered to the requisition in replevin. But, even if they did take the garments made out of their cloth, it is the obvious duty of this court in the interest of all creditors to see to it that they do not appropriate anything but the cloth or the proceeds thereof.

3. There doubtless have been cases, and will be again, where a replevin is brought before bankruptcy, and no other question but that of title is suspected to exist in the replevin suit. Under such circumstances, if it were satisfactorily shown to this court that the bond or undertaking was ample and there had been no excess levy, it would obviously be in the interests of economy to permit the question of title to be tried out. This is not such a case.

The motion is granted, on payment of all lawful charges of the sheriff.

## AMERICAN SMELTING &amp; REFINING CO. et al. v. GODFREY et al.

(Circuit Court of Appeals, Eighth Circuit. November 4, 1907.)

Nos. 2548-2551.

## 1. COURTS—JURISDICTION OF FEDERAL COURTS—AMOUNT OR VALUE IN CONTROVERSY.

In a suit to enjoin the maintenance of a nuisance, the matter in dispute, for the purpose of determining the jurisdiction of a federal court, is not the damage resulting to complainant from the alleged nuisance, but the right of defendant to maintain the same, and the value of such right determines the amount in controversy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 890-897.

Jurisdiction of Circuit Courts as determined by the amount in controversy, see notes to *Auer v. Lombard*, 19 C. C. A. 75; *Tennent-Stribling Shoe Co. v. Roper*, 36 C. C. A. 459.

For other definitions, see *Words and Phrases*, vol. 1, p. 376; vol. 8, p. 7574.]

## 2. NUISANCE—SUIT TO ABATE—DEFENSE.

In a suit to enjoin the continuance of a business as a nuisance, it is not a defense that the business is in the best place possible for the defendant, or that it is conducted in a proper manner with the latest devices, where the evidence shows that when so conducted it still results in very great damage to, if not the total destruction of, the property of complainants, who reside in the vicinity, and is a menace to health; the rights of habitation being superior to the rights of trade.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 5, 6, 60-63.]

## 3. INJUNCTION—OBJECTIONS TO RELIEF—COMPARATIVE INJURY.

The fact that the actual injury resulting from the violation of a right is small, and the interest to be affected by an injunction is large, should not, as a rule, weigh against the interposition of preventive power in equity, when it is clear that on one hand a right is violated, and on the other a wrong committed; and, in a suit for an injunction to abate a nuisance, the question of the comparative injury to the parties from the granting or refusing of an injunction will not be considered on final hearing, where the existence of the nuisance is undoubted, unless in extreme cases.

## 4. NUISANCE—INJUNCTION—UTAH STATUTE.

The statute of Utah (Laws 1903, p. 521, c. 58), authorizing a court in its discretion to refuse an injunction in a suit to abate a nuisance, on defendants giving a bond to pay all damages recovered, applies only to preliminary injunctions, and cannot be construed to confer upon a court the power to perpetuate for all time a nuisance, which would amount to the taking of private property merely upon the giving of a bond to pay damages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Nuisance, §§ 55-58.]

## 5. SAME—SUIT BY LANDOWNERS—PROOF OF OWNERSHIP.

In a suit by alleged landowners for abatement of a nuisance, where complainants testify without objection to their ownership as well as possession and occupancy of their lands, such testimony, although to a legal conclusion as to ownership, cannot be disregarded, and is sufficient to support the suit.

## 6. SAME—EQUITY JURISDICTION—IRREPARABLE INJURY.

The injury to owners of land, on which they reside and have fruit and ornamental trees, from a nuisance which endangers their health and destroys their trees is irreparable, and a court of equity is not without ju-

isdiction to protect them by an injunction merely because they might recover damages in actions at law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Injunction, §§ 55-57.]

7. SAME—RIGHT TO INJUNCTION.

Complainants to the number of over 400, owning farms in the same vicinity aggregating over 9,000 acres, on which they resided, brought suit to enjoin the operation of smelters owned by different corporations as nuisances. The evidence showed that in the smelting of sulphide ores sulphur dioxide and also arsenical fumes were discharged into the air by the smelters, and that those from the different smelters mingled and settling upon the lands of complainants destroyed their trees and crops, poisoned their stock, and endangered the health of themselves and families, rendering their farms in a large measure valueless. *Held*, that equity had jurisdiction on the ground of irreparable injury, and also on the ground of preventing a multiplicity of actions at law against the several defendants, in which it would be difficult or impossible to ascertain the damage committed by either defendant singly, and that on such evidence complainants were entitled to an injunction, regardless of the otherwise lawful character of defendants' business or the amount of their investments.

Appeal from the Circuit Court of the United States for the District of Utah.

Bills by James Godfrey and others against the American Smelting & Refining Company, United States Smelting Company, Utah Consolidated Mining Company, and the Bingham Consolidated Mining & Smelting Company.

Waldemar Van Cott (E. M. Allison, Jr., and William Riter, on the brief), for appellant Utah Consolidated Mining Company.

Andrew Howat and W. H. Dickson (H. R. Macmillan, A. C. Ellis, A. C. Ellis, Jr., and R. G. Schulder, on the brief), for appellant United States Smelting Company.

John A. Street (William H. Bramel, on the brief), for appellant Bingham Consolidated Mining & Smelting Company.

William H. King (Joseph L. Rawlins, on the brief), for appellees.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This is an appeal from a decree entered by the Circuit Court for the District of Utah, granting an injunction. It is alleged in the bill that the complainants, James Godfrey and four hundred and eight others, who joined with him in the bill, are severally the owners of, and are in possession of, certain farms described in the bill, situated in Salt Lake County, Utah; that they were, at the time the bill was filed and for more than two years prior thereto, occupying their respective farms as homes for themselves and families, and engaged in cultivating their farms; that, but for the injuries complained of, the farms would have been highly productive in fruits, vegetables, cereals, and grasses of great value; that the farms had been brought to a high state of cultivation, and contained many fruit and ornamental trees, also had houses, barns, and other valuable improvements located thereon; that they also kept on their respective farms domestic animals, such as horses,

cattle, and sheep, useful in husbandry. It is further alleged that the defendants each owned a smelter, situated in Salt Lake county, and in proximity to each other and to the complainants' farms; that wrongfully, and in disregard of the rights of the complainants, the defendants, respectively, have maintained and operated, and still maintain and will continue to operate, the smelters as they have been operated, and as they severally threaten to continue to operate the same, which have been, are, and will be injurious to the health and offensive to the senses of the complainants and each of them; that the smelters are and have been employed in the reduction of ores of lead or copper, or both, and known as sulphide ores, and also containing iron sulphates, together with arsenic, antimony, and zinc; that in the process of reduction the sulphur in the ores is reduced and converted into sulphur dioxide, all of which is permitted to and does escape in a gaseous form into the atmosphere, and is borne by the winds, together with the dust and fumes of arsenic and antimony over and upon the farms of complainants; that more than 1,000 tons of sulphur dioxide thus daily escapes from the smelters, and is deposited upon the lands in the neighborhood of the smelters, including the farms of the complainants; that, coming in contact with the moisture in the atmosphere and falling upon the soil or vegetation, the sulphur dioxide becomes sulphurous acid, and to some extent is converted into sulphuric acid, injurious to and destructive of both animal and vegetable life; that the fumes and gases escaping from each of the smelters are commingled in the air and together work their injurious effects upon the farms, property, and health of complainants; that the fumes, gases, and dust permitted to escape and to be deposited upon the farms cause the destruction of fruit and ornamental trees and various kinds of fruits, cereals, and grasses growing on the farms, or so poisons the same as to render them unfit for use; that the sulphur dioxide and other fumes entering the houses of complainants and polluting the atmosphere are offensive to the senses, injurious to the health of the complainants and their families; that the fumes, gases, and dust, either directly or by poisoning the grasses upon which they fall, have caused and are causing many of the domestic animals of the complainants to sicken and die. It is further alleged that complainants have no adequate remedy at law; that each of the defendants threatens to enlarge the capacity of their smelters and increase the amount of these ores to be smelted, thereby augmenting the injuries to complainants; that the injury and damage are oppressive and cumulative, and the grievances are and will be constantly recurring; that relief in actions at law could only be obtained by a multiplicity of suits, and the difficulty and expense attending the same in making proof of damage would render such attempts at relief futile; that the area of land injuriously affected is being constantly increased; that the damage suffered by complainants and others similarly situated in the aggregate exceeds the value of the smelters. The defendants each admit in their answers that they own and are operating the smelters as charged in the bill, denying at some length and in different forms all of

the other allegations of the bill. The complainants replied to the answers, and the case was sent to an examiner to take and report the testimony. Upon the report of the examiner being filed, the case was argued and submitted, and on the 5th of November, 1906, a decree was entered by the Circuit Court, "enjoining each of the defendants from the further roasting or smelting of sulphide ore carrying over 10 per cent. sulphur, and at their present locations, so as to discharge into the atmosphere the sulphur in the form of a gas, and from the further discharging into the atmosphere of arsenic; provided that the defendants or any one or more of them may at any time hereafter apply to the court, upon due notice to the complainants, for a modification or suspension of this injunction upon a showing, which the court may deem sufficient, that conditions have been so changed that the discharge of such sulphurous or arsenical fumes into the air by them, or either of them, may be resumed or otherwise conducted, so as not to create or continue, or contribute to create or continue, the nuisances complained of." From this decree each of the defendants appealed, but the appeal of the American Smelting & Refining Company was dismissed in this court upon a stipulation of the parties, so that the cause is here for review only upon the appeals taken by the three remaining defendants.

The question of the jurisdiction of the Circuit Court in respect to the amount in controversy was raised by two of the appellants at the final hearing, and is again urged here. It will be first disposed of, because, if the Circuit Court was without jurisdiction, it was not within its province to determine the other questions raised, and the cause would have to be reversed, with instructions to dismiss the bill for the want of jurisdiction. In support of their contention, it is insisted by appellants, that "the real matter in controversy is the damage claimed to be suffered by the several appellees, and the value of appellants' right to operate their smelters does not constitute the object of the suit." It is admitted that the smelters, taken either singly or in the aggregate, are worth more than the jurisdictional amount, and it is also admitted that the value of the right or opportunity to continue to run the smelters, or any one of them, is worth more than the jurisdictional amount, but it is said that the real thing that the appellees sue for, and the value of which is not shown, is the privilege of being free from the nuisance of smoke from the smelters. This contention cannot be sustained. The rule, as we understand it, is that when an injunction is asked against the erection and maintenance of a nuisance, it is not important to discuss what kind of damage would result if the nuisance were operated, but rather what the cost of the alleged nuisance will be. *Rainey v. Herbert et al.*, 55 Fed. 443, 5 C. C. A. 183. The general principle is stated by the Supreme Court in the case of *Mississippi M. R. Co. v. Ward*, 2 Black, 485, 17 L. Ed. 311, as follows: "He seeks redress of a continuing trespass and wrong against him and acts in behalf of himself and of others who are or may be injured. But the want of a sufficient amount of damage having been sustained to give the federal courts jurisdiction will not defeat

the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern."

We have examined the cases called to our attention by counsel for appellants at the argument, and do not think they conflict with this rule. The present suit may well be distinguished from cases upon a money demand, where the matter in dispute is the debt claimed, and cases sounding in damages where the damages claimed give jurisdiction, and those where the value of the interest or estate claimed, as in ejectment suits, determines the jurisdiction, and suits to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner are impaired, which are brought within the cognizance of the court under the statute only by the value of the property affected; and also cases where, as in *Eaton v. Hoge*, 141 Fed. 64, 72 C. C. A. 74, it is said, "in a suit by the several owners of water rights in a stream, or joining as claimants for convenience only, to enjoin the obstruction of the stream or the diversion of water therefrom by defendants, the matter in dispute must exceed two thousand dollars exclusive of interest and costs as to each complainant." It has also been held repeatedly by the Supreme Court that the distinct and separate interests of complainants in a suit for relief against assessments cannot be united for the purpose of making up the amount necessary to give the court jurisdiction. *Wheless v. St. Louis et al.*, 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583; *Fishback v. Western Union Tel. Co.*, 161 U. S. 96, 16 Sup. Ct. 506, 40 L. Ed. 630. But none of these cases can apply here, for the test of jurisdiction is not the amount of damage actually sustained by each of the complainants, but is the value of the object sought by the bill, which in this case is to compel the defendants to cease operating their smelters, or to use such appliances in conducting the work as will effectually protect the complainants from the injuries complained of. *Texas Pac. R. R. Co. v. Kuteman*, 54 Fed. 547, 4 C. C. A. 503; *Whitman v. Hubbell* (C. C.) 30 Fed. 81; *Louisville & N. R. Co. v. Smith*, 128 Fed. 5, 63 C. C. A. 1.

The fact, urged by counsel, that these smelters are located at a place where by reason of its relation to the railroads and mines is most convenient for smelting purposes does not, in our judgment, constitute any defense to a bill to evade a nuisance; neither can the courts take into consideration the fact that the business is conducted in a proper and reasonable manner, employing the latest and best devices and instrumentalities, where the evidence shows, as in this case, that when so operated and conducted, it still results in very great damage to, if not the total destruction of, complainant's property, and is a menace to health. "The rights of habitation are superior to the rights of trade, and whenever they conflict, the rights of trade must yield to the primary or natural right," 1 Wood on Nuisances, §§ 514-17 and 23.

It is also insisted that the injury to the appellants and to the public, if an injunction issues, so greatly exceeds the injury to the appellees, if denied, that an injunction should not have been granted. We think it may well be doubted whether this statement is sup-



ported by the record. The parties to this suit, upon both sides, have important and very valuable interests affected by the decree, and it would indeed be difficult to say, upon the facts disclosed by the record, which side would suffer the greater injury. However that may be, we do not think the fact that an actual injury resulting from the violation of a right is small, and the interest to be affected by an injunction is large, should weigh against the interposition of preventive power in equity, when it is clear that on one hand a right is violated and on the other a wrong committed.

It is true in the case of *Mountain Copper Co. v. United States*, 142 Fed. 625, 73 C. C. A. 621, the court said, "that the comparative convenience or inconvenience to the parties from the granting or withholding the injunction sought should be considered, and that none should be granted whenever it would operate oppressively or inequitably, or contrary to the real justice of the case, is well-established doctrine, and we need hardly multiply authorities to that effect"; but the facts in that case were very different from the facts in the case before us. They are thus stated by the court:

"We have then the ownership in the complainant of a little over four thousand acres of land within the damaged zone, mountainous in character, with little or no soil, practically worthless for agriculture or horticulture, upon which most of the trees and undergrowth as existed had, prior to the commencement of this suit, been killed by the fumes generated by the appellant company (for which it is, of course, liable in damages for whatever they may have been worth), and upon which but little more vegetation of any kind remains, susceptible of destruction. In view of these facts, about which there can be no question upon the record, can it be doubted that the maximum injury that can result to the lands of the complainant embraced by the bill is but a mere trifle in comparison to the loss inflicted by the injunction in question upon the appellant company and those dependent upon and benefited by it."

In that case, according to the statement of facts by the court, the land was practically worthless for any purpose; whereas, in this suit, we have the lands of complainants, exceeding in area nine thousand acres, located in a thickly settled and fertile valley, and all brought to a high state of cultivation; with this condition existing many years prior to the location of the smelters, and now greatly damaged and some of the lands practically ruined by the emission of gas and arsenic from the smelter stacks. The rule that the comparative convenience or inconvenience of the parties from the granting or withholding an injunction when it is sought to abate a nuisance, announced in the case just cited, must, we think, be confined to the particular case then before the court, and is not to be accepted as the statement of a rule to be applied generally in cases where it is sought to abate a nuisance, the existence of which is undoubted. This, we think, clearly appears from an examination of the case and the cases cited in support of it, some of which we will briefly notice.

In *Huckenstine's Appeal*, 70 Pa. 102, 10 Am. Rep. 669, the rule was announced in substantially the same way, but an examination of the case shows that what the court really decided was that the complainant's evidence as to the fact of the nuisance was rendered more than doubtful by the testimony of the defense. In commenting upon the

rule announced in the *Huckenstine Case*, in *Campbell v. Seamans*, 2 Thomp. & C. 231, the Supreme Court of New York said:

"It is in direct conflict with the authorities of this state, and cannot be adopted here as law."

This case was affirmed in 63 N. Y. 568, 20 Am. Rep. 567. And upon this particular question it was overruled by the Supreme Court of Pennsylvania in *Sullivan v. Jones & Laughlin Steel Company*, 208 Pa. 540, 57 Atl. 1065, 66 L. R. A. 712. In the case last cited, the court, in the course of its opinion, said:

"And as to the principle invoked that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction, it is enough to observe that it has no application where the act complained of is in itself, as well as in its incidents, tortious. In such a case it cannot be said that injury would result from an injunction, for no man can complain that he is injured by being prevented from doing to the hurt of another that which he has no right to do. Nor can it make the slightest difference that the plaintiff's property is of insignificant value to him as compared with the advantages that would accrue to the defendants from its occupation. There can be no balancing of conveniences when such balancing involves the preservation of an established right."

In that case the defendant had for many years operated his steel furnaces in proximity to the plaintiff's land, and just prior to the commencement of the suit had enlarged his furnaces, and was changing the character of the ore smelted so that it would materially increase the damage inflicted upon the plaintiff.

The case of *Powell v. Bentley & Gerwig Fur. Co.*, 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53, cannot be said to be an authority upon the point, as will be seen from the following quotation taken from the opinion:

"On the question of nuisance, the evidence is conflicting; at any rate, the plaintiff does not put his case high and dry, above all ground of fair questioning. There is enough, perhaps, for the chancellor to have directed an issue. But this issue, the plaintiff by his suit at law has already brought on and made up. Under such a conflict of evidence, the suit at law should have been tried first. The finding on such a question of fact by twelve good and lawful men, who, if deemed proper, may see and hear the thing for themselves, is still greatly relied on by the court. By such course we would avoid the possibility or likelihood of the awkward predicament that now confronts us, of a court of equity having silenced as a nuisance a factory of great cost and general utility, which the jury in the suit at law should afterwards find to be, all things considered, no nuisance at all. Besides, if the jury should find it to be a nuisance by giving substantial damages, the chancellor would then have safer ground for his decree."

In the case of *Amelia Milling Co. v. Tenn. Coal, Iron & R. Co.* (C.) 123 Fed. 811, which was an application for an injunction pendente lite, the court said:

"An injunction pendente lite is very like an execution before judgment, and ought not to be issued except in clear cases of right. In the present case, on the pleadings and affidavits submitted, it is impossible to say with certainty that the operation of the defendant's pumping station and of its water system is a nuisance at all, or, if a nuisance, one of which the milling company, complainant, has any right to complain."

The same doctrine was applied in the case of *Sellers v. Parvis* (C.) 30 Fed. 164. Some other cases are called to our attention in sup-

port of this proposition, but upon examination most of them will be found to be like those just commented upon, either relating to preliminary injunctions, or presenting phases in which there was a question as to whether or not a nuisance was created by the acts of the defendant.

The decision in the case of *Madison et al. v. Ducktown Sulphur & Iron Co.*, 113 Tenn. 331, 83 S. W. 658, much relied upon by appellants, was largely predicated upon a statute of Tennessee, which the court said was to be regarded as declaring the policy of the state upon the subject referred to. If the court based its decision upon grounds independent of the statute, then we think its conclusions are not sustained by the weight of authority. *Shelfer v. City of London*, etc. (1895), 1 Chan. 287; *Imperial Gas Light & Coke Co. v. Broadbent*, 7 H. L. C. 600; *Atty. Gen. v. Council*, etc., *Birmingham*, 4 Kay & J. 528, 538; *Cowper v. Laidler* (1903), 2 Chan. 337; *Atty. Gen. v. Colney*, etc., *Asylum*, L. R. 4 Chan. App. 146; *Corning v. I. & M. Factory*, 40 N. Y. 191; *Stock v. Judson Township*, 114 Mich. 357, 72 N. W. 132, 38 L. R. A. 355; *Village of Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367; *Harper v. Mountain Water Co.*, 65 N. J. Eq. 479, 56 Atl. 297; *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374; *Evans v. Reading Fertilizing Co.*, 160 Pa. 209, 28 Atl. 702; *Weaver v. Eureka Lake Co.*, 15 Cal. 271; *Amsterdam, etc., Co. v. Dean*, 13 App. Div. 42, 43 N. Y. Supp. 29; *Banks v. Frazier*, 111 Ky. 909, 64 S. W. 983; *Suffolk, etc., Co. v. San Miguel, etc., Co.*, 9 Colo. App. 407, 48 Pac. 828; *Clowes v. Staffordshire, etc., Co.*, L. R. S. Ch. App. 125; *Pennington v. Brinsop, etc., Co.*, L. R. 5 Ch. Div. 769; *Young v. Banker, etc., Co.* (1893), App. Cas. 691; *Hobbs v. Amador Co.*, 66 Cal. 161, 4 Pac. 1147; *Chestatee Co. v. Cavendars Co.*, 118 Ga. 255, 45 S. E. 267; *Weston Paper Co. v. Pope*, 155 Ind. 394, 57 N. E. 719; *Townsend v. Bell*, 62 Hun. 306, 17 N. Y. Supp. 210; *Brown v. Ontario, etc., Co.*, 81 App. Div. 273, 80 N. Y. Supp. 837; *Beckwith v. Howard*, 6 R. I. 1.

Our attention was called at the argument to a statute of Utah, which, it is contended, is a declaration of the policy of the state authorizing the court where an injunction is sought, and where, but for the exercise of the court's discretion, the plaintiff would be entitled to an injunction, to refuse to grant an injunction, and to require the defendant to give a bond to pay the plaintiff all damages that may be recovered on account of a continuance of the nuisance complained of, and it is said that this statute is not merely a rule of procedure, but is a property right which the federal courts must recognize and enforce. We have examined this statute at length, and do not think it susceptible of the construction contended for. We think it cannot apply and was not intended to apply, to final hearings, but can only have reference to interlocutory or restraining orders, and does nothing more than to prescribe for the state courts a method of procedure which has always obtained in the federal courts. It would be a strained construction of this statute, and one wholly unwarranted by its language, to say that it conferred upon the court the power to perpetuate for all time a nuisance, which would amount to the taking of private property

merely upon the giving of a bond to pay such damages as might be recovered. The Constitution of Utah expressly provides that "Private property shall not be taken or damaged for public use without just compensation." Const. art. 1, § 22. While the Legislature of Utah has declared certain smelter uses to be public, and authorized the exercise of the power of eminent domain for certain purposes, yet the purposes specified do not embrace the acts here complained of, and, as suggested by the Circuit Court, "it must be inferred that with respect to such acts the Legislature did not deem the incidental public benefit of sufficient importance to legalize the acts on condition that compensation be made."

An examination of the record satisfies us that there is no question of laches in this case, and we pass it without further comment.

It is also suggested by some of the appellants that the complainants have only proved possession of their farms, and that an injunction should only issue at the suit of the owner of the freehold. While this proposition of law may well be doubted, it is unnecessary to decide it, for, as suggested by the Circuit Court, "many of the complainants were called as witnesses and testified to both ownership and possession. The direct evidence as to ownership was of a legal conclusion, but evidently for the purpose of convenience, it was not objected to, and cannot be disregarded. The facts do not justify the contention made."

That the damage suffered in this case is substantial, irreparable, and incapable of adequate reparation at law, was found by the Circuit Court, and this view is, we think, fully sustained by the evidence. An injury is irreparable in all cases when the damages which may result therefrom cannot be measured by any certain pecuniary standard. As suggested by the Supreme Court of California, in *Daubenspeck v. Grear*, 18 Cal. 443:

"The fact that the defendants are willing to pay for the property is immaterial, for there are no means of determining whether the value of the property in money would compensate the plaintiffs for its destruction. It may possess a value to them which no other person would place upon it; and there is neither justice nor equity in refusing to protect them in the enjoyment of it, merely because they may possibly recover what others may deem an equivalent in money. The nature of the property, which consists of fruit trees, ornamental shrubbery, etc., gives them a peculiar claim to this protection."

To remit the complainants to their remedy at law would result in an endless multiplicity of suits. Each defendant would have to be sued separately, as they are not acting in concert, and it would be altogether impossible to determine the proportion of damages occasioned by any one of the smelters, because the fumes from all of them so commingle, "as to make discrimination impracticable." And in such circumstances the court cannot take into consideration the fact that the appellants' business is lawful, and furnishes profitable employment for many people, and is beneficial to the community at large, as well as profitable to the appellants, who have invested large amounts of money in the erection of their works, if the business is carried on in an unlawful manner so as to destroy the property of individual landowners

in the vicinity, or seriously impair or injure the health of those living upon their own land in the vicinity of their works. And when the acts of the defendants produce this result, as is clearly shown by the record in this case, the court is bound to protect such individual rights.

The decree enjoins the defendants from "roasting or smelting sulphide ores carrying over 10 per cent. sulphur, so as to discharge into the atmosphere the sulphur in the form of gas, and from the further discharging into the atmosphere of arsenic." And it is contended by the appellants, and there is some testimony in the case tending to support their contention, that, by the erection of bag houses, the discharge of arsenic into the atmosphere can be fully arrested. If this is true, then, upon the completion of the bag houses, they will not be affected by the decree as to that matter. But it is said in the reply brief, filed by the United States Smelting Company, that the erection of bag houses in a copper smelter, being something new, requires much study and many experiments, and they ask that a reasonable time be granted within which to demonstrate whether or not these bag houses can be successfully operated. The decree in this case was entered on the 5th of November, 1906. Defendants have now had almost a year, and it will be more than a year before a mandate from this court reaches the Circuit Court. If they have been diligent, it seems to us that this time is reasonable and all-sufficient to demonstrate whether the bag houses can or cannot be successfully operated.

It is fully established by evidence in this case that damage is done both by the arsenic and by sulphur dioxide, and it is not claimed by any one that the bag houses will prevent the escape of sulphur dioxide into the atmosphere; appellants concede that the only method by which this gas can be reduced, according to the present condition of science upon the subject, is to diminish the amount of sulphide ores that are being smelted, so that the amount of sulphur dioxide passing into the atmosphere will be thoroughly diffused.

It is suggested by counsel for the United States Smelting Company that by the terms of the decree the smelters may roast or smelt any kind of ore containing not to exceed 10 per cent. sulphur, but cannot mix with silicious ore, carrying no sulphur whatever, any sulphide ores carrying over 10 per cent. and they insist that the decree should be so modified as to permit them to smelt sulphide ores carrying more than 10 per cent. mixed with ores carrying less than 10 per cent. or no sulphur, if the mixture does not contain to exceed the 10 per cent. sulphur authorized by the decree. This request seems to us reasonable and a proper modification of the decree, if it is possible, but the question cannot be disposed of upon this record, as there is no testimony tending to show that it can be done. If by crushing, or other process, the ores can be reduced to particles small enough to secure such a result, we have no doubt that the Circuit Court, upon an application to modify the decree and upon satisfactory evidence that the ores could be so mixed that no more sulphur dioxide would be expelled from smelting the mixture than would be from smelting ore carrying 10 per cent. sulphur in their natural state, would permit this to be done.

After a careful examination of the record, the conclusion reached is that the decree of the Circuit Court should be affirmed, and it is so ordered.

Decree affirmed.

NOTE.—The following is the opinion of Marshall, District Judge, in the Circuit Court:

MARSHALL, District Judge. The object of this bill in equity is to obtain an injunction against a nuisance. The defendants each own a smelter situated in Salt Lake Valley near to Salt Lake City, and in proximity to each other. The ores smelted by them are largely sulphide in character, and in the process employed sulphur is driven off into the atmosphere in the form of sulphur dioxide gas. This gas is heavier than the air, and, when cooled, falls to the ground at a distance from the smelters dependent upon the air currents. When it is brought in contact with moisture either in the form of rain, freshly irrigated ground, or the moisture present in growing plants and the foliage of trees, sulphurous or sulphuric acid is formed, which is destructive to vegetation. Beside the emission of the gas, some flue dust is emitted from the smelters, which contains perceptible quantities of arsenic, resulting in the death of horses and cows. The fumes from the different smelters so mingle with each other as to make it impracticable to distinguish with any certainty the proportion of damage caused separately by each smelter. Beyond the injuries inflicted upon the property of the complainants, great personal discomfort results to those living within the section of country subjected to the fumes. The complainants number 409, and their farms alleged to be injured exceed in area 9,000 acres. The amount of damage that the complainants will suffer by a continuance of the nuisance does not clearly appear, and, indeed, can hardly be estimated in dollars and cents, but it does appear that, in many instances, the injuries inflicted preclude the carrying on of farming operations at a profit, and practically deprive the landowner of any beneficial use of his land. The aggregate damage which will ensue from a denial of an injunction is, necessarily, very large. The defendants have invested large sums in their respective smelters—employ many men; and if these smelters are closed down, the mining interests of the state will be seriously injured. No method has been discovered which will enable the defendants to smelt sulphide ores without permitting the sulphur dioxide gas to escape, unless an expenditure be entailed which would in effect render the reduction of such ores impracticable. In view of this condition, the defense is interposed that the injury to the defendants and to the public, if an injunction issues, so greatly exceeds the injury to the plaintiffs, if it be denied, that an injunction should not be ordered. In the case of *McCleery et al. v. Highland Boy Gold Mining Company (C. C.)* 140 Fed. 951, I expressed my views on this defense, as applied to a similar state of facts, and I will not repeat what was there said; but the importance of the controversy, the arguments of counsel, and the recent decision of the Circuit Court of Appeals of the Ninth Circuit in *Mountain Copper Co. v. United States*, 142 Fed. 625, 73 C. C. A. 621, demanded a reinvestigation of the question. This reinvestigation has been made, and has confirmed me in my original opinion. In *Mountain Copper Co. v. United States*, supra, the court denied an injunction on the ground that the injury which would be caused to the defendant by an injunction would be very great, and that suffered by the complainant small, if the injunction was denied. In the opinion it was said: "That the comparative convenience or inconvenience to the parties from the granting or withholding the injunction sought should be considered, and that none should be granted whenever it would operate oppressively or inequitably or contrary to the real justice of the case, is the well-established doctrine, and we need hardly multiply authorities to that effect." The case calling for this declaration of law is thus stated in the opinion: "We have then the ownership in the complainant of a little over four thousand acres of land within the damaged zone, mountainous in character, with little or no soil, practically worthless for agriculture or horticulture, upon which most of such trees and undergrowth as existed, had, prior to the commencement of this suit, been killed by the

fumes generated by the appellant company (for which it is of course liable in damages for whatever they may have been worth), and upon which but little more vegetation of any kind remains susceptible of destruction. In view of these facts, about which there can be no question upon the record, can it be doubted that the maximum injury that can result to the lands of the complainant embraced by the bill, is but a mere trifle in comparison to the loss inflicted by the injunction in question upon the appellant company, and those dependent upon and benefited by it?" It will be readily perceived that the case was an extreme one against the complainant. The declaration of law above quoted must be tested by the authorities cited in its support, and these will be examined.

In *Huckenstine's Appeal*, 70 Pa. 102, 10 Am. Rep. 669, the law was laid down in much the same way, but it was unnecessary to the decision, because the court held that the complainant's evidence as to the fact of the nuisance "is rendered more than doubtful by the testimony of the defense"—a sufficient reason for denying an injunction. In *Campbell v. Seaman*, 2 Thomp. & C. 231, the Supreme Court of New York said of this case: "It is in direct conflict with the authorities of this state (New York) and cannot be adopted here as law." On the point to which it is cited, it has been overruled in Pennsylvania. *Sullivan v. Jones & Laughlin Steel Co.*, 208 Pa. 540, 57 Atl. 1065, 68 L. R. A. 712. In this case the defendant had, for many years, operated steel furnaces in proximity to the plaintiff's land, but had recently before the commencement of the suit enlarged the furnaces, and so changed the character of the ore smelted as to materially increase the damage inflicted upon the plaintiff. At page 1069 of the opinion, as reported in the *Atlantic Reporter*, the court says: "When, however, as the result of improvements voluntarily made by the appellee, and its use of a new ore, the annoyance, inconvenience, and injury to which the appellants are now subjected do not differ merely in degree from those to which they formerly submitted as part of their lot as citizens of the 'Iron City,' but in kind, and practical destruction and confiscation of their properties confront them, a very different situation is presented to a chancellor from those cases in which the rule is laid down that people who live in such a city or within its sphere of usefulness do so of choice, and therefore voluntarily submit themselves to its peculiarities and its discomforts. That very rule as announced in *Huckenstine's Appeal*, supra, recognizes their right to live and have their homes there; and a case cannot be found as authority for the right of any manufacturing company, located in a manufacturing district of a city, to so rebuild and operate its furnaces as to actually destroy homes and other property in a residential portion of the same city. That this is what the appellee is doing with the properties of the appellants is an irresistible conclusion, and the only relief is by injunction. If it is to be permitted to so operate its furnaces that the burning and corroding ore dust emitted from their stacks is borne by the winds and scattered over the properties of the appellants with destroying effect, simply because of the plea that it cannot be helped, for the same reason it might ask a chancellor to stay his arm from arresting the descent of showers of fire from the same stacks down on the same nearby homes. If the appellees possessed the right of eminent domain, it might take the properties of the appellants and do with them what it pleases, but, not having such high right, it cannot do so, even indirectly. It has a right to the use and enjoyment of its own property, but so have the appellants to theirs, for whom the law says to the former, 'sic utere tuo ut alienum non lœdas;'" and on pages 1070 and 1071, it is further stated: "It is urged that as an injunction is a matter of grace, and not of right, and more injury will result in awarding than refusing it, it ought not to go out in this case. A chancellor does act as of grace, but that grace sometimes becomes a matter of right to the suitor in his court, and, when it is clear that the law cannot give protection and relief—to which the complainant in equity is admittedly entitled—the chancellor can no more withhold his grace than the law can deny protection and relief, if able to give them. This is too often overlooked, when it is said that in equity a decree is of grace, and not of right, as a judgment at law. In *Walters v. McElroy et al.*, 151 Pa. 549, 25 Atl. 125, the defendants gave as one of the reasons why the plaintiff's bill should be dismissed that his land was worth

but little, while they were engaged in a great mining industry which would be paralyzed if they should be enjoined from a continuance of the acts complained of; and the principle was invoked that, as a decree in equity is of grace, a chancellor will never enjoin an act, where, by so doing, greater injury will result than from a refusal to enjoin. To this we said: 'The phrase "of grace," predicated of a decree in equity, had its origin in an age when kings dispensed their royal favors by the hands of their chancellors; but although it continues to be repeated occasionally, it has no rightful place in the jurisprudence of a free commonwealth, and ought to be relegated to the age in which it was appropriate. It has been somewhere said that equity has its laws as law has its equity. This is but another form of saying that equitable remedies are administered in accordance with rules as certain as human wisdom can devise, leaving their application only in doubtful cases to the discretion, not the unmerited favor or grace, of the chancellor. Certainly no chancellor in any English speaking country will at this day admit that he dispenses favors or refuses rightful demands, or deny that, when a suitor has brought his cause clearly within the rules of equity jurisprudence, the relief he asks is demandable *ex debito justitiæ*, and needs not to be implored *ex gratia*. And as to the principle invoked, that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction, it is enough to observe that it has no application where the act complained of is in itself, as well as in its incidents, tortious. In such case it cannot be said that injury would result from an injunction, for no man can complain that he is injured by being prevented from doing to the hurt of another that which he has no right to do. Nor can it make the slightest difference that the plaintiff's property is of insignificant value to him as compared with the advantages that would accrue to the defendants from its occupation.' There can be no balancing of conveniences when such balancing involves the preservation of an established right, though possessed by a peasant only to a cottage as his home, and which will be extinguished if relief is not granted against one who would destroy it in artificially using his own land. Though it is said a chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing and leaving the party to his redress at the hands of a court and jury, and if, in conscience, the former should appear, he will refuse to enjoin (Richard's Appeal, 57 Pa. 105, 98 Am. Dec. 202); that 'it often becomes a grave question whether so great an injury would not be done to the community by enjoining the business that the complainant party should be left to his remedy at law' (Dilworth's Appeal, 91 Pa. 247); and similar expressions are to be found in other cases; 'none of them, nor all of them, can be authority for the proposition that equity, a case for its cognizance being otherwise made out, will refuse to protect a man in the possession and enjoyment of his property because that right is less valuable to him than the power to destroy it may be to his neighbor or to the public.' *Evans v. Reading Chemical Fertilizing Co.*, 160 Pa. 209, 28 Atl. 702. The right of a man to use and enjoy his property is as supreme as his neighbor's, and no artificial use of it by either can be permitted to destroy that of the other."

The lack of appositionness in *Powell v. Bentley & Gerwig Furniture Co.*, 34 W. Va. 804, 12 S. E. 1085, 1088, 12 L. R. A. 53, 56, is best shown by a quotation from the opinion where it is said: "On the question of nuisance, the evidence is conflicting; at any rate the plaintiff does not put his case high and dry, above all ground of fair questioning. There is enough, perhaps, for the chancellor to have directed an issue. But this issue, the plaintiff by his suit at law has already brought on and made up. Under such a conflict of evidence, the suit at law should have been tried first. The finding on such a question of fact of twelve good and lawful men, who, if deemed proper, may see and hear the thing for themselves, is still greatly relied on by the court. By such course we would avoid the possibility or likelihood of the awkward predicament that now confronts us, of a court of equity having silenced as a nuisance a factory of great cost and of general utility, which the jury in the suit at law should afterwards find to be, all things considered, no nuisance at all. Besides, if the jury should find it to be a nuisance by giving substantial damages, the chancellor would then have safer ground for his decree. The



decrees of the 12th and 14th August, 1890, must, therefore, be reversed, and the cause remanded, the further hearing to abide the determination of the issue of nuisance or no nuisance in the suit at law, or to be demurred to by plaintiff, according as he may be advised." It is familiar law that in cases of doubt, and before the determination of complainant's right at law, no injunction will issue. *Amelia Milling Co. v. Tenn. Coal, Iron & R. Co.* (C. C.) 123 Fed. 811, was an application for an injunction pendente lite; and at page 813 of the opinion, the court said: "An injunction pendente lite is very like an execution before judgment, and ought not to be issued except in clear cases of right. In the present case, on the pleadings and affidavits submitted, it is impossible to say with certainty that the operation of the defendant's pumping station and of its water system is a nuisance at all, or, if a nuisance, one of which the milling company, complainant, has any right to complain." The same thing is true of *Sellers v. Parvis* (C. C.) 30 Fed. 164, and the reason for the conclusion of the court is found in a quotation from the opinion, at pages 166, 167, where it is said: "A preliminary injunction, if now issued, would be simply staying the alleged nuisance during the pendency of further proceedings to establish the rights of the parties, and it would be imposing too great a hardship upon the defendant to stop its business at this time when the complainant could derive no benefit or advantage which would compensate for the certain injury which would be inflicted upon the company, if after a fuller investigation it should appear that it is not in fault, or that the complainant had an adequate legal remedy." Undoubtedly these decisions on applications for a preliminary injunction were correct. In *Evans v. Reading, etc., Co.*, 160 Pa. 209, 28 Atl. 702, it was said: "So far as the 'balance of injury' notion refers to the parties to the litigation, \* \* \* its legitimate application is to motions for preliminary injunction; not to final decrees. Where the question before the court is as to the propriety of stopping a business by preliminary injunction upon an ex parte showing, which may or may not be substantiated by further examination of the case in due course, it is very well for the chancellor to take into account the magnitude of the defendant's investment, and compare it with the character of the complainant's alleged injury, and, if the latter appears trifling beside that which would result from the impairment of the former, he may well refuse to exercise his power until more fully advised."

The application of such cases to a final hearing is not apparent. *Peterson v. City of Santa Rosa*, 119 Cal. 387, 51 Pac. 557, does not support the doctrine for which it is cited. In that case a perpetual injunction against a discharge of sewage by a municipal corporation was ordered. In *Demarest v. Hardham*, 34 N. J. Eq. 469, what was said about the "balance of injury" doctrine was largely dictum. In that case, machinery operated by the defendant communicated so much vibration to the wall of the plaintiff's house as to constitute a nuisance. The court concluded that, if the position of the machinery were changed, all substantial vibration would cease, and it was ordered that the defendant make the requisite change, and that if he failed to do so an injunction issue. So far as this case announces the doctrine of the "balance of injury," it has been overruled in New Jersey. *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 378. In *Tuttle v. Church* (C. C.) 53 Fed. 422, the defendant's manufacturing industry, alleged to create a nuisance, had been carried on for 30 years. The plaintiff had lived on his premises subjected to the claimed nuisance, and without complaint for 12 years. The suit was instigated by a third person to gratify a private spite. The court found the evidence as to the fact of a nuisance doubtful, and that if the nuisance existed it was occasional and evanescent. The injunction was properly denied. The last case cited is *Madison et al. v. Ducktown Sulphur Copper & Iron Co. et al.*, 113 Tenn. 331, 83 S. W. 658. In that case, as in this, the plaintiffs, who were farmers, sought to enjoin the operations of several copper smelters. The lands of the plaintiffs aggregated 627 acres, 452 acres of which was assessed for taxation at the aggregate sum of \$689; the assessed value of the remaining 175 acres did not appear, but the court found that its value was about the same per acre as that of the other land, and that the entire acreage consisted of thin mountain land of little value for agriculture. The property of one of the defendants was assessed for taxation at \$1,279,533,

with an average pay roll of \$40,000 per month, 1,300 men employed, and 12,000 persons dependent on the industry for support. The case was an extreme one. In Tennessee there is a special statute, the effect of which on the decision is apparent from this quotation from the opinion at page 666 of 83 S. W.: "It cannot be doubted, therefore, that although the amending acts above copied purport, in terms, to apply only to suits brought for the recovery of damages resulting from nuisances the purpose was to declare the legislative will in respect of the use of the injunctive power in nuisance cases when sought to be used in effecting final relief, and to ordain that, in administering this relief, the court should exercise a sound discretion, and either 'order or decline to order the nuisance to be abated,' as such sound discretion should dictate. This act must be regarded as declaring the policy of the state upon the subject referred to. It is perceived from the caption that the Legislature had in view the public utility of enterprises attacked on the ground of nuisance, and authorized the court to grant or withhold the injunction, as wise discretion might suggest or warn." These decisions, however appropriate to the facts involved in *Mountain Copper Co. v. United States*, do not seem to justify the application of the doctrine there advanced to the case at bar. The Constitution of Utah provides that: "Private property shall not be taken or damaged for public use without just compensation." The Legislature of Utah has declared certain smelter uses to be public, and authorized the exercise of the power of eminent domain for these specified purposes. Those uses, however, do not embrace the acts here complained of, and therefore it must be inferred that with respect to such acts, the Legislature did not deem the incidental public benefit of sufficient importance to legalize the acts on condition that compensation be made. Where the Legislature has refused to act, it is not for a court to interfere by judicial legislation.

In *Shafer v. City of London Electric Light Co.* (1895) 1 Chan. 287, 315, the court, in considering Lord Cairns' Act (21 and 22 Victoria, c. 27), which conferred upon the court of chancery jurisdiction to award damages in lieu of an injunction, said: "Jurisdiction to give damages instead of an injunction is, in words, given in all cases; but the use of the word 'damages' has led to a doubt whether the act applies to cases where no injury at all has yet been inflicted, but where injury is threatened only. Subject, however, to this doubt, there appears to be no limit to the jurisdiction; but, in exercising the jurisdiction thus given, attention ought to be paid to well-settled principles; and ever since Lord Cairns' Act was passed the court of chancery has repudiated the notion that the Legislature intended to turn that court into a tribunal for legalizing wrongful acts; or, in other words, the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict. Neither has the circumstance that the wrongdoer is, in some sense, a public benefactor (e. g., a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed. Expropriation even for a money consideration is only justifiable when Parliament has sanctioned it. Courts of justice are not like Parliament, which considers whether proposed works will be so beneficial to the public as to justify exceptional legislation and the deprivation of people of their rights with or without compensation." The English cases are distinctly against the defense here sought to be interposed. *Shelfer v. City of London, etc.* (1895), 1 Chan. 287; *Imperial Gas Light & Coke Co. v. Broadbent*, 7 H. L. C. 600; *Atty. Gen. v. Council, etc., Birmingham*, 4 Kay & J. 528, 38; *Cowper v. Laidler* (1903), 2 Chan. 337; *Atty. Gen. v. Colney, etc., Asylum*, L. R. 4 Chan. App. 146. The weight of authority in the United States is also opposed to it. *Corning v. I. & M. Factory*, 40 N. Y. 191; *Stock v. Judson Township*, 114 Mich. 357, 72 N. W. 132, 38 L. R. A. 355; *Village of Dwight v. Hayes*, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367; *Harper v. Mountain Water Co.*, 65 N. J. Eq. 479, 56 Atl. 297; *Hennessey v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 374. The cases contra have been extreme cases, in most of which it might be said either that the evidence of the nuisance left the matter in doubt, or that the injury apprehended was of a very slight character, compensation for which in an action at law was adequate. In such cases, of course, no injunction should

issue. *Osborne v. Mo. Pac. Ry.*, 147 U. S. 248, 259, 13 Sup. Ct. 299, 37 L. Ed. 155; *McElroy v. Kansas City (C. C.)* 21 Fed. 257. In the case at bar, the injury is substantial, irreparable; for the destruction of fruit and ornamental trees has always been so held (*United States v. Guglard [C. C.]* 79 Fed. 21, 23), and incapable of adequate reparation at law. The suggestion that the complainants should be remitted to actions at law for damages is entitled to but little weight. In such actions the damages recovered would be limited to that suffered before the date of the writ. The result would be an endless multiplicity of suits, in each of which only one of the defendants could be sued, for they are not acting in concert; and it would be a matter of great difficulty to determine the proportion of damage caused by the one defendant, because the fumes from the smelters so commingle as to make discrimination impracticable. The remedy would be worse than the evil. To the extent that the complainants are denied an adequate remedy because of the indirect public benefit, their property is injured without compensation—a result which should be less possible under the system of written Constitutions in the United States than in England.

It is next argued that, because of laches, damages should be assessed in lieu of an injunction. This was done in the case of *McCleery v. Highland Boy Gold Mining Company* under the exceptional circumstances there presented; and, as to some of the complainants here, a similar decree might meet the demands of justice, but as to many of the complainants there has been no undue delay. The injury resulting from the smelter fumes has been cumulative on the one hand, and has, on the other, extended, as time has elapsed, over a wider area. Farmers who had not been injured were not required to anticipate this; and, as to such complainants, their right to an injunction has not been waived.

It is also said that the complainants have only proved possession of their respective farms, and that an injunction should only issue at the suit of the owner of the freehold. I should be inclined to doubt the proposition of law announced, but it is not necessary to decide it. Many of the complainants were called as witnesses, and testified to both ownership and possession. The direct evidence as to ownership was of a legal conclusion, but evidently for the purposes of convenience, it was not objected to, and cannot be disregarded. The facts do not justify the contention made. The American Smelting & Refining Company further claims a prescriptive right. That company succeeded to the ownership of three smelters situated within a radius of several miles from its present plant, at which the smelting of sulphide ores had been carried on for many years; the aggregate quantity of such ores smelted not being greatly less than the amount now smelted at its present smelter. The evidence justifies the conclusion that for some reason, either the lack of concentration of the smelting or a difference in the methods employed, but little damage was done by these separate smelters. In any event a prescriptive right to continue these smelters can in no event justify the damage done by the new smelter, situated at a different place, and conducting operations on a much larger scale than any one of the former smelters. It is also contended that if the American Smelting & Refining Company operated alone, no substantial damage would be done. The evidence does not satisfy me that this is true, but, if true, it is irrelevant. It is sufficient to warrant an injunction that it materially contributes to substantial damage. It might be true in a given case that no one smelter, operating alone, would do substantial damage, but that such damage would result from the united operations of all. If in such a case any distinction be made it should be in favor of the smelter first beginning its operations; and in this case, that would not be the American Smelting & Refining Company. To a certain extent I am inclined to yield to the argument that the last-named company does little damage. The evidence does not clearly show that damage would result from the smelting of ores carrying small per cents. of sulphur. The American Smelting & Refining Company smelts some ores classed by it as direct smelting ores, without any preliminary roasting, and yet carrying a sulphur content not exceeding 10 per cent. Until the complainants have established at law that the smelting of these ores constitutes a nuisance, I am unwilling to prohibit it.

The jurisdiction of the court is also challenged, on the ground that it is not alleged that any one complainant will suffer a damage exceeding \$2,000 if an injunction be denied. The discussion of this question, properly preliminary, has for convenience, been deferred to the close of this opinion. As this suit is for an injunction to restrain the operation of the smelters, the value of the matter in dispute is the value of the claimed right of which the defendants will be deprived by the granting of the relief sought. *Miss. & Mo. R. R. Co. v. Ward*, 2 Black, 485, Fed. Cas. No. 17,156; *Whitman v. Hubbell*, 30 Fed. 81; *Texas Pac. R. R. Co. v. Kuteman*, 54 Fed. 547, 4 C. C. A. 503; *Rainey v. Herbert*, 55 Fed. 443, 5 C. C. A. 183; *Amelia Mill Co. v. Tenn. Coal, Iron & R. Co. (C. C.)* 123 Fed. 811; *Louisville, etc., R. Co. v. Smith*, 128 Fed. 5, 63 C. C. A. 1; *McKee v. Chautauqua Association (C. C.)* 124 Fed. 811. All of the defendants, except the Bingham Consolidated Mining & Smelting Company and the Bingham Copper & Gold Mining Company, affirmatively allege this value in a sum largely exceeding the minimum limit of jurisdiction, and all of the defendants have based their chief defense on evidence of this value. The difficulty is that, with respect to the two defendants above named, nowhere in the bill or answer is there any specific averment as to the value of the matter in dispute; and as to those defendants no decree on the merits can be entered in this state of the pleadings. However, as the evidence of the defendants clearly shows the requisite value, the complainants will be permitted to file an amendment to their bill in this respect to conform to the proof. Sufficient authority for this will be found in *Tremaine v. Hitchcock*, 23 Wall. 518, 23 L. Ed. 97. Upon the filing of the amendment authorized, a decree will be entered, enjoining each of the defendants from the further roasting or smelting of sulphide ores carrying over 10 per cent. sulphur, and at their present locations so as to discharge into the atmosphere the sulphur in the form of a gas, and from further discharging into the atmosphere of arsenic; provided that the defendants, or any one or more of them, may at any time hereafter apply to the court, upon due notice to the complainants, for a modification or suspension of this injunction, upon a showing which the court may deem sufficient that conditions have been so changed that the discharge of such sulphurous and arsenical fumes into the air by them or either of them may be resumed, or otherwise conducted, so as not to create or continue, or contribute to create or continue, the nuisance complained of. As the interests involved are large, and the questions decided of great importance, this injunction will only take effect at the expiration of 30 days from the date of the decree, a period sufficient for the perfecting of an appeal.

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## O'CONNOR v. ARMOUR PACKING CO.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1908.)

No. 1,697.

### 1. NEGLIGENCE—TRIAL—QUESTIONS OF LAW OR FACT.

The question of negligence is generally for the jury; and it is only when the evidence is without material conflict, and is such that all reasonable men must draw the same conclusion from it, that the question is for the court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 279-302.]

### 2. MASTER AND SERVANT—INJURY TO SERVANT—EXPOSURE TO INFECTIOUS DISEASE.

It is the duty of a master to exercise reasonable care to protect his servants from exposure to contagious or infectious disease while in the performance of their work, and such duty, like that to provide a reasonably safe place and appliances, is absolute, and cannot be delegated. If it requires an inspection, it is not performed by employing competent and skilled inspectors, but there must be, in fact, a reasonably careful and skillful inspection, and the master is responsible for an injury to a serv-

ant from a cause which such an inspection would have discovered and removed.

3. SAME—DUTY OF INSPECTION.

The inspection of cattle and meats at packing houses by the government under the federal statutes is for the purpose of preventing traffic in diseased and unwholesome meats, and does not relieve a corporation engaged in slaughtering cattle from the duty of exercising reasonable care to see that its employes engaged in handling its meats are not exposed to infectious diseases. If it relies on the government inspection, it is responsible to its servants in that regard for the efficiency of such inspection.

4. SAME—ACTIONS FOR INJURY TO SERVANT—QUESTION FOR JURY.

In an action by an employe against a packing company to recover damages for personal injury which it was alleged was caused to plaintiff by an infectious disease which he contracted in handling the diseased carcass of an animal which he was negligently required to dress by defendant, the evidence held sufficient to entitle plaintiff to a submission of the case to the jury.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Southern District of Texas.

James B. Stubbs (Charles J. Stubbs, on the brief), for plaintiff in error.

Thomas F. West, H. M. Chapman, and Ballinger Mills (Terry, Cavin & Mills, of counsel), for defendant in error.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This action was brought in a Texas state court, and was removed to the Circuit Court. The plaintiff, John T. O'Connor, claimed \$20,000 damages for injuries received by him while in the service of the defendant, the Armour Packing Company. Among other averments, it was alleged in the petition that defendant is engaged in the business of selling meat to the retail butchers to be retailed in the city and county of Galveston and elsewhere; that plaintiff was heretofore employed by the defendant, and in the course of such employment it was his duty to skin the cattle received in hides at defendant's warehouse, and while so engaged on or about May 27, 1905, while skinning and preparing certain meats for market, as it was his duty to do, he became infected with a disease known as "charbon," with which disease the cattle, or some of them, which he was handling, were infected, and he contracted the disease by contact with such meats while performing his duty to the defendant; that it was the duty of the defendant to use a proper and ordinary degree of care for plaintiff's safety by not requiring him to work upon diseased meats and prepare them for the retail trade, in which duty to plaintiff the defendant wholly failed; that the defendant, by the use of a proper and ordinary degree of care, knew or should have known that the cattle plaintiff was directed to prepare for market were diseased, and that infection would result from the handling of them; that previous to his infection and injury through defendant's negligence, as herein alleged, he was a healthy, able-bodied man, but since his injury he has been unable to work or earn a livelihood, and for a time has been and will be totally disabled from working and earning the wages that he

would have been able to earn if he had not been injured through defendant's negligence, as alleged, and his disability will continue for a long time to come; that, as a result of the infection of plaintiff from the diseased meat, his right arm became swollen and painful, and a malignant pustule broke out on his arm, requiring two severe operations to be performed upon him, and two pieces to be cut from his arm, and he was confined to his bed and room for several weeks, during which time he suffered great physical and mental pain and anguish, and was unable to earn a livelihood for himself and family, and is still unable to work and earn wages.

The defendant's answer contained a general denial of the petition.

On the trial it was proved, without material conflict, that the relation of employer and employé existed between the plaintiff and the defendant; that the latter was engaged in the business of slaughtering cattle and selling meat; that plaintiff was in the service of the defendant at Galveston, Tex.; that he became, while so engaged, afflicted with a disease of some kind which caused him to consult a physician; that he was treated for such disease and was subjected to two painful surgical operations; and that the affliction caused him expense and damage. There was evidence on the part of plaintiff that he sustained a scratch or injury while skinning a calf in defendant's plant on May 27, 1905, and that shortly thereafter the disease appeared at the place of such injury or scratch. There was evidence on the part of the defense that any injury he received was in handling a quarter of beef in defendant's plant.

The evidence relating to the three propositions or questions of fact discussed later will be stated as each question is considered.

After all the evidence was presented, the trial judge instructed the jury to return a verdict for the defendant. The plaintiff excepted, and the only question necessary to be decided is whether or not the case should have been submitted to the jury.

A case should be taken from the jury if the evidence is so distinctly all one way that a verdict to the contrary would shock the judicial mind, and, would be set aside as having no evidence to sustain it; but, on the contrary, when the evidence is such that reasonable men may fairly differ as to what is proved, or as to the inferences to be drawn, the determination of the matter should be left to the jury. The question of negligence is generally for the jury. It is only where the evidence is without material conflict, and is such that all reasonable men must draw the same conclusion from it, that the question of negligence is for the court. Where the trial judge is in doubt as to whether or not he should direct a verdict, the better course is to submit the case to the jury. While the rule on this subject is found in varying phrases in hundreds of reported cases and is familiar to bench and bar, it is recognized that its proper application to different cases as they arise requires careful and discriminating judgment. The trial judge is required to apply the rule during the progress of the trial and without opportunity to closely examine the evidence offered. Even when the evidence is all in print and carefully scanned, we find experienced judges differing on the question of its sufficiency to carry the case to the jury. Each case must, of course, be decided on its own facts.

This case should have been submitted to the jury, if, in addition to the proof we have mentioned, there was evidence tending to prove three propositions:

First. That the disease with which the plaintiff was afflicted was anthrax.

Second. That he became infected by handling a calf or beef infected with that disease.

Third. That the defendant was guilty of negligence in causing the plaintiff to handle the infected calf or beef.

The evidence relating to each proposition must be examined separately; but it may be found that the evidence bearing on one proposition tends to prove another.

First. The evidence tending to show that the plaintiff's disease was anthrax or charbon may be briefly stated. Dr. Lawrence, the physician who attended the plaintiff, testified that the plaintiff came to him for treatment about the 28th or 29th of May, 1905; that he had a small sore on his right arm about the size of a dime; that there was a depressed grayish circular lesion with slightly elevated hardening edge, and in the edge two or three small blisters; and that the plaintiff had fever. The doctor learned from his patient that three days previous he had received a slight injury to his skin while dressing a calf. The witness described the plaintiff's symptoms with more particularity than it is necessary to repeat here. In answer to a question as to his diagnosis, he said:

"I diagnosed it at that time as a case of charbon or anthrax, and that this was the point of infection and the seat or starting of the disease, and that the germs had gained access through the skin through this lesion."

The physician proceeded to treat him for anthrax, using a local anesthetic and cutting out the affected parts. He had to perform a second and more serious operation; this time administering chloroform. The progress of the disease and its disappearance under treatment confirmed the witness in his diagnosis. He was "perfectly satisfied" that it was charbon or anthrax. Dr. Lawrence sent part of the flesh or tissue taken from the plaintiff's arm to a pathologist, Dr. James J. Terrill, who examined it and made a report that it contained anthrax bacilli. He also submitted to Dr. Terrill "smears" on glass of the flesh or tissue taken from the plaintiff's arm, and received a report that those "smears" also contained anthrax bacilli. Dr. Lawrence testified that the result of the examinations made by Dr. Terrill confirmed his diagnosis. Dr. Terrill was examined as a witness, and explained the process by which he discovered and proved the anthrax bacilli to be in both the tissue and smears. He was cross-examined to show that by other and additional experiments he could have added to the reliability of the diagnosis; but he adhered to the opinion that the processes resorted to by him were sufficient, and that the flesh and smears contained the anthrax bacilli. We think it cannot be denied that this evidence was sufficient to entitle the plaintiff to go to the jury on the first proposition. In fact, this conclusion is not controverted by the learned attorneys for the defendant in error; for, in their able and instructive printed argument, they say:

"There was some testimony to the effect that the plaintiff had anthrax or charbon, and, so far as this one issue was concerned, it might have been proper for the court, had there been any testimony tending to establish the other two requisite facts, to have submitted this issue to the jury."

Second. The plaintiff himself testified to facts bearing on the second proposition. On the 27th of May, 1905, he helped to skin three calves. While skinning the second calf, his hand slipped, and he was cut by the bone underneath the calf's neck. The wound became inflamed. He suffered from it on Sunday, and on Monday he went to Dr. Lawrence. We have already quoted Dr. Lawrence as to the treatment and diagnosis. The calf, the witness said, "looked mighty rough." It had "dark brown reddish spots on the inside and outside where the hide was, and the spots would not come off." The spots were on the outside where the hide came off—under the hide. There were spots also "about the skirt lining." Following instructions, he washed the calf off with a preparation of soda and water. Woodliff, who was present when the plaintiff received the injury, describes the calf as being in a "very bad condition, so that it had to take a wash to clean it up." The witness said "it was slimy" on the inside and outside, too. It had "a kind of dark slimish color to it." Dr. W. A. Knight, a witness for the defendant, was asked on cross-examination:

"An animal that has anthrax, and after it has been slaughtered, are there or not hemorrhagic spots?"

And he answered:

"Yes, sir; there would be hemorrhagic spots. There would be contusions. It would be very plain to see in the tissues. The tissues, under the skin of the animal, have a yellow or oedemic condition."

Another witness for the defendant, Dr. A. H. Wallace, describing the disease, said:

"There may be spots."

He said, describing the last stages of the disease:

"On the inside of the carcass—that is, on the membrane lining of the abdomen and the lining of the chest walls—will find irregular spots on the inside of the carcass, of a reddish color. In the last stages you will find an infiltration of the serum, a gelatine or waterish substance in the muscles, and in some cases portions of the skin you might find spots."

There is no conflict among the experts examined that anthrax is an infectious disease, and that it may be transmitted by contact with the diseased carcass, especially by contact that reaches the blood circulation. The evidence bearing on the first proposition aids the plaintiff in proving the second, because, if the jury should conclude that the plaintiff was afflicted with anthrax, there is evidence from which they might conclude that he was infected by coming in contact with the carcass of the calf. Considering such evidence in connection with the description of the calf given by O'Connor and Woodliff, and the description of the effects or marks of the disease by Knight and Wallace, we cannot say that there was no evidence tending to show that the plaintiff became infected as alleged in his petition.

Third. The proposition as to the sufficiency of the evidence to carry the case to the jury on the question of the defendant company's neg-



ligence requires some comment of a general nature, and involves an inquiry as to the duty of the master to the servant, and the further question as to whether the facts, without dispute or contradiction, show the performance of that duty by the master.

1. It was a part of the common law that our ancestors brought with them to this country that an action for damages would lie "for the entry of diseased cattle into the plaintiff's close by which the plaintiff's cattle were infected." *Anderson v. Buckton*, 1 Strange, 192. In *Cesar v. Karuts*, 60 N. Y. 229, 19 Am. Rep. 164, it was held that a landlord who lets premises knowing they are infected by a contagious disease, without notifying the tenant, is liable to the latter for the damages sustained in case the disease is communicated. In *Gilbert v. Hoffman*, 66 Iowa, 205, 23 N. W. 632, 55 Am. Rep. 263, it was held that an innkeeper who kept his inn open for business, knowing that it was infected with smallpox, was liable for damages to a guest who contracted the disease while there. In *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377, Cooley, J., speaking for the court, held:

"That a party who being allowed to remain on land, under a mere license, so uses it as to make it the means of communicating an infectious disease, will be held liable in damages for all the injury thus occasioned to the property of the owner or licensor of the premises; such owner being ignorant of the danger to which his property was exposed."

In *Grayson v. Lynch*, 163 U. S. 468, 16 Sup. Ct. 1064, 41 L. Ed. 230, the Supreme Court sustained a judgment for damages suffered by reason of disease being communicated to herds of plaintiff's cattle through the negligence of the defendant. These cases all recognize the fact that there is danger in contagious or infectious diseases, and that defendants may be held liable to plaintiffs who are injured by the negligence of defendants in reference to such ailments. In *Kliegel v. Aitkin*, 94 Wis. 432, 69 N. W. 67, 35 L. R. A. 249, 59 Am. St. Rep. 901, the principle was applied in a suit by a servant against the master. It was there held that a master is liable for exposing to a contagious or infectious disease a servant who is ignorant of the danger and unable to know of it by the exercise of ordinary care, and who thereby contracts the disease, if the master knew, or in the exercise of ordinary care ought to have known, of the danger, and did not warn the servant.

2. It may be stated as a general rule that a master is bound to take ordinary and reasonable care not to subject his servant to unreasonable or extraordinary dangers by putting him to work in dangerous buildings, on dangerous premises, or with dangerous tools, machinery, or appliances. If the master fails in his duty in this respect, and the servant in consequence of such failure is injured, without fault on his part, and without having assumed the risk of the master's negligence, he may recover damages of the master. 4 Thompson on Negligence, §§ 3759, 3986. The same principle is applicable where the servant is put to work on material that is dangerous to his health or life. The duty of the master in this respect is primary and unassignable; that is he becomes responsible for the negligence or inexperience of anyone to whom

he delegates the performance of it. 4 Thompson on Negligence, § 3988. Thompson says that:

"No general definition of negligence can be of much value in the practical administration of justice."

The same observation is true as to the definition or statement of the degree of care required of an employer in protecting his employés from injury. It may be stated generally, however, that he is required to adopt all reasonable means and precautions to provide for the safety of his servants while in the performance of their work; and that he is required to exercise such care as an ordinarily prudent man would exercise under the circumstances. He is not an insurer of the safety of his servant, but is required to exercise ordinary and reasonable care for his safety. 1 Labatt on Master and Servant, § 14, and notes.

3. The defense relied on by the defendant is that he did exercise reasonable and ordinary care, and that, if it be true that the plaintiff became infected as alleged, it was not by reason of negligence on the part of the defendant. There was no inspector of cattle or meats at the defendant's plant in Galveston. The evidence tends to show that the calf which the plaintiff claims was infected was slaughtered at the defendant's plant in Ft. Worth, and shipped to Galveston to be skinned, sold to butchers, and by them sold by retail to consumers. The defendant contends that it exercised ordinary and reasonable care, in that all cattle slaughtered in May, 1905, at its Ft. Worth plant was inspected by men employed by them to purchase cattle, and especially that the United States government inspectors inspected all cattle purchased and slaughtered at its plant in Ft. Worth. The contention is that this evidence of inspection is such that it shows without conflict the exercise of reasonable and ordinary care, and therefore the absence of negligence. The evidence of inspection on the part of the defendant's agents is not urged as being in itself sufficient. J. E. McCarthy testified that he had been defendant's cattle buyer at Ft. Worth for four years. "They are examined carefully. \* \* \* We aim to buy something that will make good veal or beef, and, if it looks at all doubtful, we buy subject to government inspection. If the animal seems to have anything at all the matter with it, we buy it separate, and it is held separate and the government man takes it, etc. If it is all right, it is passed, and, if not, it is tanked. When it is tanked, it is boiled up and goes into grease for fertilizing." His plan was not to reject cattle, although it might seem to be diseased, but he would let it take its chance to pass the government inspectors. Wm. Cargill, the defendant's manager at the Ft. Worth plant, referring to cattle purchased at Ft. Worth, said:

"The government inspectors have rejected many. \* \* \* There are some rejected daily."

Both of these witnesses corroborated Dr. A. H. Wallace as to the general system of government inspection in force at the Ft. Worth plant.

The defendant company relied mainly on the evidence of Dr. Wallace to show that a proper inspection was made of cattle slaughtered at Ft. Worth. He is a veterinary surgeon in the service of the department of agriculture at Ft. Worth. He described the system of ante mortem and post mortem inspection in force by the United States government inspectors in May, 1905. Such inspection, he said, was made of all animals slaughtered. Those condemned were tagged, tanked, and destroyed. All that were not condemned were marked with gelatine labels, showing inspection. When a calf was slaughtered and dressed, but not skinned, "the label is placed on the side of the carcass on the inside of the flank." He had under him "23 or 24" men. "Two were assigned to cattle inspection, post mortem work. \* \* \* These men, of course, are required to be present at all times when slaughtering is going on, and are required to examine every animal slaughtered." It was the witness' duty to "go around at different times" and to see that the men are attending to their duties.

No one of the 23 or 24 men in service under Wallace was examined as a witness. Wallace began this supervision at the Armour plant "not later than May 13, 1905." The alleged infection of the plaintiff occurred May 27, 1905. The evidence leaves it in doubt as to how long the calf alleged to be infected remained in the Galveston plant before it was skinned. If it was inspected at the Ft. Worth plant, it does not seem to be certainly proved that such inspection occurred after May 13th, when Dr. Wallace took charge.

Dr. Wallace testifies that the veterinary who looked after the post mortem inspection of calves was Dr. Peck, who, when the witness last heard of him, was practicing at Independence, Mo. He was not examined as a witness, nor was his deposition taken.

The statute and rules for inspection by government officials is only applicable to cattle slaughtered for interstate shipment, and the calf in question was slaughtered in Texas and not shipped out of the state, but the evidence tended to show that all cattle slaughtered were, in fact, subjected to the same inspection.

The inspection made by Dr. Wallace and other government officials was made under the provisions of Act March 3, 1891, c. 555, 26 Stat. 1089, as amended by Act March 2, 1895, c. 169, 28 Stat. 732 [3 U. S. Comp. St. 1901, p. 3190].

As we have already stated, the master is in duty bound to exercise reasonable and ordinary care not to subject his servant to extraordinary danger by putting him to work in a dangerous place, with dangerous machinery or appliances, or on material dangerous to his health or life. From this duty there has arisen the rule that it is incumbent on the master to inspect or have inspected the place where the servant works, and the tools, appliances, and material with which he is required to work. The contention of the plaintiff is that the defendant has negligently failed to perform this duty, and the contention of the defendant is that the inspection by the government was all that could be required, and that, under the circumstances, the master was not chargeable with the duty of making any inspection. It was not denied that the doctrine requiring inspection was applicable to the case, but the

contention is that the inspection provided was sufficient, as matter of law, to relieve the defendant of the charge of negligence.

The object of the federal statutes requiring inspection was to provide additional safeguards against the traffic in spoiled or diseased cattle and meats. They should not be so construed or applied as to deprive any one injured or damaged by the negligence or wrongdoing of a dealer in or a vendor of cattle or meats any remedy which he had under laws existing when the statutes were enacted. We are not of opinion that the inspection by government officials of a place, machinery, instrumentality, or material necessarily and as matter of law releases the master from his duty to make such examinations and inspections as are required of him by the rule which demands that he exercise ordinary and reasonable care for the safety of his servant. This duty of the master is absolute and inalienable. He cannot transfer it to another so as to avoid responsibility. 4 Thompson on Negligence, § 3791. It would seem to follow that the court, in the absence of a statute requiring that course, cannot permit another to assume the responsibility for him. In *McGregor v. Reid*, 178 Ill. 464, 53 N. E. 323, 69 Am. St. Rep. 332, it was held that inspection of freight elevators by city officers and indemnity companies did not as matter of law relieve the owner of the elevators from liability for their defective condition. Commenting on the effect of the inspection of others than the proprietor himself, Labatt says:

"It is difficult to admit that the fact of an appliance having been pronounced sound by an official inspector should be deemed to preclude the jury from considering whether his inspection was really an adequate one. Such an inference seems to be unwarrantable without assuming the possession by such inspectors of a much larger measure of skill and diligence than can be fairly credited to any class of employes."

And the learned author adds:

"Another objection to holding the master not liable as matter of law is that the doctrine of nondelegable duties is virtually ignored." 1 Labatt on Master and Servant, § 165.

See, also, 3 Thompson on Negligence, § 3700.

Granting the contention of the defendant that, to show the exercise of reasonable and ordinary care, it may avail itself of the inspection proved to have been made under the supervision of the government, it must of necessity follow that the defendant is burdened with the deficiencies, if any are shown, of such inspection. The defendant cannot ask more than that the case should be examined as if the government inspectors were its own inspectors. It is clear that the master's entire duty is not performed when he employs competent and skillful inspectors. That is only the first step necessary to secure the reasonable safety of his servant. There must be a reasonably careful and skillful inspection. Although the master may have engaged competent and skillful inspectors, if a servant is injured in consequence of a defect which would have been discovered by a reasonably careful and skillful inspection, but was not discovered, the master will be liable. 4 Thompson on Negligence, § 3793; 1 Labatt on Master and Servant, § 157; *C. C. & St. L. Ry. v. Ward*, 147 Ind. 256, 45 N.

E. 325, 46 N. E. 462. Was there evidence in the case from which the jury might have concluded that no inspection of the calf in question was made; or, if made, that it was made unskillfully and negligently? Dr. W. A. Knight, a witness called for the defendant, testified that anthrax would not necessarily be discovered by an inspection of the animal on foot. It might escape detection if it had not "broken out," but that after the animal is slaughtered, and a post mortem examination is made, "the entire relations would be such that it could not possibly slip an inspector." The witness gives a full description of the effects of the disease in enlarging the organs of the animal and in causing "hemorrhagic spots." No one can read the description and fail to see that a reasonably careful inspection by a reasonably skillful inspector would easily discover the existence of disease. There is much other evidence, which it is unnecessary to quote, which is confirmatory of this view.

Considering all the evidence in the record, we think it was at least sufficient to carry the case to the jury.

The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

PARDEE, Circuit Judge, dissents.

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#### ANDERSON v. MESSENGER.

(Circuit Court of Appeals, Sixth Circuit. December 17, 1907.)

No. 1,679.

**1. APPEAL AND ERROR—SECOND APPEAL—FORMER DECISION AS LAW OF THE CASE.**

It is the established doctrine of the federal courts that the decision of an appellate court on a question of law becomes the law of the case, and will not be reconsidered on a subsequent appeal or writ of error in the same case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4358-4368.]

**2. ESCROWS—DEED—CONDITIONS OF DEPOSIT.**

To constitute the holding in escrow of a deed it must have been deposited under an agreement which prevents the grantor from recalling it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Escrows, § 2.

For other definitions, see Words and Phrases, vol. 3, pp. 2464-2467.]

**3. TRIAL—TAKING CASE FROM JURY—EFFECT OF REQUESTS BY BOTH PARTIES FOR DIRECTED VERDICT.**

In the federal courts the effect of requests by both parties for direction of a verdict at the close of the evidence is the same as a stipulation to try the case to the court without a jury, and the direction of a verdict for one party is equivalent to a general finding of the facts in his favor which must stand, if there was any evidence upon which it can be supported; but if the judgment rendered must necessarily rest upon a fact or facts, the finding of which was not warranted by any evidence in the case, it is erroneous.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 400.

Operation and effect of motions by both plaintiff and defendant for direction of verdict, see note to 77 C. C. A. S.]

**4. LIFE ESTATES—TAXATION—FORFEITURE OF INTEREST OF LIFE TENANT BY PERMITTING SALE FOR TAXES—OHIO STATUTE.**

Rev. St. Ohio, § 2852, which provides that if any person seised of lands for life shall fail to pay the taxes thereon for such length of time that they are sold for taxes, and shall fail to redeem the same, shall forfeit all of his estate therein to the remainderman, and which as construed by the Supreme Court of the state applies only in case of a valid sale, cannot be effective in any case to vest title in a remainderman, since the tax sale, if valid, cuts off both the life tenant's estate and his own. But such provision, if conceded effectiveness in any case, being a part of the statute relating to general taxation, does not apply to sales made for special assessments for local improvements.

**5. CONSTITUTIONAL LAW—DUE PROCESS OF LAW—VALIDITY OF TAX SALE—ASSESSMENTS FOR LOCAL IMPROVEMENTS.**

The charter of the city of Toledo, Local Laws Ohio 1836-37, p. 32, while authorizing special assessments on property to pay for local improvements, made no provision for a hearing to ascertain the benefits to such property by reason of the improvement, and for that reason a sale of property thereunder for nonpayment of such an assessment was void, as depriving the owner of his property without due process of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 872.]

**6. SAME—TENURE OF OWNERSHIP—DEPRIVATION WITHOUT DUE PROCESS OF LAW.**

The fourteenth amendment to the Constitution of the United States, requiring due process of law, merely applied to the legislation of the states an elementary principle of the common law which was a part of the fundamental law of the several states, and which the federal courts in administering the law of the states were previously bound to recognize and enforce.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, §§ 726, 727.]

**7. ESTOPPEL—PURCHASE OF TAX TITLE BY PERSON UNDER DUTY TO PAY TAXES—EFFECT AS AGAINST GRANTEE.**

A mortgagee assigned his mortgage as collateral security. He subsequently obtained a quitclaim deed to the property from the mortgagor, and while he held the same assessments were levied thereon for local improvements, and the property was sold for their nonpayment. Subsequently, the assignee of the mortgage foreclosed the same, and a contract was entered into between him and the assignor, by which, in consideration of the surrender of other collateral held by him, it was agreed that the assignee should take title to the mortgaged property under the foreclosure decree. Thereafter the assignor acquired the tax title. *Held*, that he could not use such title nor invoke any rights by reason of the tax sale to defeat the title acquired under the foreclosure decree, both because estopped by his contract, and because, being the one on whom the duty rested to pay the taxes, his acquisition of the tax title operated as a redemption as between him and the holder of the mortgage.

**8. EJECTMENT—DEFENSES—ESTOPPEL OF DEFENDANT TO DENY PLAINTIFF'S TITLE.**

The fundamental question in an action of ejectment is the right of possession, and this usually follows the legal title, but the defendant may be under an estoppel which precludes him from denying the plaintiff's title, in which case he cannot set up to defeat plaintiff's right of possession an adverse title which he is estopped from asserting.

[Ed. Note.—For other cases in point, see Cent. Dig. vol. 17, Ejectment, § 114.]

In Error to the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

R. P. Cary, C. H. Trimble, and C. A. Thatcher, for plaintiff in error.  
H. E. King and C. W. Everett, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, District Judge. This cause came here on a former writ of error, and, upon attentive consideration of the record, we reversed the judgment of the court below. 146 Fed. 929. We did not direct the judgment to be entered in that court, as we might have done, but on account of certain incidental matters about which the record was not clear, and which might properly affect the judgment which ought to be given, notably certain sales and deeds of the land on assessments for local improvements, we thought it expedient to order a new trial; and a mandate issued accordingly. A second trial has been had, this time before the court and a jury, with the result of a verdict for the defendant under the direction of the court and a judgment for that party. This case is again brought here by the plaintiff for review of the proceedings on that trial. The principal facts are fully stated in our former opinion and need not be now repeated at length. With the exception of those which relate to the assessment and sale of the land for a local improvement, the grading of a street in Toledo, and the deeds issued thereon, the facts exhibited by this record are in all essential particulars the same as those disclosed by the record at the former hearing. We have been invited by counsel for defendant to reconsider the question of the construction of Henry Anderson's will. We must decline to do this. The questions there decided are matters adjudged and have become the law of the case. When the former writ of error was disposed of the questions of law in the case were settled, and we have now no authority to redetermine them. This is the established doctrine which governs the federal courts and is quite generally accepted in other courts. This court has recognized and applied the rule in previous cases. *Stoll v. Loving*, 120 Fed. 805, and cases cited at page 806, 57 C. C. A. 173; *Western Union Telegraph Co. v. City of Toledo*, 121 Fed. 734, 58 C. C. A. 16. And see, also, *Maguire v. Tyler*, 17 Wall. 253, 284, 21 L. Ed. 576; *Kingsbury v. Buckner*, 134 U. S. 650, 670, 10 Sup. Ct. 638, 33 L. Ed. 1047. All the reasons and arguments which might have been urged at the hearing on the former writ of error against any conclusion then made were, by the effect of the decision, overruled. No doubt, if upon a new trial a substantially different state of facts is shown so that another question is presented, the former adjudication does not hold. But that is not the case here, except as above noted. With respect to our decision that the deeds of the executors and trustees of Henry Anderson to Charles Butler were not valid as against the remainderman for the reason among others that they were not delivered during the continuance of the trust with which the executors were charged, a point which is now contested, we add that the conditions on which that decision was based were not altered on the new trial. In the stipulation respecting the facts, it was stated that the deeds were not delivered until about the 1st of May, 1860, at which time the executors were no longer trustees. After the cause had been remanded to the Circuit Court, upon

application of the attorneys for the defendant stating that they were mistaken when they made that stipulation, and that the deeds were delivered at an earlier date, the court relieved the defendant from it. But the fact stated in the stipulation in that regard was clearly shown by the evidence in the case. And upon the new trial the evidence that the fact was as stated was so clear and uncontradicted that a finding to the contrary would have been wholly unauthorized. But as we shall see, the court did not find that the deeds in question were delivered earlier than about May 1, 1860.

It is contended by the defendant that the deeds from the trustees under the will to Butler were held in escrow by the Manhattan Bank to be delivered upon the payment by Butler of his debt. But to constitute an escrow there must be a contract, which prevents the grantor from recalling the deed. *James v. Vanderheyden*, 1 Paige (N. Y.) 385; *Cook v. Brown*, 34 N. H. 460; *Prutzman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592. There is no evidence in this record that anything more was done or intended than to leave the deeds with a depository conveniently near to Butler, so that when he should pay his debt he could take the deeds. For aught that appears they could have been recalled at any time without the violation of any contract on the part of the trustees. To have prevented them there must have been some binding obligation. The self-serving statement by Butler that they were left at the bank in escrow is not evidence that such was the fact. And in his letter of March 19, 1860, to one of the trustees asking for the delivery of the deed he states that he has been to the bank and seen the deed, and that "the envelope has the indorsement 'the property of Walter Goodman, Peter Anderson, and to be delivered on the order of either of them.'"

At the conclusion of the evidence, both the plaintiff and the defendant requested the court to charge the jury peremptorily, each in his own favor. The court refused the request of the plaintiff and granted that of the defendant. We are required by the opinion of the Supreme Court in *Beuttell v. Magone*, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654, to hold that these mutual requests were the equivalent of a withdrawal of the facts from the jury and a submission of them for a finding by the court. And we must presume that the consequence must be the same as if there had been an original stipulation to try the case without a jury. In that case, where the court makes only a general finding, that finding must stand if there was any evidence on which the court could have properly found the facts necessary to support the judgment. But if, though the finding be general, it must necessarily rest upon a fact or facts, the finding of which was not warranted by any evidence in the case, a judgment based on such general finding would be erroneous. One of such facts in the present case would have been that the deeds were delivered at a time when the trustees were authorized to deliver them. The presiding judge did not file any written opinion, and the bill of exceptions does not state the ground of his action. At the hearing we were supplied by counsel for the plaintiff with a copy of the stenographer's notes of the judge's statement of the ground on which his direction was given to the jury. Counsel for the defendant stated that they had also a copy, and no objection



was made to the correctness of that furnished by counsel for the plaintiff. The opinion of the court below is not required to be made part of the record, and is sent up only to enable the appellate court to understand the grounds of its decision, and, if its authenticity is shown, that is sufficient. In these circumstances we think we may properly refer to it. Having regard to our former decision, it must have been made to appear on the new trial either that the deeds of the trustees were delivered while they held the office of trustees, or that the plaintiff had been cut off by the assessment proceedings and the deeds to Butler founded thereon. It appears from the stenographer's notes that the court put its direction to the jury upon the sole ground that the plaintiff's action was barred by the statute of limitations, in that he had not asserted his right within 10 years after he had become of age. He reached that conclusion upon the following line of reasoning: He conceded the general rule to be that statutes of limitation for actions in ejectment run only from the time when the right of entry accrues, and that in the case of one having an estate in remainder his right of entry accrues on the cessation of the preceding estate. But he referred to a statute of Ohio which he thought operated in the case at bar to extinguish the life estate before its intended limit and to accelerate the commencement of the estate in remainder. That statute was this:

"If any person who shall be seised of lands for life shall neglect to pay the taxes thereon, so long that such lands shall be sold for the payment of the taxes, and shall not, within one year after such sale, redeem the same, according to law, such person shall forfeit to the person or persons next entitled to such lands in remainder or reversion, all the estate which he or she so neglecting as aforesaid, may have in said lands." Rev. St. Ohio, § 2852.

It has the rare quality that it proposes to punish the delinquent taxpayer by forfeiting his estate to another person. The Supreme Court of Ohio holds that this statute is valid (*McMillan v. Robbins*, 5 Ohio, 28); but that to have effect the sale must be a valid sale, and that a void sale does not work a forfeiture. *Estabrook v. Royon*, 52 Ohio St. 318, 39 N. E. 808, 32 L. R. A. 805. And this seems a just conclusion if the statute is valid, for it would be an absurdity to punish a man for a neglect to do a thing which he is not legally obliged to do. That which is void is as if it did not exist. But if the sale is a valid sale, the title is thereby forfeited to the purchaser. Or, to speak more precisely, such a sale cuts up by the root all previous titles, and inaugurates a new and absolute title in the purchaser. As the preceding estate as well as the estate in remainder are cut off by the neglect to pay the taxes and the sale and deed therefor, there is nothing to forfeit, and the entire scheme is fruitless. But this discussion assumes that the statute in question, which is a part of legislation relating to the collection of general taxes, applies to assessments for local improvements. We think, however, it would be erroneous to admit this. And we shall premise what we have to say upon this subject by suggesting that the question is involved in the entire proceeding taken by the common council of the city for the assessment of the land in controversy for the projected street improvement; and, further, that if this particular provision of the statute is to be given any effect, it is for the forfeiture of the life

estate and is penal, and should therefore be given a strict construction. There is a well-known and well-established distinction between general taxes and assessments for local improvements. The former are for the promotion of the general order and the welfare of the public organization. They are levied and collected under general laws which regulate the steps to be taken in detail, and, with respect to the more important, fix a definite time and place when and where they must be taken. Every citizen is required to take notice of such laws; and he is thereby provided with the means of knowing what is necessary for the protection of his property, and the time, place, and manner of securing it. An assessment for a local improvement is a levy made upon the citizen or his property for the purpose of paying for an improvement in his neighborhood which enhances the value of his own property. It would be beyond the power of the government to compel any such tribute of one person for the single purpose of benefiting his own land; but when a number of owners composing a district of the public or owning land in the district which is benefited by the improvement, the power to specialize the district for such a purpose is recognized as falling within the analogy of the power to levy general taxes. It is a quasi public purpose. And the legislation is special. Under the general grant to municipalities of the power to tax, no authority to levy special taxes for particular improvements is included. There must be special authority, and provision must be made for safeguarding the rights of those affected by its exercise; and, further, the exercise must be pursued in all essential particulars in accordance with the lines prescribed. The citizen is not now under the obligation of the general law nor directed by it how and when he is to protect himself against the invasion of his private rights. As the power to levy tribute for such improvements is not conferred by a general grant but only by special grant, its exercise must conform therewith, and it is a reasonable rule, the proceeding being in invitum, that not only must the power conferred provide for the protection of individual rights, but that the provisions shall be strictly complied with. The grant may refer to and adopt provisions of the general law, and in such case the latter, so far as they extend, are to be read as part of the grant, but not otherwise or further. These propositions are believed to be well established; and the consequence is that if the special law fails to make the necessary provisions, or if provided, they are not followed, any proceedings thereunder are void. This distinction between general taxes and special assessments is universally recognized.

Cooley in his work on Taxation, p. 636 (2d Ed.), says, "Though assessments are laid under the taxing law, and are in a certain sense taxes, yet they are a peculiar class of taxes, and not within the meaning of that term as it is usually employed in our Constitutions and statutes;" citing many cases, among which are *Maloy v. Marietta*, 11 Ohio St. 636; *Lima v. Cemetery Association*, 42 Ohio St. 128, 51 Am. Rep. 809; *Raymond v. Cleveland*, 42 Ohio St. 522. To which may be added *Reeves v. Wood County*, 8 Ohio St. 333; *Chicago, etc., R. Co. v. Keith*, 67 Ohio St. 279, 65 N. E. 1020, 60 L. R. A. 525. And in the last case here cited it was held that a statute which

did not provide for a notice of hearing in a proceeding for levying a particular assessment was void. Judge Jackson, while Circuit Judge, so held in *Scott v. Toledo* (C. C.) 36 Fed. 385, 1 L. R. A. 688, and again in *Murdock v. Cincinnati* (C. C.) 39 Fed. 891. The extent to which the land is benefited and therefore of the assessment to be levied upon the owner is of prime importance to him. An opportunity must therefore be provided for him to be heard before some tribunal having authority to determine it, upon the question of the extent of the benefit. The provisions of section 28 of the charter of the city of Toledo, Local Laws of 1836-37, p. 40, do not provide for any such hearing. The only notice or hearing provided for by any part of the charter relating to this subject is one contained in section 28, which is this:

"The city council shall give notice in one of the newspapers published in said city or vicinity for six consecutive weeks of the improvement to be made, in order that any one damaged by reason of such improvement may file his claim in writing in the office of the city clerk within ten days after the expiration of said six weeks' notice, and the said committee shall assess the damages, if any, of such claims and shall add the same to the cost of the improvement as a part of the expense so to be assessed as aforesaid, and said committee within twenty days after the time shall have expired for filing claims for damages, shall return to the office of the treasurer a report setting forth the estimated cost of such projected improvement including the damages awarded by them, etc."

The damages here spoken of are such as the several parcels sustain by reason of the construction of the work. They are made part of the general cost and expenses of the proceedings. They have no relation to the value of the benefits for which the several parcels are assessed.

The charter was amended by an act passed in 1846, Local Acts, p. 208, and by section 36 it was enacted that:

"The tenth, twenty-sixth, twenty-seventh, twenty-eighth and twenty-ninth sections of the act of 1837 are repealed, provided 'that all rights, titles, liabilities and remedies acquired or incurred or subsisting under and by the first mentioned act and the ordinances, resolutions and bylaws made in pursuance of the authority thereof, shall remain unaffected by the passage of this act and the repeal of said act of incorporation, and the ordinances, bylaws and resolutions aforesaid shall remain in force until the same are repealed by the council and the present officers of said city shall hold their respective offices until their successors are elected and qualified.' Passed Feb. 27, 1846."

But the proceedings relative to the assessment had taken place as early as 1843, and it was put upon the roll of that year. For some reason the taxes and assessments on that roll were not collected. The assessments in question were put upon the roll of the year 1847, and, being unpaid, the lands were sold, and certificates thereof given. It appears that the proceedings for the assessment were taken in 1843 and therefore controlled by the act of 1837, and that the proceedings for the collection in pursuance of which the sale was made, and the sale itself, took place in 1847. The deeds thereon were made in 1860. It is contended that the deeds were void, because the proceedings on which they rest in failing to afford an opportunity for a hearing, disregarded a fundamental right, and we are of opinion that for the reasons we have given it must be so held. *Cooley*

on Taxation (2d Ed.) 655; *Whiteford v. Probate Judge*, 53 Mich. 130, 18 N. W. 593; *Chicago, etc., R. Co. v. Keith*, 67 Ohio St. 279, 65 N. E. 1020, 60 L. R. A. 525; 25 Am. & Eng. Encl. of Law (2d Ed.) 1215. The fourteenth amendment to the Constitution in requiring due process of law formulated a principle of justice which had long been recognized. It applied to the legislation of the states an elementary principle which had been imbedded in the institutions of government from the time of Magna Charta that a man may not be disturbed in his rights of person or property unless by due process of law, which always includes notice and an opportunity to be heard. And it made complaints of the violation of this enactment justiciable by the courts of the United States. But before that time it was a principle in the fundamental law of the several states; and the federal courts in administering the law of the states were bound to recognize and enforce it.

Other reasons consisting in irregularities in the proceedings are urged by counsel for the conclusion that the deeds were void, but we will not prolong this discussion by considering them. We think that the court below was mistaken in supposing that under the law of Ohio the failure to pay these taxes resulted in a forfeiture of the life estate, and that the plaintiff's right to the possession accrued at a time prior to the death of James Anderson. All this is said however upon the assumption that section 2852 has application to an assessment for local improvements. But it is as we have said a provision found in the statutes for general taxation, and the neglect to pay taxes which this section speaks of is the neglect to pay the taxes which the statute is there dealing with. Besides, it seems clear that the person whose estate is to be forfeited must have been under an obligation to pay the taxes. But at the time when these assessments were made the life tenants under the will of Henry Anderson were not the owners, and owed no duty to pay these assessments.

But there is another reason springing from other facts which we think must lead to the same result. In 1843, when this assessment, if valid, should have been paid, Charles Butler was the owner of this land by virtue of the deed to him from Bissell in February of that year. He continued to be the owner until the date of the master's deed to Henry Anderson on November 18, 1844, and should have attended to the payment of the taxes and assessments levied upon the land in those years. The lands were bid off by Charles M. Dorr at the sale on December 27, 1847. On February 18, 1860, Butler sold these lands by contract to Bronson. March 26, 1860, Butler obtained from the city clerk deeds which recite that they were issued to Butler as assignee of the certificates of sale. He thus became the owner of a title which had its origin in his own default. By his contract with Henry Anderson of October 4, 1844, the latter was to take title to this land upon the sale which had been made to him by the master in the earlier part of that year. For several years previously the mortgage had been pledged by Butler to Anderson as security for his debt, and the question arises whether, in view of these facts, Butler could acquire and stand upon, as against Henry Anderson or those holding in his right,

a title to this land based on his neglect to pay a lawful assessment upon it (for we are now assuming it was lawful) while he was the owner, and which he was bound to pay or cause to be paid. We think the obligation of good faith would prevent him from doing this. It is true he did not warrant the title. But it was not necessary that he should have done so, if, by his relation to the property and to other parties having an interest in it, he was precluded from building up a hostile title to it in derogation of his contract. Dorr did not obtain the deeds upon his certificates of purchase. But he had the right to have them. The title, assuming the proceeding to have been legally sufficient to found one, never came to him. But this circumstance is not very material. When Butler purchased the certificates and later obtained the deeds, they came into the hands of one who, as against the title derived from Henry Anderson, had been originally charged with the obligation to pay the taxes, and although that obligation did not rest upon Dorr, it revived and attached to Butler, and effectually precluded him from setting them up as muniments of title in himself as against the title which he had for his own purposes created in another. This doctrine is now well settled. *Bispham's Equity*, § 265; *Kennedy v. Daly*, 1 Sch. & Lef. 355, 359; *Church v. Ruland*, 64 Pa. 432; *Ashton's Appeal*, 73 Pa. 153; *Sawyer v. Wiswell*, 9 Allen (Mass.) 39; *Kost v. Bender*, 25 Mich. 516; *Dubois v. Campau*, 24 Mich. 360; *O'Connell v. Pate*, 59 Fed. 182, 184, 8 C. C. A. 78.

In *Kost v. Bender*, the action was by the indorsee of a promissory note against the maker. The plaintiff had been the original payee of the note, and had indorsed it for value to a bona fide holder who sold it to the payee; and the question was whether the plaintiff did not by reacquiring the note expose himself to the defenses which existed while he was the first holder. Judge Cooley, in delivering the opinion of the court, said:

"If the defendant had a legal and just defense to the note, either in whole or in part, arising from the conduct of the plaintiff, it was the duty of the latter to recognize and allow it, and he had no moral right to cut it off, or to attempt to do so by any transfer. But having done so, and afterwards acquired the note a second time, the law, we think, will not permit him to take advantage of this wrong, but will remit the defendant to his original rights."

And he refers to the former case of *Dubois v. Campau*, 24 Mich. 360, as an illustration of the principle, in which the action was ejectment, where the party whose duty it was to pay certain taxes sought afterwards to claim the benefit of a tax title which was based upon his default to pay them, and which a third party had bought in and then sold to him. It was held in that case that he had no more right to claim the benefit of the title he had thus bought in than he would have had if he was the original purchaser at the tax sale. In the case referred to, the defense was made under a tax deed and possession thereunder, for a period long enough to establish a title under the statute of limitations. In the opinion of the court it was said at page 370:

"But in a case where a party whose duty it is to pay all the taxes on the land allows it to be sold for such taxes to a stranger who might hold the whole against all parties, though this might terminate the tenancy while such tax title is held by another, yet it has been terminated by the wrong of the party in default; and when he purchases in the title, he and the former own-

ers are remitted to their original position and rights as they stood before the sale, and as they would have stood had the taxes been paid when due, or had the sale for the taxes been made directly to such party in default. Such we think must be the result upon principle."

And, further, the court said:

"We think, therefore, the purchase of the tax title \* \* \* operates merely as a payment, and gave him, the purchaser of the tax title, no additional rights to the land, as against the plaintiff at least."

And the judgment was reversed because effect had not been given to this principle. And we note in this connection that these cases were actions at law, the latter being ejectment. The rule in Michigan in regard to the nature of the action and the circumstances in which it may be maintained is the same as in the federal courts. It matters little whether the doctrine in such cases rests upon an estoppel, or upon the theory that the title never vested in the party, but was extinguished by operation of law, which we think the correct view. It was so held in *Douglas v. Dangerfield*, 10 Ohio, 152, 158, where *Hitchcock, C. J.*, said:

"If by this proceeding he could be considered as having procured a strictly legal title, the circumstances are such as might induce a court of equity to interpose and divest him of that title at the suit of the former owner of the land. But in our view, the complainant acquired no additional rights by the purchase, and must be held to be in the same situation that he would have been had he paid the taxes before the sale."

And, indeed, the doctrine has frequently been recognized as having a peculiar adaptation to the case of one who has acquired a deed for land for taxes which he ought to have paid, especially where, as between himself and another person, he ought to have paid the taxes. A mortgagor cannot set up against his mortgagee a title founded on his default in paying the taxes. And in *Smith v. Lewis*, 20 Wis. 350, it was held to apply to a mortgagee as against the assignee of a mortgage. And if, in this case, *Bissell*, the mortgagor, had continued to be the owner, he would in like manner have been precluded from setting up a hostile tax title founded on his own default. Upon an abundant citation of authorities Judge Cooley sums up the doctrine thus:

"There is a general principle applicable to such cases which may be stated thus: that a purchase made by one whose duty it was to pay the taxes shall operate as payment only; he shall acquire no rights as against a third party by the neglect of a duty which he owed to such party. This principle is universal and is so entirely reasonable and just as scarcely to need the support of authority. Show the existence of the duty, and the disqualification is made out in every instance"—

and then, after giving numerous illustrations, he says further:

"In all such cases, and all to which the like reasons apply, the purchase as between the parties, is in law a payment only; or if made at secondhand from another who was purchaser at the public sale, it is allowed to operate, for the purposes of justice only, as a redemption."

Cooley on Taxation (2d Ed.) 501-3; *Id.* (3d Ed.) vol. 2, 964 et seq. But counsel answers this by saying that this could not affect the legal title; that it might raise an equity; but this could not be regarded in

an action of ejectment where only the legal title is in issue. It is undoubtedly the rule that the plaintiff must have the right of possession, and this usually follows the legal title. But if the defendant is under an estoppel which precludes him from the right to deny the title of the plaintiff, he cannot maintain the right to possession under a hostile title which he is estopped from asserting. The fundamental question in an action of ejectment is to whom does the right of possession belong. *Cincinnati v. White's Lessee*, 6 Pet. 431, 8 L. Ed. 452; *Dickerson v. Colgrove*, 100 U. S. 578, 25 L. Ed. 618. The question of the legal title is generally the leading factor in determining that right, but it is not in all circumstances the ultimate test. But if the acquisition of the tax title by Butler operated only as a redemption, there is no occasion for invoking the doctrine of estoppel.

The judgment must be reversed; and as there was a trial by jury, we think the proper course will be to order a new trial, notwithstanding the fact that both parties requested positive instructions, and the court took the facts from the jury.

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#### TEIS v. SMUGGLER MINING CO.

(Circuit Court of Appeals, Eighth Circuit. December 9, 1907.)

No. 2,593.

##### 1. NEGLIGENCE—PROXIMATE AND REMOTE CAUSES.

The philosophy of the responsibility for a negligent act is that the wrongdoer is answerable only for such consequences as flow directly from the act and are such as a reasonable man should anticipate would probably result from the act first committed. Where a negligent act of the defendant is not wanton, the law attaches responsibility to it for all the consequences which ensue directly therefrom and for such effect as in the natural order of sequence follows therefrom, no matter how remote in point of time or distance, limited by the requirement that the ultimate result must be such as that a reasonable person should anticipate that in the natural order of things would probably ensue. Whenever this causal connection between the negligent act and the ultimate injury is interrupted by reason of the interposition of some independent force or human agency acting independently of the first negligent act, but for which the ultimate injury would not have come, the former is the remote and the latter is the proximate cause.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Negligence, §§ 69-82.]

##### 2. MASTER AND SERVANT—INJURY TO SERVANT—PROXIMATE CAUSE OF INJURY.

Plaintiff while employed in defendant's mine was overcome by gas, and was afterward found by a searching party lying on the ground unconscious. He was taken to the surface by such party on the elevator cage which was 5½ feet square, two sides being inclosed and two open, and by reason of the projection of one of his feet beyond an open side of the cage it was caught by the timbers of the shaft and his leg broken. *Held*, that the negligence of defendant in permitting a dangerous quantity of gas in the mine, if conceded, while a remote, was not the proximate cause of the injury to plaintiff's leg, which was the negligence of those who placed him on the cage, and that, under the rule that one committing an act of negligence is responsible only for such consequences as would naturally and probably result and as should reasonably have been foreseen, defendant was not liable for such injury.

**3. TRIAL—DIRECTION OF VERDICT—UNDISPUTED FACTS.**

Where the facts of the particular case are disputable and are of such character that different minds might reasonably draw different conclusions therefrom, it presents a question of fact properly determinable by the jury; but, where there is no dispute about the facts and the law pronounces the judgment on the facts established, it is the province and duty of the court to direct the verdict.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 376-380.]

In Error to the Circuit Court of the United States for the District of Colorado.

M. J. Galligan, for plaintiff in error.

William E. Hutton (Bruce B. McCay, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. This is an action for personal injury. At the conclusion of the plaintiff's evidence, the court directed a verdict for the defendant in error. To reverse this action the plaintiff has brought the case here on writ of error.

The plaintiff was an employé of the defendant, working in its mine, in which there was more or less gas escaping. He had worked in this mine for 12 or 14 months prior to the accident. In the month of August, 1903, some of the timbers employed in the mine took fire, when the work therein was suspended until the first part of September. The plaintiff returned to work about three days prior to the injury in question. He was engaged, in connection with one Crozier, a fellow servant, in hauling ore out of the mine with a tramway car drawn by a horse. On the afternoon of September 8, 1903, the gas in the level where the plaintiff was at work manifested itself in sufficient quantity to make it uncomfortable to the plaintiff and his fellow workman. They came out of the mine two or three times, and remained in the fresh air for half an hour or more at a time to get rid of the effects of the gas. The last time was just before supper, when the plaintiff complained of a headache produced by the gas. His testimony is that:

"We did pretty well before supper, and did not feel the gas very much. Of course, we felt it a little bit, and Crozier asked me how I felt about supper time. I told him I was not feeling very good—and said I would not like to go in there again right away. He said: 'Wait a little while, and you'll feel all right.' Pretty soon he came along with the horse and train, so I thought I would not let him go in alone, and I jumped on too, of course. When we got in, we found that the chutes were tied up, and Crozier told me to go up to the 40 foot, the gas was not so bad, and he said he would load the car, and I said 'All right,' and started out, and that is all I know about it. I must have dropped right there."

He further testified that just after supper, when they started into the mine, Crozier took a piece of waste and tied it around his nose. He further testified to having had a conversation with Mr. Carey, the mine superintendent, before he went into the mine the last time; that Mr. Carey asked him how he felt and he told him he had a headache, and Carey told him he would get over that, that it would not hurt him; that he need not be afraid, there was no danger about the gas. As



the plaintiff and Crozier did not return to the surface as soon as expected by the men at the top, which was an hour or more after they had returned to work, a searching party went after them. The plaintiff was found about a hundred or more feet from the elevator shaft, to one side of the tramway track, prostrate on the ground, with his face downward, and in a comparatively unconscious condition. Crozier was found lying on top of him dead. There were two methods of egress from where they were found: One was out by the tunnel through which the tramway ran, some 500 or 600 feet. The other was by the elevator cage. The rescuers carried the plaintiff to the latter, which was a square cage about 5½ feet wide between the sides, two of which were closed and the other two were open. The shaft, of course, was larger, with timbers eight feet by eight inches. There was no light in the elevator, except, perhaps, the customary lamps on the men's hats or caps. The rescuers laid the plaintiff on the floor of the elevator; and their testimony is that in their ascent the plaintiff did not move. When they reached the surface, upon examination, it was discovered that one of the plaintiff's legs at the ankle was broken, and the injury was more or less serious. His testimony was that in going up the elevator, in a dazed kind of way, his eyes opened, when he felt the shock, and he seemed to fall asleep again, that he recollected that much of it, and it was all he knew about it.

The petition counts alone upon this injury to the leg as the basis of damages. The allegation in this respect is that:

"While being taken from said level in a cage in a shaft in said mine to the surface thereof, as the result of being so overcome by gas, and while so unconscious by reason thereof, his leg became caught in said cage and timbers while he was being so taken to the surface, and his leg was broken, and he thereby became seriously and permanently injured, and suffered great pain," etc.

The petition further alleges that the plaintiff resumed work in the mine shortly before the accident, as the defendant assured him there was no danger from the gas, and that he relied upon said assurance; and charges negligence on the part of the defendant in failing to inspect said tunnel level in a proper manner, in failing to discover gas in dangerous quantities at the place where the plaintiff was at work, and failed to provide reasonable, suitable, and sufficient ventilation in said mine. The answer pleaded the general issue and assumption of risk by the plaintiff.

Three questions are presented by this record: (1) Was the defendant company guilty of actionable negligence in permitting gas in the mine in sufficient quantity to affect the plaintiff? (2) Did the plaintiff, with knowledge of the presence of the gas in the mine, continue to work therein under circumstances which would charge him with assumption of the risk? (3) Was the defendant's alleged negligence the proximate cause of the injury to the plaintiff's leg?

When the work in the mine ceased in August, by reason of the timbers therein taking fire, most certainly there was not present in the mine, during the existence of the fire, any dangerous quantity of gas, as there was no explosion therefrom. If there was gas in the mine in such quantity as to attract attention so as to impose upon the super-

intendent the duty of giving warning thereof to the employés and taking energetic steps to remove the danger, knowledge of that fact was as obvious to the plaintiff as to the inspector. As persuasive proof that up to the time the plaintiff was overcome there was no apparently dangerous quantity of gas in the mine, there were about 100 men at work therein, and there is no evidence of any deleterious effect upon or complaint made by them. The evidence is that the mine was equipped with the usual machinery for pumping fresh air into it through a six-inch pipe, and with a corresponding pipe for drawing therefrom foul air and gases. There was no evidence that the equipment for such purpose was not the usual, ordinary provision suitable therefor. Neither was there any tangible evidence of any lack of due care on the part of the superintendent in making reasonable inspection of the mine. On the contrary, the evidence is that the foreman had been in the mine twice that afternoon; his last observation being taken about three hours before the accident, without discovering the presence of any dangerous quantity of gas. Under such state of the proofs, the statement made by Carey, the superintendent, to the plaintiff, was little more than an expression of opinion on his part that, with the facts in his possession, in his judgment it was not dangerous for the plaintiff to return to work, remaining for short periods in the mine. Plaintiff's testimony further is that, when he saw Crozier coming along with the horse and train, he thought he would not let him go in alone, and he jumped onto the train and went with him, indicating that he acted upon the impulse of fellowship rather than reliance upon the statement made to him by the superintendent. If it be conceded that these were questions for the determination of the jury, the foregoing statement of the essential facts makes it quite indisputable that the appearance of sufficient gas at the time of the injury to asphyxiate the plaintiff and Crozier was sudden and abnormal. The important question therefore is: Was the injury to the plaintiff's leg the proximate cause of the imputed negligence of the defendant company in exposing the plaintiff, according to his contention, to the gas in the mine?

Without undertaking to review the mass of authorities bearing on this vexed question, it is sufficient to say that they range themselves along two lines, closely allied, but more or less divergent. The one asserts that, when several concurring acts or conditions of things—one of them the wrongful act of the defendant—produce the injury, and it would not have been produced but for such wrongful act or omission, it is the proximate cause of the injury. From this postulate the plaintiff's counsel argues that but for the gas in the mine the plaintiff would not have been rendered helpless, so as to have been exposed to the supervening negligent act of the men in so placing him in the elevator cage as to leave his leg extending beyond the outside thereof, whereby it came in contact with the timbers; and therefore the negligent act of exposing him to the gas was a continuing, unbroken cause. This, it seems to us, is the argument *post hoc propter hoc*. It runs back to the first wrongdoer, no matter how many supervening or intervening causes. It admits of no break in the chain of causation,

because it is builded on the presumption that but for the first negligent act the person injured might not have come into the position where the supervenient cause, although put in motion by a force entirely independent of the first, smote the party to his injury. Carried to its logical sequence, where A. should wrongfully eject B. from his house at a time when the sky was clear, if a storm should suddenly arise and a flash of lightning should kill B., his death would be the proximate cause of the act of ejection. Opposed to this doctrine is the line of authorities asserting the rule to be that, where the negligent act of the defendant is not wanton, the law attaches responsibility to it for all the consequences which ensue directly therefrom, and for such effect as, in the natural order of sequence, follows therefrom, no matter how remote in point of time or distance, limited by the requirement that the ultimate result must be such as that a reasonable person should anticipate that in the natural order of things would probably ensue. Whenever this causal connection between the negligent act and the ultimate injury is interrupted by reason of the interposition of some independent force or human agency, acting independently of the first negligent act, but for which the ultimate injury would not have come, the former is the remote and the latter is the proximate cause. This is very aptly expressed by Wharton thus:

"The intervener acts as a nonconductor and insulates the negligence."

The philosophy of the responsibility for a negligent act is that the wrongdoer is answerable for such consequences as flow directly from the act, and are such as a reasonable man should anticipate would probably result from the act first committed. Judge Cooley, in his work on Torts (volume 1 [3d Ed.] p. 99), with characteristic exactness, has summarized the rule as follows:

"It is not only requisite that damage, actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded; and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, not to the remote, cause. The explanation of this maxim may be given thus: If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote. The chief and sufficient reason for this rule is to be found in the impossibility of tracing consequences through successive steps to the remote cause, and the necessity of pausing in the investigation of the chain of events at the point beyond which experience and observation convince us we cannot press our inquiries with safety. To the proximate cause we may usually trace consequences with some degree of assurance; but beyond that we enter a field of conjecture, where the uncertainty renders the attempt at exact conclusions futile. A writer on this subject has stated the rule in the following language: If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action."

As a corollary to this postulate he says (page 101):

"When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as a proximate result of a sufficient cause."

The Court of Appeals of Pennsylvania in *Hoag et al. v. Lake Shore & Michigan Southern Railroad Company*, 85 Pa. 293, 27 Am. Rep. 653, has applied this better rule. In that case the plaintiff owned an oil lease near the defendant's railroad track, where it ran along the bank of Oil creek at the base of a high hill. A slide of earth and rocks, during a rainstorm, came down the hillside, lodging on defendant's track. A train of cars of the defendant, loaded with crude petroleum, ran into this slide, whereby the train was derailed and the petroleum ignited by fire from the engine. The ignited oil ran into the creek and was carried down stream some 300 or 400 feet, setting fire to the plaintiff's building, destroying it. It was held that the plaintiff could not recover because the destruction of the building was not the proximate cause of the defendant's imputed negligence. The court said:

"A man's responsibility for his negligence and that of his servants must end somewhere. There is a possibility of carrying an admittedly correct principle too far. It may be extended so as to reach the *reductio ad absurdum*, so far as it applies to the practical business of life. \* \* \* The true rule is that the injury must be the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act. This is not a limitation of the maxim, '*Causa proxima non remota spectatur*.' It only affects its application. \* \* \* It would be unreasonable to hold that the engineer of the train could have anticipated the burning of the plaintiff's property as a consequence likely to flow from his negligence in not looking out and seeing the landslide. The obstruction itself was unexpected. \* \* \* The probable consequences of the collision, such as the engineer would have a right to expect, would be the throwing of the engine and a portion of the train off the track. Was he to anticipate the bursting of the oil tanks, the oil taking fire, the burning oil running into and being carried down the stream; and the sudden rising of the waters of the stream, by means of which, in part at least, the burning oil set fire to the plaintiff's building? This would be a severe rule to apply, and might have made the defendant responsible for the destruction of property for miles down Oil creek. \* \* \* It is manifest that the negligence was the remote and not the proximate cause of the injury to the plaintiff's building."

In *S. S. Pass Railway Co. v. Trich*, 117 Pa. 390, 11 Atl. 627, 2 Am. St. Rep. 672, the plaintiff was upon the rear platform of a street car and about to enter the same when the driver whipped up the horse to avoid a collision with a runaway horse and carriage. The abrupt jolt threw the plaintiff to the ground, when he was struck by the runaway and injured. The court held that a verdict for the defendant should have been directed. The court, through Mr. Justice Green, said:

"The utmost that can be said would be that such a consequence might possibly happen. But things or results which are only possible cannot be spoken of as either probable or natural. For the latter are those things or events which are likely to happen and which for that reason should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency or

regularity as to become a matter of definite inference. To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been declared."

In *Stone v. Boston & A. R. Company*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794, the railroad company negligently stored oil upon a station platform. A teamster, not an employé, went to the platform to deliver goods and dropped a match on the platform, causing a fire which finally communicated to the plaintiff's building, about 75 feet from the point of origin of the fire. The court held the damages not proximate, and said:

"Was the starting of the fire by Casserly the natural and probable consequence of the defendant's negligent act in leaving the oil upon the platform? According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it is possible consequence, but whether it was probable; that is, likely to occur, according to the usual experience of mankind. That this is the true test of responsibility, applicable to a case like this, has been held in many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience. One is bound to anticipate and provide against what usually happens and what is likely to happen; but it would impose too heavy responsibility to hold him bound in like manner to guard against what is unusual and unlikely to happen, or what, it is sometimes said, is only remotely or slightly probable. A high degree of caution might, and perhaps would, guard against injurious consequences which are merely possible; but it is not negligence, in a legal sense, to omit to do so."

Accordingly in *Gibson v. International Trust Company*, 177 Mass. 100, 58 N. E. 278, 52 L. R. A. 928, the janitor of the defendant's building, while riding in the elevator, carelessly moved the stool of the elevator boy, who, not aware thereof, when he attempted to sit down, lost his balance, and, in saving himself from falling, clutched at the elevator lever, which started the elevator and injured a passenger. It was held that the act of the elevator boy in clutching the lever was the proximate cause of the injury, and not the act of the janitor in removing the stool.

Mr. Justice Miller in *Insurance Company v. Tweed*, 7 Wall. 44, 19 L. Ed. 65, after adverting to the rule of proximate and remote cause, said:

"One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote."

In *Milwaukee & St. Paul Railway Company v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256, Mr. Justice Strong declared the rule as follows:

"The question always is: Was there an unbroken connection between the wrongful act and the injury a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that neg-

ligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

In *Insurance Company v. Boon*, 95 U. S. 117, 130, 24 L. Ed. 395, Mr. Justice Strong again recognized the principle that "when the causes are independent of each other, the nearest is, of course, to be charged with the disaster."

In *Scheffer v. Railroad Company*, 105 U. S. 249, 26 L. Ed. 1070, the executors of Charles Scheffer brought suit against the defendant railroad company for the death of said Scheffer, alleged to have resulted from a collision of railway trains, due to defendant's negligence. As a result thereof said Scheffer became disordered in mind and body, his brain and spine were affected, whereby his reasoning powers became impaired, and in eight months thereafter, as a consequence of illusions and forebodings over his condition, he committed suicide. It was held that the negligent act of the railroad company was not the proximate cause of Scheffer's death. After reaffirming the rule laid down in *Railroad Company v. Kellogg*, supra, Mr. Justice Miller said:

"Bringing the case before us to the test of these principles, it presents no difficulty. The proximate cause of the death of Scheffer was his own act of self-destruction. It was within the rule \* \* \* a new cause, and a sufficient cause of death.

"The argument is not sound which seeks to trace this immediate cause of death through the various stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad. Such a course of possible or even logical argument would lead back to that 'great first cause least understood,' in which the train of all causation ends.

"The suicide of Scheffer was not a result naturally and reasonably to be expected from the injury received on the train. It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train."

Without adverting to the accordant decisions of state and federal courts in other jurisdictions, it is sufficient to say that the rule above declared has been recognized and applied in this circuit. *Railway Company v. Elliott*, 55 Fed. 949, 5 C. C. A. 347, 20 L. R. A. 582. In the more recent case of *Cole v. German Savings & L. Association*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416, known as the "Elevator Case," the facts of which are quite familiar, Judge Sanborn reaffirmed the rule expressed in the syllabus:

"An injury that results from an act of negligence, but that could not have been foreseen or reasonably anticipated as its probable consequence, and that probably would not have resulted from it, had not the interposition of some new and independent cause interrupted the natural sequence of events, turned aside their course, and produced it, is not actionable, and such an act of negligence is the remote cause, and the independent intervening cause is the proximate cause, of the injury."

A discriminating observance of the foregoing distinction between the proximate and remote cause would have prevented some confusion in the authorities, and greatly simplified the solution of seemingly complicated facts of the particular case.

Turning to the case in hand, it may be conceded that the mineowner might be held to have reasonably anticipated that, permitting gas to flow in the mine, a workman exposed thereto might be overcome and rendered unconscious. It may also be conceded that it would not be an unnatural course to pursue by the men, on discovering the plaintiff prostrate in the mine, to carry him to the elevator as the shortest and quickest method of taking him to the surface for restoration. It may further be conceded, for the purposes of this case, that, with the knowledge the defendant had of the construction of the elevator and its mode of operation, a disabled man would, in the passage to the surface, be exposed to the usual and ordinary incidents of such mode of carriage. Beyond question, the defendant could be held liable for any injury to the lungs and the general health of the plaintiff traceable directly to his exposure to the gas. But here its responsibility would end. The elevator from side to side was about  $5\frac{1}{2}$  feet, nearly the length of an ordinary man. As it was square, there was ample room between the transverse corners in which the plaintiff could have been laid without his leg extending over the side of the elevator. And had he been, with ordinary care, laid crosswise at full length, his feet would not have extended outside of the elevator over two or three inches. In the absence of any knowledge, so far as this record discloses, on the part of the defendant that any person carried up the elevator had ever had his feet or legs injured by coming in contact with the wall of the shaft, would it be within the range of reasonable probability that the company should be held to have reasonably anticipated that the rescuers would so carelessly dump the plaintiff in the car as to leave his leg unnecessarily protruding beyond the elevator, and thereby be broken by coming in contact with the wall of the shaft?

It cannot be said that, if the plaintiff had not been rescued at the time he was, he would have died. The fact that Crozier, who lay above him, was dead, and that the plaintiff, whose face was to the ground, was still living, would indicate that the gas was not so deleterious next to the earth. And that the gas had measurably spent its destructive force at the time the plaintiff was discovered is evidenced by the fact that the rescuing party carried him out without inconvenience to themselves on account of the presence of gas, and that they returned thereafter and brought up the body of Crozier. The horse was also discovered near by and was led out the length of the tunnel by one of the employes, without injurious result. Suppose that the rescuing party had thought it the better course to have carried the plaintiff out to the open through the tunnel, and to that end had placed him on the ore car; but in their haste they left his leg hanging over the edge of the car, and the horse drawing the car towards the mouth of the tunnel had become frightened, or from viciousness, had kicked the plaintiff and broken his leg, would that have been a probable result that the defendant should be held to have reasonably anticipated from the plaintiff's exposure to gas in the mine? This very situation is aptly illustrated by the case of *Roedecker v. Metropolitan Street Railway Company*, 87 App. Div. 227, 84 N. Y. Supp. 300, where the plaintiff, under the direction of the conductor, rode on the front platform of a horse car. Through the negligence of the company re-

specting the track the horse fell, which stopped the car. The car was moved backward so that the horse could be released, and, when released, it kicked the plaintiff, who was standing on the platform. It was held that the driver's negligence ended with the fall of the horse, and therefore the injury was not the proximate cause of the negligent act. After adverting to the lack of harmony in the decisions, the court said:

"The principle to be evolved from their consideration is that, although a situation may be produced by negligence, it is only for injuries which probably, naturally, or necessarily flow from such negligence, without the intervention of another and a distinct cause or agency, that the author of the negligence can be held liable; and this would exclude injuries resulting from another, subsequent, different, and independent cause. \* \* \* We must be careful to avoid confusing two things which are separate and distinct, namely, that which causes the injury and that without which the injury could not have happened. \* \* \* If, after the cause in question has been in operation, some independent force comes in and produces an injury, not its natural or probable effect, the author of the cause is not responsible."

When the plaintiff was carried to the surface of the mine, and the doctor had placed him on a table for examination, had some third party carelessly struck a leg of the table and overturned it, whereby the plaintiff's leg would have been broken, could it be said that that was the natural or probable result of the presence of gas in the mine, which the defendant should be held to have anticipated? The breaking of the plaintiff's leg was such an abnormal, extraordinary incident, through the carelessness of the men who carried him up the elevator, as to exclude it from the range of reasonable probability as the result of the gas in the mine. It was a result that might not have happened in a thousand repetitions of the act of carrying him up the elevator. As well say, if his rescuers had abstracted his pocketbook or his watch, while he was comparatively unconscious and helpless, the defendant company should be held liable because he was rendered helpless by the gas, and that that was the first and continuing unbroken cause. The law is that in all the relations and transactions of business life we have a right to assume that others will perform their duty and discharge their undertakings in a reasonable, prudent, and careful manner. We are not held to assume that injury will come as the result of the carelessness or incautiousness of others.

The final contention on behalf of plaintiff in error is that the question of proximate and remote cause should have been submitted to the determination of the jury. Where the facts of the particular case are disputable, and are of such character that different minds might reasonably draw different conclusions therefrom, it presents a question of fact properly determinable by the jury; but where, as in this case, there is no dispute about the facts, and the law pronounces the judgment on the facts established, it is the province and duty of the court to direct the verdict. This has been so ruled in respect of this character of action. *Hoag v. Lake Shore & M. S. Ry. Co.*, *supra*; *S. S. Pass Ry. Co. v. Trich*, *supra*; *Goodlander Mill Company v. Standard Oil Company*, 63 Fed. 400, 407, 11 C. C. A. 253, 27 L. R. A. 583; *Cole v. German Savings & L. Association*, *supra*.

The Circuit Court did not err in directing a verdict for the defendant, and its judgment is affirmed.



INTERSTATE DRAINAGE & INVESTMENT CO. v. BOARD OF COM'RS OF  
FREEBORN COUNTY, MINN.

(Circuit Court of Appeals, Eighth Circuit. November 23, 1907.)

No. 2,540.

1. STATUTES—CONSTRUCTION.

The essential object in judicial construction of statutes should be from a consideration of all its parts to discover the legislative mind in enacting it. When the true intention is ascertained, it should prevail over literal terms. So, when the expression is special or particular, but the reason general, the special should be deemed general. Any construction that leads to absurd results should be avoided, where the trend of the act admits of a different, sensible application.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, § 259.]

2. DRAINS—MINNESOTA DRAINAGE STATUTE—CONSTRUCTION.

The Minnesota Drainage Law, Laws 1901, p. 413, c. 258, as amended by Laws 1902, p. 90, c. 38, which authorizes counties to contract for the making of drainage ditches on petition of persons interested, the cost to be paid by assessments on the lands benefited, construed liberally and as a whole as required to carry out the paramount legislative purpose to reclaim swamp lands for agricultural purposes and to protect the health and lives of persons living in the vicinity, by the provisions requiring the engineer in his report of survey and specifications on which contracts for the work are let to specify the date when the work shall be completed, which is also required to be stated in the contracts, does not preclude the letting of contracts after the expiration of such time, where for lack of proper bids they could not be let sooner, but in such case the county auditor, who is authorized to let the work in sections and to adjourn the letting "from time to time until the whole work shall be taken" and also to extend the time for completion as stated in the contracts and to relet contracts where the original owner fails to do the work within the time fixed, has power to let contracts even though the time originally fixed in the engineer's report has expired, and with the approval of the engineer to fix a later date for completion; and where contracts were so let, and the work completed thereunder in accordance with their terms and approved by the engineer, all without objection, the county cannot avoid payment to the contractor on the ground that the letting was illegal.

In Error to the Circuit Court of the United States for the District of Minnesota.

In the state of Minnesota there are large quantities of swamp lands which, left to natural law, would be quite useless to man and highly deleterious to the health of those living contiguous to the marshy region. When drained these lands become valuable for agricultural purposes. To the end of destroying the unwholesomeness of such marshes and reclaiming them from waste, the Legislature devised a scheme for the construction of draining ditches by the respective counties, to be paid for by assessments on the landowners within a prescribed contiguous area. The proceedings were provided for by statute (chapter 258, p. 413, Laws Minn. 1901; amendments, chapter 38, p. 90, Laws 1902), the main provisions of which are collected in Rev. Laws Minn. 1905, c. 44. The initiatory proceeding is by a petition of the given number of prescribed landowners, addressed to the board of county commissioners. The county auditor is required to give notice of the filing of the petition, and the time and place for the hearing thereon. The act provides for an engineer under bond, who shall, after the filing of said petition, make a complete survey of the line of the proposed ditch, stake out and define its limits and location, its extent, width, etc., marking it off each 100 feet by stakes or monuments; and his report shall specify the time and manner in which the work shall be done. He shall also include in his report the form of contract "as complete in

its provisions as practicable," containing detailed and complete specifications, and provide for the necessary supervision for the laying of the tile, excavation, and other construction work of the contractor, defining the relation between the contractor or contractors, and give "the engineer the right, with the consent of the auditor or auditors, to modify his plans and specifications as circumstances may require," etc. At the completion of the engineer's survey he shall make report of his doings and submit therewith plans, specifications, and description of the lands, together with the expenses incurred, and the like. At the same session of the county board when said engineer is appointed, or within 10 days thereafter, said board shall appoint three resident freeholders of the county as viewers, who shall meet at the time and place designated by the auditor preparatory to commencing their duties as afterwards specified. Within five days of the filing of the engineer's report the auditor shall designate the time and place for the first meeting of the viewers within 15 days after the filing of said report, and he shall issue to said viewers a certified copy of the petition, notice of their appointment, and the time and place of the first meeting. The said viewers were to ascertain and report the names of the owners of the land and a description thereof, said names to be the same as appear on the tax duplicates of said county, estimate the number of acres in each of said tracts of land to be benefited or damaged, etc. The land, etc., so benefited shall be assessed in proportion to the benefits for the construction thereof. The viewers shall forthwith file with the auditor a report of their doings and findings in detail within 30 days from the date of their first meeting; provided, that high water, inclement weather, or unavoidable accident may excuse the viewers. Within three days after the filing of such report of the viewers, the auditor shall call a special meeting of the board, and give three weeks' published notice of the time and place of such special meeting. The statute provides how the damages shall be paid. After the county board shall make the order establishing said ditch, the auditor shall proceed to offer for sale the jobs of digging and constructing the entire work, either as one job or in one or more linear sections of 100 feet each, said sections to be known and numbered by the stake or monument set by the engineer at the foot thereof. The auditor shall contract in the name of the county with the party to whom any of such jobs of construction work or any section is sold, requiring him to construct the same in the time and manner specified in the provisions and form of said contract, and shall take from him a bond, etc. The auditor is to give three weeks' public notice of the letting of such contracts, and the time when and place where such contracts shall be let to the lowest responsible bidders, etc., inviting bids for the work as one job and also for any one or more of such sections, reserving the right to reject any and all bids. Such auditor may adjourn such letting from time to time until the whole work shall be taken, and with the approval of the engineer may let any one or more of such sections or construction jobs. If no bids are received which can be entertained, the bondsmen for the petitioners may have the right, at any time, to pay the costs of the proceedings and dismiss the same. The said contracts shall be drawn to the satisfaction of the engineer, and shall embrace all of the provisions provided for the giving of bond by contractors for public works and improvement; and shall provide that the time therein specified shall be of the essence of the contract, "in that if there be any failure to perform the work according to the terms of said contract, within the time limited therein, originally or by extension, the contractors shall forfeit to the county," etc. The statute provides for the granting of an extension of time by the auditor when applied for in writing.

Conformably to the provisions of this statute, the board of county commissioners of Freeborn county, on the 15th day of April, 1904, ordered to be constructed the ditch in question. The time mentioned in the report of the engineer to the board for the completion of the work was October 1, 1904. Accordingly the county auditor duly gave notice of the time and place for the public sale of the jobs for constructing said ditch, in linear sections of 100 feet each. No acceptable bidders appearing at the time designated for the first meeting, the auditor, by open proclamation, continued the bidding until a later date in June; and for the same reason, by proclamation at this second

designated time, the letting was continued to another fixed period from time to time until the 13th day of October, 1904, when the plaintiff's bids were accepted for the several linear sections of this work, for the completion of which it entered into separate contracts and gave bonds for their faithful performance, which were accepted and approved by the auditor and engineer. Each of the contracts contained the following clause: "It is further specifically agreed between the parties hereto that the time limit within which said job of ditching and constructing shall be completed is hereby extended to and fixed at December 31, 1904, for the reason that by the delay in letting this contract it is impossible to complete said work within the time limited by the engineer's report." The time was continued in the other contracts so as to enable the contractor to complete the work after the winter season was broken. The engineer made the following certificates which were incorporated in each of the said contracts, with different dates for their completion: "I hereby certify that I am the identical E. W. Van Meter who is the engineer referred to in the within contract and who was the engineer duly appointed as by law required in the matter of Ditch No. 8, referred to therein. I have carefully and thoroughly examined the foregoing contract and all matters pertaining to the letting thereof and the bid of the said Interstate Drainage & Investment Co. (a corporation) filed therein, and I hereby express my consent to, my approval of, and satisfaction with, the form of said bid and the acceptance thereof, and the foregoing contract, and the form of the bond hereto attached, and I specifically consent and approve of the extension of time limited for the doing of said job of ditching and constructing to the 31st day of December, 1904." These contracts were duly filed, and the county commissioners were fully cognizant thereof.

The plaintiff proceeded with the construction of the ditch, and completed the work called for by the first contract series in the season of 1904. Thereupon the engineer duly certified the fact to the county commissioners that the contract had been fully performed in exact accordance with the provisions thereof, and on the 11th day of January, 1905, the defendant paid the plaintiff the full price of this contract. When the ditch season of 1905 opened, the plaintiff continued the work and completed the next two contracts of the series within the time limited in the contracts; the engineer inspected and accepted all the work covered by these contracts, and no question is made that the work was not done according to the contracts and accepted by the engineer. The assessment for the work was duly made upon the landowners of the designated ditch district. About the time of the completion of the work under the second contract three of the property owners, out of a very large number of the affected ditch district, instituted suit in the district court of Freeborn county against the county and certain of its officers and this plaintiff, seeking to have the order establishing the ditch vacated and the contractor restrained from continuing the work. No steps, however, were taken by the petitioners therein to obtain a temporary restraining order, and they gave no bond therefor. That suit has never been tried. It assailed the transaction on the ground "that no ditch or drain was ever laid in said proceedings, and that the defendant, the Interstate Drainage & Investment Company, had not right or authority under the statutes of the state of Minnesota to enter into said contracts or engage in the construction of any ditch or drain in said state." The grounds thus predicated did not present the essential issue for the first time set up in the answer to the plaintiff's action herein, to be hereinafter noted. After the plaintiff had completed the work on its two succeeding contracts of 100 linear feet divisions, and after the engineer had accepted the work and duly certified that the same had been performed in full compliance with the contract, the county commissioners refused to pay therefor because of said injunction suit. Thereupon the plaintiff brought this action to recover on said completed contracts, which the defendant not only resists on the ground that the work was not completed within the time stated in the first report of the engineer to the board of county commissioners, but by counterclaim seeks to recover back the amount paid to the plaintiff on the first contract. At the conclusion of the plaintiff's evidence the court directed a verdict for the defendant on the plaintiff's action, and for the plaintiff on the counterclaim.

John A. Senneff and Henry A. Morgan (Morgan & Meighen, on the brief), for plaintiff in error.

Norman E. Peterson and John G. Skinner, for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge (after stating the facts as above). For the first time in the history of the transactions in question, in the final answer of the defendant county was the contention put forth that the contracts in question are void by reason of the fact that they were not made and the work completed prior to October 31, 1904, the time stated in the first report made by the engineer to the board of county commissioners. And the ruling of the Circuit Court affirmed this contention. If this proposition be correct, its judgment must be affirmed. If, however, it be untenable, the judgment should be reversed.

The essential object of judicial construction of a statute is to discover the legislative mind in enacting it. The first step in the analysis is to perceive from the face of the whole act what was the underlying purpose. "The intention of a legislative act may often be gathered from a view of the whole and every part of a statute taken and compared together. When the true intention is accurately ascertained, it will always prevail over the literal sense of the terms. The occasion and necessity of the law, the mischief felt, and the object and remedy in view are to be considered. When the expression in a statute is special or particular, but the reason general, the special shall be deemed general, and the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice, contradiction, and absurdity. \* \* \* A thing within the intention of the Legislature in framing a statute is sometimes as much within the statute as if it were within the letter." In the Matter of Bomino's Estate, 83 Mo., loc. cit. 441. Included in the statutory scheme of the state of Minnesota for constructing such ditches were (1) the paramount object of rescuing from waste large bodies of land and subjecting them to profitable husbandry and production; and (2) the protection of the health and lives of the people exposed to the deleterious effects of such overflowed lands. To emphasize this fact the thirty-first section of the act enjoined that "this act shall be liberally construed so as to promote the public health and the drainage and the reclamation of wet or over-flowed lands." From the necessities of the situation, the character of the work to be done and the letting of the "job sales," the whole matter was largely committed to an engineer selected by the county commissioners and to the county auditor. That which principally concerned the public immediately interested in the ditch was that it should be built through the designated section in the direction desired, of the particular dimensions, the cost thereof, and a completion of the work at as early a period as practicable. While the engineer in the first instance was to state in his preliminary report the time within which the work was to be done, that is a subordinate matter of minor consideration. It was important only and required for the purpose of advising persons who came to bid at the job sales to enable

them to decide in their own minds whether or not they could probably complete the work within the time fixed by the engineer.

On the face of the statute it is apparent that the Legislature realized that it was not expected that the engineer could in advance fix a hard and fast time for the completion of such work; and therefore the statute provided that "he shall specify the time so far as practicable, and the manner in which the work shall be done, and for that purpose may set a different time for completing the several contracts." The statute furthermore anticipated that at the time fixed by the auditor for receiving bids no acceptable bidder might appear; or that only a given 100-foot subdivision might be let at such meeting. To meet this possible contingency, the statute empowered the auditor to "adjourn such letting from time to time until the whole work shall be taken, and with the approval of the engineer, may let any one or more of such sections," etc. "The engineer shall attend to the letting of the work and no bid shall be accepted without his approval." It will be observed that in authorizing the auditor to make such adjournments he is not limited to any given number of adjournments, and in authorizing him to adjourn from time to time there is no prescription that the time first stated in the preliminary report of the engineer should be the outside limit of such adjournments. The object of the time first fixed for the auditor for receiving bids had subserved its purpose when the auditor and engineer met to receive the bids. Presumptively all persons desiring to bid on the jobs would attend at said first meeting, when then and there they would have notice, by proclamation of the auditor, when the next meeting would be held. If they did not attend it was their fault, and no one can complain thereof. If there were persons, as suggested by counsel for defendant, who might at any time desire to make bids after the first meeting, they could have ascertained by going to the auditor's office, to whom the statute committed such adjournments, whether any jobs had been sold, what remained to be sold, and when they would be exposed to sale. So that no reasonable, conceivable injury could come to parties interested in the construction of the ditch by the extension of the time.

No construction should be given to a statute that would inevitably lead to absurd results, when that can be sensibly avoided. If, as contended for, the contracts for work made at any such adjourned meetings for completion beyond the time specified in the engineer's first report to the board of county commissioners are absolutely void, what would be the result? The statute provides that any party interested, dissatisfied with the action of the board of county commissioners in ordering the ditch, may resort to the courts and make contest in respect of his property, or damages thereto; which proceeding might last beyond the time fixed in the engineer's report. Again, the statute authorized the letting of separate contracts to different bidders for each 100-foot section. At one meeting fixed by the auditor a single job of 100 feet might be sold, and another adjourned meeting ordered for the sale of the remaining jobs, and so on until the whole should be sold. The first purchaser of a job, in obedience to the mandate of the statute, would at once enter into contract under bond requiring the

completion of the work to be done by him within the time specified. If the remaining jobs were not sold in time to allow the work under them to be completed within the period stated in the engineer's first report, what would be the situation? Most certainly the contractor who had, conformably to his undertaking, completed his job and received the requisite certificate from the engineer, would be entitled to his pay. As the remainder of the ditch could not be finished within the time fixed in the first report of the engineer, according to the defendant's contention the ditch project must then and there end after 100 feet may have been dug and paid for. The statute makes no provision for a second report by the engineer to the county commissioners, setting another time for the completion of the work of construction. In such condition, under the defendant's contention, we perceive no other course open to the community desiring the ditch than to begin de novo a proceeding to secure it. The scheme of the statute, in our judgment, admits of no such obstructive absurdities.

As persuasive proof that the lawmakers anticipated that from the very necessities of the situation contingencies would arise prolonging the time first suggested, the act authorized the auditor to adjourn the biddings from time to time to meet the contingency of no bidders at a given meeting; when sold, the auditor was to exact the contract for doing the work "in the time and manner specified in the provisions and form of said contract," with the additional provision that the engineer should attend to the letting of the work, and no bids should be accepted without his approval. The Legislature further anticipated that unforeseen contingencies might arise after the contractor began his work, rendering it impossible to complete it within the prescribed time; and therefore the statute authorizes the auditor to extend the time for completion, and this regardless of the time named in the engineer's report.

Finally, as demonstrative of the general intendment of the legislative scheme, that, after the work should be authorized by the county commissioners, the time first stated by the engineer was rather directory than mandatory, being for the mere guidance of bidders at the first meeting, the statute provided that:

"If a job be not completed within the time fixed in the contract, the bondsmen shall notify the auditor in writing of that fact, within five days after the expiration of the time fixed in the contract; whereupon the auditor shall, in writing duly dated, order said bondsmen to complete said job within a time specified by him, and said bondsmen shall receive from the proper county the amount due on such job or part thereof that they have so completed, less the proper deduction for forfeiture, to be determined by said engineer: provided, that a job not completed as hereinbefore specified by the original contractor, and the completion of which is not undertaken by the bondsmen as hereinbefore provided, within ten days after the date of such order, or of which failure to complete the bondsmen shall not so notify said auditor, shall be resold by the auditor after ten days' published notice, to the lowest responsible bidder."

From which it is manifest: (1) That the time for doing the work by the contractor is stated in his contract; (2) that having the ditch constructed was the paramount object; and (3) it was left to the auditor to fix the time in which the uncompleted work should be done

after the failure of the first contractor. In no contingency was the matter to go back on any second report to the county commissioners and await their approval and order.

The Supreme Court of Minnesota has recognized, from the very necessities of the situation in the practical application of such statutes, the sensible rule that, as from oversight or minute particularity in detail they are imperfect, and therefore implications and inferences may be drawn from the evident intent of the Legislature, gathered from the law taken as a whole, "from the necessity of making them operative and effectual as to specific things which are included in the broad and comprehensive terms and purposes of the law; as these inferences and implications are as much a part of the law as that which is distinctly expressed therein." *State v. Board of County Commissioners*, 87 Minn. 335, 92 N. W. 218 (60 L. R. A. 161).

In *McMillan v. Board of County Commissioners of Freeborn County* (the same defendant as here), 93 Minn. 16, 100 N. W. 384, the petition for the work was filed in September, 1901, for the construction of the ditch. The auditor and county commissioners duly complied with the provisions of the statute, but the viewers were not appointed until December, 1902, their appointment being delayed for several months by the board of commissioners after the report of the engineer was made. It was urged that by failing to comply with the provisions of the statute in respect of the time in appointing the viewers the board had lost jurisdiction of the case. Of this contention the court said:

"Under the rule repeatedly adopted and applied by this court in causes involving a variety of subjects, we are of the opinion the provisions of the act of 1901, as amended, directing the county commissioners to act within a certain specified time, must be deemed directory merely, and that the neglect of said board to appoint such viewers within the time fixed by the act does not invalidate said proceedings. (Citing authorities.) The reasons for holding this class of enactments directory are summoned up in *Kipp v. Dawson*, 31 Minn. 373, 17 N. W. 961, 18 N. W. 96, as follows: 'Where the provisions of a statute as to the time when an act shall be done are intended merely for the guidance of public officers, so as to insure the orderly and prompt performance of public business, a disregard of which cannot injuriously affect the rights of parties interested, it will be deemed merely directory; but where it is intended for the protection of the citizen, and to prevent a sacrifice of his property, and is such that, by a disregard of it, his rights might be injuriously affected, it will be deemed mandatory.'

No one, including the property owners immediately interested in the construction of this ditch, whose health and lives it was intended to protect, made any complaint of the extension of the time by the auditor in the contract, but they stood by and saw the work done beyond the time stated in the engineer's report, knowing that it had been extended; and not until after the work in suit was completed, honestly and faithfully, accepted and approved by the engineer, and the cost thereof assessed against the designated property owners, after the county had paid for a part of it, and after this litigation began, was any question ever raised respecting the matter of time fixed in the engineer's report. In our judgment, common justice and common sense conspire to say that the statute does not admit of such defense under such circumstances.

Since the trial of this cause in the Circuit Court, the Legislature of Minnesota, on April 23, 1907 (Gen. Laws Minn. 1907, p. 509, c. 367), undertook to pass a curative act, which in its terms would effectually validate the contracts in question. In view, however, of the doubt in our minds as to whether the scope of the text is sufficiently indicated by the title of the amendatory act, we refrain from making any ruling thereon, but rest our conclusion on the reasonable practical construction of the statute under which the contracts in question were made and performed.

The Circuit Court erred in directing a verdict for the defendant. The judgment must be reversed, and the cause remanded with directions to grant a new trial, and for further proceedings in conformity with this opinion.

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COLONIAL TRUST CO. et al. v. PACIFIC PACKING & NAVIGATION CO.  
CORBY v. SAME.

(Circuit Court of Appeals, Third Circuit. November 27, 1907.)

No. 22.

1. BROKERS—RIGHT TO COMMISSIONS—CONSTRUCTION OF CONTRACT.

Under a contract with receivers by which a broker was authorized to "offer and sell" the stock of salmon of a canning company, with a provision that the sales were to be subject to the receivers' instructions and confirmation, he was not required to procure an offer but a purchaser, and was entitled to the stipulated commission if he was the efficient means of procuring a purchaser whose offer, made directly to the receivers, was accepted, and to whom a sale was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 74.]

2. SAME—EARNING OF COMMISSION.

That a principal is ignorant of the efforts of his broker in procuring a customer does not affect the broker's right to a commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 74.]

3. SAME.

To entitle a broker to his commission on a sale, it is not necessary that he should be present and an active participator in the making of the sale, but it is sufficient if he procured the purchaser who makes the purchase on any terms agreed to between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 74.]

4. SAME—TRANSFER OF PROPERTY TO CORPORATION.

Where petitioner, as a broker, being authorized thereto by a contract with defendants as receivers of a canning company who were located at Seattle, entered into negotiations in New York for the sale of the company's stock of canned salmon with persons who were interested in another corporation engaged in a similar business, and two of whom were respectively the president and general manager thereof, and assisted in arranging for funds to enable them to make the purchase, and as a direct result of such negotiations the president of the corporation went to Seattle and with petitioner's knowledge and consent made the purchase by direct negotiations with the receivers, the fact that the sale and transfer were made to the corporation and not to the individuals did not affect plaintiff's right to the commission which was to be paid him under his contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 8, Brokers, § 74.]



## 5. SAME—WAIVER OF CLAIM TO COMMISSIONS.

Delay on the part of a broker in presenting to receivers his claim for commissions on a sale effected by him, to which he was entitled under a contract, *held*, under the facts shown, not to have operated as a waiver of such claim.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 142 Fed. 298.

Wallace Macfarland, for appellant.

Clifford P. Williamson, for appellees.

Before DALLAS and GRAY, Circuit Judges, and CROSS, District Judge.

CROSS, District Judge. On the 11th day of February, 1905, the petitioner, Charles Corby, a broker and commission merchant for the sale of canned salmon, fruits, and other Pacific Coast products, entered into a contract in writing with the receivers of the Pacific Packing & Navigation Company, the material parts of which are as follows:

"We authorize you to offer and sell our present stock of canned salmon on the following terms, to wit:

"First—All sales to be made subject to our instructions, as to selling price from time to time and upon the customary terms for domestic sales, except that in lieu of the usual guarantee on swells an arbitrary allowance to be made not to exceed  $\frac{1}{2}$  of 1%.

"Second—All sales to be made subject to our confirmation.

"Third—We reserve the right to sell to anyone where offer made is satisfactory to us and without any compensation to you; in view, however, of your undertaking to handle this salmon and that you will incur some expense therein, we will not solicit business from other brokers for sixty days from the date hereof, but this shall not be construed to prevent our negotiating the sale of any large blocks of salmon either domestic or foreign without liability hereunder.

"Fourth—You will not knowingly sell for shipment to Great Britain either directly or indirectly prior to June 30th of the present year.

"Fifth—Your commission for sales to be 4% on the net f. o. b. price in lots of 10,000 cases or under and 2% in lots of 11,000 cases or over to any one buyer or combination of buyers.

"Sixth—This agreement may be cancelled by the receivers at the end of sixty days from date."

Pursuant to the foregoing contract, the petitioner claims that he performed services which entitled him to recover from the receivers a commission of 2 per cent. on the sum of \$440,433.50, the price for which the receivers, whose office was in Seattle, Wash., sold their stock of Red Alaska salmon to the Northwestern Fisheries Company, whose office was also in Seattle. After ineffectual efforts in San Francisco and Chicago to sell the salmon, the petitioner arrived in New York about March 2, 1905, and almost immediately thereafter opened negotiations for its sale with certain persons named Churchill, Satterlee, Jarvis, and Rosene, who were then interested in the Northwestern Fisheries Company, the corporation which subsequently bought the salmon. The more important facts connected with the negotiations and sale will appear herein later.

There is no question that Corby, in the course of the negotiations with the parties above referred to, devoted much time and performed

much labor in an endeavor to effect a sale of the salmon. Indeed, the more active of the receivers in his testimony says:

"I will tell the court this, that if I had had in mind that Corby had been active and as active as his own testimony shows he was in making this sale, I never would have allowed a sale to be consummated or would not have consummated one as receiver, that would not have provided for his commission."

The decision of the learned judge who heard the case in the Circuit Court is predicated upon a finding that the petitioner did not perform the conditions precedent prescribed in his contract, and that his failure in this respect lay in his not having obtained and submitted to the receivers an offer which they were willing to accept. It is true that a broker may, by agreement with his principal, so contract as to make his compensation depend upon a contingency which his efforts cannot control, even though it relates to the acts of his principal. *Hinds v. Henry*, 36 N. J. Law, 328; *Walker v. Tirrell*, 101 Mass. 257, 3 Am. Rep. 352. In other words, he is bound by his contract, even though it be a hard one. It becomes important, therefore, to inquire at the outset what, under the circumstances, Corby was required to do in order to earn his commission. By its terms he was authorized to "offer and sell" the salmon, with the provision that the "sales" were to be subject to the receiver's instructions and confirmation. These expressions, however, do not mean that the receiver was in fact required to make a sale; he could not do that; he did not have the power. The right to fix prices and terms having been reserved to the receivers, the authority given to Corby was in effect to offer the salmon for sale and find a party willing to buy upon terms satisfactory to them. We do not deem that it was at all essential that the broker himself should submit a proposition of sale directly to the receivers. He was not authorized by his contract to submit any binding proposition to a possible purchaser. He had no discretionary control of the price. His duty was limited to finding a satisfactory purchaser. A proposition submitted by him and accepted, or modified and accepted, by the receivers, unquestionably entitled him to a commission. If however, instead of submitting the purchaser's offer to the receivers, he induced the purchaser himself to go to the receivers and submit an offer directly, which was acceptable, he would have done everything in substance that the contract required him to do; he would have found a customer able and willing to purchase upon terms satisfactory to his principal. The essence of the contract was not that Corby should procure an offer, but a purchaser, for the salmon. But assuming that he was required to procure and submit an offer, it will not be questioned that the broker could have submitted such offer by telegram, letter, messenger, or otherwise, and still have been within the literal terms of his contract. We reach the conclusion, therefore, that under the terms of this contract it was a matter of indifference that the petitioner did not obtain from his customer and transmit directly to the receivers an offer for the salmon. It made no possible difference to the receivers how or through whom the offer was submitted; hence, if Corby found an acceptable purchaser, he as fully and satisfactorily complied with the contract by sending him to the receivers to submit his offer as he would

by submitting the offer to the receivers in person. The real question in the case is, therefore, was the broker the efficient or procuring cause of the sale? which is the question uniformly presented in this class of cases.

But it is further urged on behalf of the receivers that at the time they sold the salmon to the Northwestern Fisheries Company they had no knowledge that Mr. Corby had conducted prior negotiations with the officers of that company for the sale of the salmon. The broker's right to a commission, however, does not rest at all upon that proposition. That a principal is ignorant of the efforts of his broker in procuring a customer does not affect the question of the broker's right to a commission. A broker may be the procuring cause of a sale within the meaning of the authorities, although his principal at the time be wholly ignorant of that fact. In *Sussdorff v. Schmidt et al.*, 55 N. Y. 319, the court said:

"The undertaking of the broker is to make efforts to procure a purchaser, but if he fails he is entitled to no pay unless there is a special contract. But if the purchaser is found by his efforts and through his instrumentality he is entitled to compensation, although the owner negotiates the sale himself. (*Lloyd v. Matthews*, 51 N. Y. 124). Nor is it indispensable that the purchaser should be introduced to the owner by the broker, nor that the broker should be personally acquainted with the purchaser; but in such cases it must affirmatively appear that the purchaser was induced to apply to the owner through the means employed by the broker. \* \* \*

"It did not appear that the defendants knew that *Eckersdorff* and *Marwig* came to purchase in consequence of information obtained through the plaintiff, and it may be that this fact, if it existed, was designedly withheld from them so as to secure commissions for *Eckersdorff*. However that may be, it is not conclusive against the plaintiff. If he was the producing cause of this sale, his right to compensation would not be affected by the circumstances that the defendants were ignorant of it at the time, nor should he be prejudiced by the acts of others."

To the same effect is *Lloyd v. Matthews*, 51 N. Y. 124. In *Graves v. Bains and Woodman*, 78 Tex. 92, 14 S. W. 256, it is said:

"If an agent be authorized to make a sale of land and a purchaser is procured by him, he is entitled to his commissions, and it is of no consequence that the owner did not know of the fact and made the sale himself."

Again, in *Bryan v. Abert*, 3 App. D. C. 180, it is held that, where a broker who is authorized by an owner to find a purchaser at a certain price is the procuring cause of a sale made by the owner, he is entitled to his commissions, even though the owner is ignorant of it at the time and sells for a price and upon terms different from those fixed in his contract with the broker. So, too, in *Adams v. Decker*, 34 Ill. App. 17, and *Kelly v. Stone*, 94 Iowa, 316, 62 N. W. 842, it is held that the fact that the owner has not been notified that the purchaser had been sent to him by his agent is immaterial. See, also, *Millan et al. v. Porter*, 31 Mo. App. 563; *Tyler v. Farr*, 52 Mo. 249; and *Ross v. Muskowitz* (Tex. Civ. App.) 95 S. W. 86. Nor, again, does it affect the broker's right to a commission that he did not complete or was not present at the completion of the sale made by the principal to the broker's customer. This proposition is thoroughly established, and reference will be made to but a few of the many au-

thorities supporting it. In *Sibbald v. Bethlehem Iron Company*, 83 N. Y. 378, at page 382, 38 Am. Rep. 441, the court says:

"In *Wylie v. Marine National Bank*, 61 N. Y. 416, it was held that, to entitle the broker to commissions, he must produce a purchaser ready and willing to enter into a contract on the employer's terms. This implies and involved the agreement of buyer and seller, the meeting of their minds, produced by the agency of the broker. In *Moses v. Bierling*, 31 N. Y. 462, it was declared that the authorities clearly establish the proposition that, until the broker has faithfully discharged the obligation assumed in the contract with his principal, he is not entitled to his agreed commission, and that obligation is fulfilled only when he produces a party ready to make the purchase at a satisfactory price. In *Glentworth v. Luther*, 21 Barb. 147, it was declared that commissions were earned when the broker produces to his principal a party with whom the owner is satisfied, and who contracts for the purchase at an acceptable price. It was not meant by these cases, and we do not mean, that the broker must of necessity be present and an active participator in the agreement of buyer and seller when that agreement is actually concluded. He may just as effectually produce and create the agreement, though absent when it is completed and taking no part in the arrangement of its final details."

See, also, *Hoadley v. Savings Bank*, 71 Conn. 599, 42 Atl. 667, 44 L. R. A. 321; *Vreeland v. Vetterlein*, 33 N. J. Law, 247; *Keys v. Johnson*, 68 Pa. 42; *McMillin v. Beves*, 77 C. C. A. 444, 147 Fed. 218; *French v. McKay*, 181 Mass. 485, 63 N. E. 1068. In the last case cited, a broker had brought about an exchange of real estate; the deal, however, was concluded without him, and the defendant sought to be relieved from the payment of commissions because the property he had received in exchange was not the same which was under consideration when the plaintiff was last seen in the transaction. The defense however, was not sustained.

From what has been said, it is apparent, as already intimated, that the real questions presented in this class of cases are, was there an employment of the broker, and, if so, was he the efficient or procuring cause of the sale? These facts once established, it is of no consequence whatever whether the broker was present or absent at the conclusion of the sale, or whether the sale was concluded upon the same or different terms than those originally proposed, or whether or not the principal had knowledge of the broker's agency in procuring the customer. Since Corby's employment as a broker in this matter cannot be gainsaid, we may turn at once to a consideration of the evidence with a view to ascertaining just what Corby's relation was to the sale in question, and whether he was its efficient or procuring cause. It should be kept in mind that Churchill, Satterlee, Jarvis, and Rosene, with whom Corby negotiated in New York, were at that time interested in the Northwestern Fisheries Company, which became the purchaser, and it further appears that Mr. Rosene was its president and Mr. Jarvis its general manager. In the course of the negotiations Corby submitted to these men an offer which he represented as one which he thought the receivers would consider favorably, but which it ultimately appeared was slightly less than the one accepted by them. The receivers were from time to time informed by Corby of his efforts to procure an offer for the salmon; he, however, never submitted one directly. His main obstacle, and the one which seems to have caused most of the delay, was the procurement of the funds necessary to

finance the operation. Pending the negotiation, however, \$100,000 in cash were provided in New York, and Corby was informed of the fact, and it then became necessary to finance the balance of the operation on the Pacific Coast. At the suggestion of Messrs. Churchill and Satterlee, Corby thereupon opened negotiations for that purpose with one Kelly at Seattle, who was his friend and the head of a large and influential brokerage firm at that city. The proposition was that Kelly should arrange with certain banking houses on the Pacific Coast to advance upon the security of the salmon the difference between the \$100,000 raised in New York and the price at which the salmon could be purchased. Kelly was also made acquainted by Corby with the negotiations in New York, and at his instance became actively associated with the New York parties above mentioned, and subsequently on March 17th completed arrangements with certain banks whereby the necessary funds were to be forthcoming when required. While these arrangements were in progress, the receivers were in a general way apprised of them by Corby, although he did not disclose the names of his customers. On March 18th the receivers wrote Corby a letter in which the following statement appears: "There is absolutely no change in conditions since you left here." On the 21st Corby telegraphed them in substance that the financial arrangements were about completed; that some details, however, were unfinished, but he was confident that he could submit a firm offer in a day or two. On the 22d he wrote them that he expected to be able to wire a definite proposition not later than Friday, and he hoped on the following day, and on the 23d he wrote them a letter of similar import. When all the arrangements had been completed for the purchase of the salmon by the parties in New York, upon the terms suggested by Corby, Churchill informed Corby that he thought before making the offer he would better await the arrival at Seattle of Mr. Rosene, who had left New York for that city. Accordingly, Corby telegraphed Kelly: "Have effected financial arrangements here, see Rosene and help things along." On March 22d Satterlee telegraphed Rosene at Seattle that the plan to buy the salmon had been perfected. The receipt of this telegram was acknowledged by Rosene March 23d, and on the 27th he telegraphed Satterlee that he had not yet agreed with the receivers upon a price, but thought the financial arrangements were satisfactory. On the 25th, Messrs. Churchill and Satterlee told Corby they were prepared to make the offer he had suggested, but had decided to make it directly to the receivers through Mr. Rosene, who had then arrived at Seattle. Mr. Corby thereupon, on March 25th, sent to the receivers the following telegram: "Interested parties here advise Rosene will make their offer Red Alaska salmon direct. Please telegraph at once, as soon as deal is completed." There was a slight but unimportant error in the transmission of this telegram, but as received it notified the receivers that Rosene would make an offer for the salmon direct, and they were requested to telegraph as soon as the deal was completed. This telegram was received at the office of the receivers in Seattle by their managing clerk in charge thereof. On March 29th Rosene telegraphed Satterlee that he had purchased the salmon, and on the 30th the receivers telegraphed Corby that the deal was closed, and that particulars would be

sent by mail. Jarvis co-operated with Rosene at Seattle in making the purchase. It satisfactorily appears from the testimony that the negotiations by Kelly, Jarvis, and Rosene at Seattle were but a continuation of the negotiations which were opened and assiduously carried on by Corby in New York, and that the financial arrangements made in New York and at Seattle were availed of in making payment of the purchase price of the salmon. We have no question that the taking of the title to the salmon by the Northwestern Fisheries Company was understood, and arranged by the parties with whom Corby negotiated. Pending the negotiations at Seattle between the receivers and Rosene and Kelly, Rosene was in constant communication with Mr. Satterlee, one of the associates in New York, as appears by the telegrams above referred to; and in a letter dated March 28th, the day before the deal was closed, he wrote him a letter, in which, after referring to an offer that the receivers had refused, he says: "Inasmuch as we had previously agreed that we would give as high as 90c. per dozen for this fish, subject to the discounts above stated, we finally made that offer but it was also refused." This quotation seems to show conclusively that Rosene was making the offer for himself and his New York associates. He referred to it as an offer which they had previously agreed upon, and it was in fact the same offer which Corby had suggested might be satisfactory to the receivers. Kelly testifies that, in his negotiations with the banks and Mr. Rosene in respect to the purchase of the salmon, he represented the individuals of the syndicate and the Northwestern Fisheries Company, and Satterlee swears that he became interested in the matter as a result of Corby's interviews with him, and that Corby was the inducing cause which operated on his mind to persuade him to go into the enterprise. Furthermore, the Northwestern Fisheries Company, the purchaser of the salmon, had previously bought from the receivers not only the canneries of the Pacific Packing and Navigation Company, but also the trade-marks on the boxes of salmon which were sold, and it was therefore but natural that the transfer should be made to that company. We have by no means referred to all the testimony bearing upon this point; it is sufficient to say that we are convinced therefrom that the transfer was made to the Northwestern Fisheries Company in compliance with the understanding of the individuals interested in the purchase, and that the petitioner is no less entitled to his commission than he would have been had the transfer been made directly to the individuals with whom he negotiated. In the case of *Brooks v. Leathers*, 112 Mich. 463, 70 N. W. 1099, it was held that a real estate broker employed to sell land, and who had negotiated with a corporation for its purchase, was entitled to a commission upon a sale made by the owner to one of the stockholders of the corporation where the latter was influenced to make the purchase by the broker's efforts to sell to the corporation.

The case at bar is the converse of the one just cited. Authority, however, would seem to be unnecessary to support the proposition that a broker who has earned a commission cannot be deprived of it because at the last moment the purchaser decides to have the deed made, and it is accordingly made, to a third party. Under the facts disclosed in this case, it was unimportant, so far as the petitioner's rights are

concerned; whether the transfer was made to the associates who were all interested in the purchasing corporation, or to the corporation itself. The broker's services were in either case equally valuable and efficient; he was the procuring cause of the sale, and substantially complied with the terms of his contract.

Before concluding, however, it seems proper to refer specifically to two or three points which have been raised in behalf of the receivers. The first is that, prior to the sale of the salmon, the petitioner assumed a position where his interests were hostile to and conflicted with those of the receivers, and that consequently he cannot recover. This defense was apparently an afterthought. The receivers' answer to the petitioner's petition is full and explicit, but no such defense as is now presented was therein set up or even suggested; consequently the petitioner had no notice that the point now made would be raised, hence it may readily be seen that whatever proofs there are which seemingly bear upon the question might easily have escaped attention, and remained in part uncontraverted or unexplained. But that aside, the change is substantially one of fraud or bad faith on the part of the broker, and the burden of proof to substantiate it rests upon the receivers. This burden they have not sustained. Such evidence as relates to the question is, we think, easily explicable upon a theory not inconsistent with the good faith of the agent. It certainly falls far short of satisfying us of his bad faith.

Another point urged is that the receivers had reserved to themselves the right to sell the salmon, and that pursuant thereto they found the purchaser and independently conducted the negotiations which resulted in the sale. Upon this point the proofs are likewise vague and wholly inconclusive. It appears that about the middle of March one of the receivers approached the secretary of the Northwestern Fisheries Company, in Seattle, and had several "talks" with him before Rosene arrived at that place, but it should be recalled in this connection that on the 18th of that month the receivers wrote Corby that "there is absolutely no change in conditions since you left here." Furthermore, it does not appear what the "talks" were, how far they progressed, if they did progress, or what authority, if any, the secretary had in the premises. It does appear, however—and this is important—that they took place some time after Corby had opened his negotiations in New York with the very persons who, as we have seen, ultimately, to all intents and purposes, became the purchasers of the salmon.

Only one other suggestion remains which requires special consideration. It is to the effect that Corby himself recognized that he had no claim upon the receivers for commissions in the matter, because he made no demand therefor until between two and three months after the transaction was closed. Corby did, however, on March 31st, and immediately after the receipt by him of the receivers' telegram, announcing that the deal with Rosene had been closed, write a letter to the receivers in which he expressed his gratification that the negotiations which were opened and carried on by him in New York had finally culminated in the disposition of the salmon; and on April 4th he wrote them another letter in which he indirectly refers to the fact that he

carried on with Rosene, Churchill, Satterlee, and others the negotiation for the sale of the salmon. On the 28th of June following, in a friendly letter concerning his compensation, in which, however, he made no arbitrary demand upon the receivers, he said: "Under the agreement I would be justly entitled to 2% upon the amount of the sale." Moreover, it appears that Corby had been in the employ of the insolvent corporation, was well known to Kerr, and that they were good friends. The receivers, however, more particularly rely upon the fact that at an interview between Kerr and Corby, held on the 5th day of April in New York, at which some other matters were adjusted, no reference was made by Corby to any claim for commissions in respect to the sale of the salmon. Mr. Kerr says that the matter of the sale was discussed; Corby says it was only incidentally referred to, and that the reason the subject of his commissions was not taken up was because the time was wholly occupied in the settlement of outside matters, and that another interview was arranged between them for the following day, which Kerr, however, did not keep, but went west with his daughter that afternoon, and consequently he had no further opportunity of seeing him. This statement of Corby's is not directly denied by Kerr, and it would seem to afford ample explanation, if any were necessary, why the matter of commissions was not discussed at the previous interview. We would certainly not be warranted under the evidence in holding that Corby had impaired, much less waived or abandoned, his right to a commission. There is ample justification in the facts presented for Corby's dilatoriness, if such it was, in presenting his claim or in not presenting it in a more formal and decisive manner than it was presented. Corby was not a lawyer, and may not have understood his rights; at all events, we would not be justified in inferring from the evidence that he at any time waived his claim against the receivers. If his rights to compensation were seriously in doubt, the point urged would be entitled to more consideration.

We think the decree of the Circuit Court should be reversed, and one entered directing the receivers to pay to the petitioner the sum of \$8,808.67, with interest thereon from March 30, 1905, besides costs.

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CONNELLA v. HASKELL, Warden.

(Circuit Court of Appeals, Eighth Circuit. November 27, 1907.)

No. 2,535.

1. HABEAS CORPUS—FEDERAL COURTS—SCOPE OF WRIT—STATUTES.

A person imprisoned pursuant to a judgment of a territorial court for violation of a territorial law is not in custody under or by virtue of the authority of the United States, so that, on a writ of habeas corpus sued out of a federal court, the case is to be regarded as not differing from one of imprisonment on a judgment of a state court for violation of a state law, within Rev. St. § 753 [U. S. Comp. St. 1901, p. 592], providing that the writ shall not extend to a prisoner in jail, unless he is in custody in violation of the Constitution or of a law or treaty of the United States.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 38.]



**2. SAME—GROUNDS.**

Where petitioner for a writ of habeas corpus had been convicted for violating a territorial law, it was not ground for habeas corpus that the laws of the territory were not complied with in the selection of the grand jury that indicted him, in that the grand jurors were not drawn from the various precincts in the proportion the voting population therein bore to the population of the entire county, and that the election judges who drew the jurors did not take the prescribed oath in accordance with the laws of the territory, and that like omissions occurred in the selection of the petit jurors.

**3. SAME—SCOPE OF WRIT—SEARCHING RECORD.**

A writ of habeas corpus does not search the record for errors committed in the exercise of jurisdiction, and cannot be employed to perform the office of a writ of error or an appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 4.]

**4. SAME—DEFECTS IN INDICTMENT—DUPLICITY.**

That an indictment charged more than one offense, in violation of the laws of the territory where petitioner was convicted, was a mere error of procedure, which did not divest the trial court of its power to render judgment, and was, therefore, not ground for petitioner's discharge on habeas corpus.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 25, Habeas Corpus, § 25.]

**5. CRIMINAL LAW—SENTENCE—PREJUDICE—TERMS OF IMPRISONMENT RUNNING CONCURRENTLY.**

Where petitioner was convicted in a territorial court of two offenses under a territorial law for which the punishment prescribed was imprisonment for not to exceed seven years, and was sentenced to imprisonment for five years on each conviction, the terms to run concurrently, he was not so prejudiced by the court's failure to comply with a statute providing that where a person is convicted of two or more crimes the sentence shall be cumulative that he should be released on habeas corpus by a federal court.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Criminal Law, §§ 3183-3188.]

**6. HABEAS CORPUS—GROUNDS—IMPROPER SENTENCE.**

Where petitioner was convicted of two offenses, for each of which he could have been sentenced to seven years' imprisonment, but was sentenced to five years' imprisonment for each offense, the terms to run concurrently, the sentence could not be held void on habeas corpus, because the statute of the territory in which petitioner was convicted required such a sentence to be cumulative.

**7. SAME.**

Where a sentence imposed on petitioner was excessive, he could not obtain his discharge on habeas corpus while serving the portion which the court had power to impose.

**8. CRIMINAL LAW—JUDGMENT—SIGNATURE.**

Where the record of the conviction of accused duly authenticated by the clerk, recited the session of the court, the presence of the judge and other officers, and the rendition of the judgment, the signature of the judge was unnecessary to the validity of the judgment entered.

**9. HABEAS CORPUS—SCOPE OF WRIT—FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP.**

Where petitioner was convicted of an offense in a court of the territory of Oklahoma, and was sentenced to imprisonment in the Kansas State Penitentiary, where he was confined, the District Court of the United States for the District of Kansas, in habeas corpus proceedings against the warden of said penitentiary, was not entitled to review the proceedings of the Oklahoma trial court, as on appeal to the highest court of

Oklahoma, because of the diverse citizenship of the parties, and of Const. art. 3, § 2, providing that the judicial power of the United States shall extend to controversies between citizens of the different states.

[Ed. Note.—Jurisdiction of federal courts, see note to *In re Huse*, 25 C. C. A. 4.]

Appeal from the District Court of the United States for the District of Kansas.

Rufus R. Connella, in pro. per.

W. O. Cromwell and Fred M. Klein, for appellee.

Before SANBORN and HOOK, Circuit Judges, and PHILIPS, District Judge.

HOOK, Circuit Judge. Rufus R. Connella was convicted in a court of the territory of Oklahoma of violating one of its penal laws and sentenced to imprisonment for five years in the Kansas State Penitentiary. Being confined there, and claiming that he was held under a void judgment, he petitioned the District Court of the United States for the District of Kansas for a writ of habeas corpus. His petition was denied, and he thereupon prosecuted this appeal. Before considering the grounds of petitioner's attack upon the judgment, we should first observe the limitations upon the power of the courts of the United States in cases of this character. The acts of the Legislature of a territory are not laws of the United States. *Matter of Moran*, 203 U. S. 96, 27 Sup. Ct. 25, 51 L. Ed. 105; *Ex parte Moran*, 144 Fed. 594, 75 C. C. A. 396. A person imprisoned, pursuant to a judgment of a court of a territory for the violation of a territorial law, is not in custody "under or by virtue of the authority of the United States." The case is therefore to be regarded as not differing from one in which the imprisonment is by virtue of a judgment of a state court for a violation of a state law. As thus narrowed, the applicable provision of section 753 Rev. St. [U. S. Comp. St. 1901, p. 592], which confers jurisdiction upon courts of the United States, is:

"The writ of habeas corpus shall in no case extend to a prisoner in jail unless where he is \* \* \* in custody in violation of the Constitution or of a law or treaty of the United States."

In *Rogers v. Peck*, 199 U. S. 425, 434, 26 Sup. Ct. 87, 89, 50 L. Ed. 256, it was said:

"It has been so frequently ruled by this court, that it is scarcely necessary to cite cases, that the federal courts will not by writs of habeas corpus undertake to reverse the proceedings of the state courts, while acting within their jurisdiction under statutes which do not conflict with the federal Constitution."

In *Storti v. Massachusetts*, 183 U. S. 138, 142, 22 Sup. Ct. 72, 73, 46 L. Ed. 120, the court said:

"Some of the matters presented involve only the construction of state statutes and should be determined by the courts of the state, whose determination in respect thereto is binding upon this court. It must be borne in mind that under section 763 (753) of the Revised Statutes, the jurisdiction of the federal court to issue a writ of habeas corpus is limited to 'the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States,' and to cases arising under the laws of nations."

In *Tinsley v. Anderson*, 171 U. S. 101, 107, 18 Sup. Ct. 805, 808, 32 L. Ed. 91, the following appears:

"It is said that the imprisonment for contempt was limited by the state statute to three days (article 1101, Rev. St. Tex. 1895), but the state court held that that statute had reference to a quasi criminal contempt as a punishment, and not to a civil contempt, where the authority of the court is exercised by way of compelling obedience. *Rapalje on Contempts*, § 21. This is not a federal question, and we accept the ruling of the state court in its construction of the statute."

In *Andrews v. Swartz*, 156 U. S. 272, 275, 15 Sup. Ct. 389, 391, 39 L. Ed. 422, it was said:

"Whether, as is contended, the above statute in its application to capital cases is in violation of the Constitution of New Jersey is not necessarily a federal question, and upon that point we need not, therefore, express an opinion. The repugnancy of a statute to the Constitution of the state by whose Legislature it was enacted cannot authorize a writ of habeas corpus from a court of the United States unless the petitioner is in custody by virtue of such statute, and unless also the statute is in conflict with the Constitution of the United States."

It was held in *re Wood*, 140 U. S. 279, 11 Sup. Ct. 738, 35 L. Ed. 505, that if the laws of a state are valid a failure to comply with them in selecting grand and petit jurors will not authorize the discharge of a prisoner on habeas corpus by a court of the United States.

The petitioner contends that his imprisonment is illegal for seven reasons: (1) That the laws of the territory were not complied with in the selection of the grand jury that indicted him in that the jurors were not drawn from the various precincts in the proportions the voting population therein respectively bore to such population in the entire county; also, that the election judges who drew the jurors did not first take the oath prescribed. (2) That the same omissions occurred in the selection of the petit jurors. Like questions were presented in the *Moran Cases*, *supra*, and decided adversely to petitioner's contention. The Supreme Court said:

"If the Legislature of Oklahoma had prescribed the method of selection followed, that method would not have violated the Constitution or any law or treaty of the United States. If it did prescribe a different one, a departure from that was a violation of the territorial enactment alone." 203 U. S. 104, 27 Sup. Ct. 25, 51 L. Ed. 105. See, also, *In re Wood*, *supra*.

(3) That the laws of Oklahoma provide that an indictment must charge but one offense in respect of which there can be but a single verdict and judgment, whereas in petitioner's case the indictment charged two offenses, and there were two verdicts and two judgments. (4) That the laws of Oklahoma provide that when a person is convicted of two or more crimes the sentences shall be cumulative, whereas petitioner was sentenced to imprisonment for five years for each of the two offenses, the terms to run concurrently from a given date. As to these contentions it should be observed, aside from the limitations upon the power of courts of the United States in cases of imprisonment under judgments of local courts pursuant to local laws, that it is a settled rule that a writ of habeas corpus does not search the record for errors committed in the ex-

ercise of jurisdiction, and it cannot be employed to perform the office of a writ of error or an appeal. If the charging of two offenses in one indictment was erroneous, it did not affect the jurisdiction of the court. It was merely an error of procedure, and did not divest the trial court of its power to try the case and render judgment. In *De Bara v. United States*, 99 Fed. 942, 40 C. C. A. 194, it was held that error in the consolidation of indictments cannot be inquired into by habeas corpus. There is no substantial distinction as regards effect between an erroneous joinder in a single indictment and an erroneous consolidation of two indictments. Given jurisdiction of the offense and the party, each is an error in its exercise. Nor can we perceive how petitioner's rights were injuriously affected by concurrent instead of cumulative sentences. The indictment is not set forth in the petition. It is not important, so far as this proceeding is concerned, whether it contained two counts, each charging a distinct offense, or, as was permissible, two counts charging the same offense in different forms. The punishment for such offenses as were charged was imprisonment not exceeding seven years. The punishment imposed was imprisonment for five years, which was within the power of the court upon conviction under either count. This would be so even though the case were before this court on writ of error. *Claasen v. United States*, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; *Evans v. United States*, 153 U. S. 584, 14 Sup. Ct. 939, 38 L. Ed. 839; *Evans v. United States* (No. 2), 153 U. S. 608, 14 Sup. Ct. 934, 38 L. Ed. 830. Much less ground is there for declaring the sentence void when attacked on habeas corpus. (5) That the laws of Oklahoma provide that where persons are convicted of crime, and the exact period of imprisonment is not prescribed, the court imposing sentence shall limit the time, if longer than a year, so that it will expire between the months of March and November, whereas petitioner was sentenced to imprisonment for the term of five years from December 19, 1903. Without determining whether a court of the United States has power on habeas corpus to declare the sentence of a local court void for such a reason, and also passing various questions as to the construction of the local law, it is sufficient to say that the most petitioner could claim is that the sentence is excessive, and that the term should have been fixed to end the last day of October next preceding the expiration of five years from December 19, 1903. We do not say the claim would be well founded, for the law authorized imprisonment for not exceeding seven years, and had the attention of the court been directed to the matter now complained of it could have corrected it by enlarging the term. But were the sentence excessive, there should be no discharge while petitioner is serving that portion which the court had power to impose. In *re Swan*, 150 U. S. 637, 653, 14 Sup. Ct. 225, 37 L. Ed. 1207; *United States v. Pidgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; *De Bara v. United States*, *supra*. (6) That because of the foregoing reasons assigned, petitioner is deprived of his liberty without due process of law and in violation of the Constitution of the Unit-

ed States. This has already been considered in connection with the five preceding grounds. (7) That the judgments are void for the reason that there is no evidence that they are the judgments of the court as they were not signed by the judge. The petitioner furnished evidence of the judgments by attaching to his petition a transcript from the records of the court, duly authenticated by the clerk, which recited the session of the court, the presence of the judge and other officers thereof, and the proceedings in question. The signature of the judge to the judgment entry was unnecessary.

It is urged that it was the duty of the District Court of the United States for the District of Kansas, from whose order this appeal was taken, to review the proceedings of the Oklahoma trial court to the same extent as the highest court in Oklahoma might have done, because petitioner was a citizen of the territory, and the warden of the penitentiary where he was confined was a citizen of Kansas, and therefore there existed the diversity of citizenship contemplated by section 2 of article 3 of the Constitution, which provides that the judicial power of the United States shall extend to controversies between citizens of different states. This involves numerous misconceptions, among them one as to the function of a writ of habeas corpus. The others need not be mentioned.

The order denying the writ is affirmed.

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JOHN NAYLON & CO. et al. v. CHRISTIANSEN HARNESS MFG. CO.  
CHRISTIANSEN HARNESS MFG. CO. v. JOHN NAYLON & CO. et al.

(Circuit Court of Appeals, Sixth Circuit. January 16, 1908.)

Nos. 1705, 1706.

**BANKRUPTCY—ACTS OF BANKRUPTCY—TRANSFERS WITH INTENT TO PREFER CREDITORS.**

Where a corporation, at a time when its assets were much less in value than the amount of its debts, and its insolvency was or should have been known to those in charge of its business and within four months prior to the filing of a petition in bankruptcy against it, made payments to certain creditors under circumstances which indicated a probability that they would result in preferences, a finding by a referee, approved by the District Court, that such payments were made with intent to prefer the creditors receiving them, and constituted acts of bankruptcy within Bankr. Act July 1, 1898, c. 541, § 3a (2), 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], will not be reversed on appeal.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 929.]

Cross-Appeals from the District Court of the United States for the Southern Division of the Eastern District of Michigan.

H. B. Graves, for Christiansen Harness Mfg. Co.

H. Helfman, for Naylon and others.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. These are appeals taken from an order of the District Court adjudging the Christiansen Harness Manufacturing Company bankrupt. The first of these appeals is by the al-

leged bankrupt; the other is a cross-appeal by petitioning creditors. This cross-appeal is rested upon the ground that the court below, although it made the adjudication prayed, yet in its opinion held that some of the grounds urged by the petitioners therefor were not sustained. The theory of the cross-appellants seems to be that, if this court should not support the adjudication upon the ground on which the District Court based it, the taking of the cross-appeal would enable us to review the opinion of the District Court on the issues which that court found against them, and if its opinion should be held erroneous, then to affirm the order of the court below on the grounds which it rejected. We will suspend the consideration of the cross-appeal for the present.

The alleged bankrupt had for some time been engaged at Detroit in manufacturing and selling articles of the kind indicated by its title. It had become embarrassed, and had been failing to meet its obligations as they became due for more than four months before the filing of the petition by its creditors on December 26, 1905. The grounds on which the adjudication was prayed were three in number, and in the order in which we shall notice them, as follows: First. That the alleged bankrupt had within the last preceding four months, while insolvent, transferred portions of its property to some of its creditors with intent to prefer them. Second. That it had within that time, viz., on December 4, 1905, while insolvent, given a power of sale of its stock of goods and other assets to one Wasey, and also a mortgage or power of sale of its assets to the Commercial National Bank, a principal creditor of the bankrupt, both of which instruments are alleged to have been given with the intent to prefer the said bank. Third. That it had, while insolvent, transferred its property with intent to defraud its creditors. The referee, upon his finding of facts and conclusions of law, held that the respondent should be adjudicated bankrupt upon both of the first two grounds. At least, we so construe his report, although the District Judge in his opinion seems to have understood it differently. The District Court however held adversely to the petitioners in respect to the second, and placed the adjudication upon the first, ground. Clause (2) of the third section of the Bankrupt Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422], declares it to be an act of bankruptcy when the person has "transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors." To fulfill these conditions three things must concur: The bankrupt must have transferred some part of his property to his creditors; he must have been insolvent at the time; and he must have intended, in doing it, to prefer those creditors over others. The record shows beyond doubt that the alleged bankrupt transferred some of its property to some of its creditors and that it had other creditors. The creditors to whom, and the dates and amounts of, these parts of its property so transferred were as follows: To Morley Bros. Saddlery Co., September 8, 1905, \$20; September 30, 1905, \$20; October 13, 1905, \$25; November 3, 1905, \$25; November 11, 1905, \$20; November 22, 1905, \$15. To C. C. Bartley, September 14, 1905, \$10; September 26, 1905, \$7.13. To California Tannery Co., on September 11, 1905, \$10.39,

and on September 23 and 27, 1905, two payments of \$10 each. To George De P. Keim Saddlery Co., September 13, 1905, \$20; and two payments of \$10 each to American Horse Breeder on August 13, 1905, and September 18, 1905. Amounting in all to \$212.52. The debts of the bankrupt amounted to \$7,742.36; and the assets, when reduced to cash soon afterward, to \$1,344.73, excluding \$250 retained by attorneys for fees, and some old book accounts of trifling value. As to the question of the solvency of the respondent at the time of making these payments, the evidence in the record leaves no doubt. At no time during this period was the value of its assets equal to its indebtedness. On the contrary, it was at all times much below the amount of the indebtedness. Nor can we entertain any serious doubt that its condition of insolvency was known by the company. It is true that Hans A. Christiansen, who was treasurer, and Max G. Christiansen, who had charge of the purchases and sales, testify that no inventory had been taken for a long time, and that they knew nothing of the financial condition of the concern. And no one connected with the company would profess any knowledge of its condition. But we are loath to believe that those who had charge of and were so much interested in the affairs of the company could be and continue so utterly ignorant of the financial condition of their company as the general terms in which their testimony was given would seem to indicate. It might well be that they did not know it exactly or even with any close approximation to the facts, and perhaps that was the test assumed when they gave their testimony. But that they should have no understanding of its condition while it was running down, its trade small, the disparity of its debts and its assets growing more and more apparent, and its inability to pay its debts becoming so acute that it could only pay them in dribbles and when pressed by collectors, we are not prepared to believe. As against the literalness of such statements, we think it safer to rely upon the strong presumption that they had a general knowledge of its condition. However, the knowledge of its insolvency by the respondent is not of itself a material fact. It is only important as it bears upon the question of its intent in making these payments. And the question as we view it is, did those in charge of the affairs of the company, appreciating that it was going to the wall, intend that, in paying these creditors these portions of their debts, they should be made sure of what they got, no matter what might happen to its other creditors; or were these payments made in the ordinary course of business by a going concern, in the expectation that all would come right, and all the creditors be in time duly paid? It may be admitted that either of these conclusions is possible. The payments were not large, but they were made in circumstances which indicated a probability that they would result in preferences. For the reasons we have stated we are strongly inclined to the view taken by the referee and the District Judge, whose concurrent findings upon a question of fact should, in any case, be accepted unless clearly seen to be wrong.

This conclusion makes it unnecessary for us to consider the other grounds on which the petitioning creditors sought an adjudication. There was no occasion for the filing of a cross-bill. No one can complain of a decree in his favor which grants all he demands. The par-

ticular reason which governed the court in making its decree in no wise affected its substance or its value. Besides, the appeal of the other party brought the whole matter here. This court would proceed de novo, and if we found that, upon any ground established in the case, the decree of the lower court was correct, though a wrong reason was given for it, it would be our duty to affirm the decree. *Merchants' National Bank v. Cole*, 149 Fed. 708, 79 C. C. A. 414; *Loveland on Bankruptcy* (3d Ed.) § 326.

On the appeal of the Christiansen Harness Manufacturing Company the order adjudicating it bankrupt is affirmed with costs. The cross-appeal by creditors will be dismissed, also with costs.

NOTE.—The following is the opinion of Swan, District Judge:

SWAN, District Judge. The referee to whom by stipulation of the parties it was referred to hear and report the testimony with his recommendation upon the issues raised by the petitioning creditors for an adjudication, and the bankrupt's answer thereto, has recommended that respondent be adjudicated bankrupt. The creditors' petition was filed December 26, 1905, and alleges payment by the bankrupt while insolvent during September, October, November, and December, 1905, to some of its creditors, of sums aggregating several hundred dollars and that such payments were preferences.

(2) The execution December 4, 1905, by the bankrupt, while insolvent, to the Commercial National Bank, a creditor, of the instrument (Exhibit A) attached to the petition of creditors, which it is charged "was designed and intended to give said bank a lien on all the assets" of the respondent, in connection with the election of Mr. Wasey as an officer of the bankrupt corporation, and the conversion by him into cash of the assets of the corporation which are alleged to be "a part of one plan and design to hinder, delay and defraud creditors."

(3) Said Exhibit A is counted on as a chattel mortgage, and its execution and delivery to the mortgagee are charged as a preference.

The second and third propositions are not sustained by the proofs nor is the recommendation of the referee founded upon them, but upon the first ground—sundry payments while insolvent to creditors and with intent to prefer.

Exhibit A is neither "a payment, pledge, mortgage, or gift. \* \* \*"  
*Holmes v. Hall*, 8 Mich. 66, 77 Am. Dec. 450; *Dalton v. Laudahn*, 27 Mich. 527; *Winter v. The Iowa, etc., Co.*, 7 N. B. R. 293, Fed. Cas. No. 17,890. It is a naked power to take possession of the property it describes on future conditions and sell the same for a certain purpose—not a present transfer of the whole or any part of the property. It neither "parts with property or the possession of the property absolutely or conditionally." It could not operate to hinder, delay, or defraud creditors as it interposed no obstacle to the enforcement of their claims nor gave a lien upon the property. It was not regarded as security. This is evidenced by the fact that the bankrupt subsequently executed a mortgage to the bank in due form securing the same debt. This latter instrument is not charged in the petition as an act of bankruptcy. Coming to the payments made to creditors between August and December, 1905, upon which the referee based his recommendation that an adjudication of bankruptcy should be entered, the question presented by the report and the arguments of counsel is whether such payments were made with intent to prefer, and were sufficient in amount to warrant adjudication. The proofs abundantly show that the bankrupt was then insolvent. The directors testify that they were ignorant of the fact. Does their mere ignorance suffice to disprove the intent to prefer? This and the cognate question as to the sufficiency of the preferences in amount must both be answered against the bankrupt's contention.

In the case at bar the admitted payments on old accounts within the four months' period aggregate several hundred dollars and the insolvency of the bankrupt is practically admitted. In *Toof v. Martin*, 13 Wall. 40, 20 L. Ed. 481, the court says: "The transfer in any case by a debtor of a large por-



tion of his property to one creditor, without making provision for an equal division of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the creditor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such cases, and not upon the assignee or contestant in bankruptcy." The act of 1867 construed in that case, like the present act, made the transfer by an insolvent of any of his property an act of bankruptcy if followed seasonably by proceedings in bankruptcy. The exculpatory showing required was not made or attempted in this case. Nothing was offered to show that the bankrupt could "reasonably expect" to pay all its debts when the payments were made between August and December. In *Wager v. Hall*, 16 Wall. 602, 21 L. Ed. 504, the language of *Toof v. Martin*, quoted above, is modified, and the transfer by an insolvent debtor "of his property, or a considerable portion of it," is held to be prima facie evidence that a preference was intended unless the debtor shows the two facts required by *Toof v. Martin*, supra. The modification does not aid the bankrupt. The prima facie effect of the transfer remains undisputed. The proportion of the property transferred by the bankrupt here is relatively to its assets nearly if not quite as large in value as were those in the cases cited. There possibly may be cases of preference to which the courts would apply the maxim "*De minimus lex non curat*," but this is not one of them. As the inevitable result of these transactions was to create a preference, if the bankrupt was then insolvent, as proved to be the fact, the law conclusively imputes the intention to bring about the result necessarily arising from the nature of the act. *Western Tie Co. v. Brown*, 196 U. S. 509, 25 Sup. Ct. 339, 49 L. Ed. 571. The facts shown by the testimony approve the recommendation of the referee, and, in accordance therewith, an order of adjudication will be entered against the bankrupt, and the case referred to Referee Davock.

Respondent's exceptions to the referee's findings of fact: (1) That "respondent only paid bills it was compelled to pay"; and (2) that "The Commercial National Bank had knowledge of the arrangement" (of the bankrupt) "with Mr. Wasey on December 5, 1905"—are sustained on the ground that there is no evidence in the record to support those findings.

Respondent's exceptions to the first, second, and seventh of the referee's findings of law are overruled. Its third, fourth, fifth and sixth exceptions to said findings, in view of the conclusions reached upon the character and effect of the payments by the bankrupt in the months of August, September, October, November, and December are not passed upon. Respondent is also entitled to the additional findings of fact set forth in its exceptions, excepting numbers fourteen and sixteen, which are refused. In the disposition of the bankrupt's exceptions to the finding of the referee, the additional findings of fact prayed—except numbers fourteen and sixteen—have been regarded as added to the referee's report and findings.

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### NATIONAL FIRE PROOFING CO. v. ANDREWS.

(Circuit Court of Appeals, Sixth Circuit. December 17, 1907.)

No. 1,687.

#### 1. MASTER AND SERVANT—INJURIES TO SERVANT—DEFECTIVE MACHINERY—KNOWLEDGE.

Rev. St. Ohio 1906, § 4364-89c, makes it the duty of factory owners to countersink or cut off bolt heads and set screws on revolving machinery which might otherwise project beyond the surface of the revolving part, and Act April, 1904 (97 Ohio Laws, p. 547), provides that knowledge by an employé that the machinery of his employer is not guarded as required by statute shall not be a defense, but that a continuance in service with such knowledge shall prevent a larger recovery in case of death than \$5,000 or \$3,000 when there is injury without death. *Held*, that where an employé

was injured by a projecting set screw on a shaft which had not been countersunk, but there was no evidence that he knew the screw projected, the court properly refused to charge that if they found plaintiff knew of the projecting set screw they could not return a verdict for more than \$3,000.

2. WRIT OF ERROR—INSTRUCTIONS—PREJUDICE.

Where the court charged that if plaintiff knew of a projecting set screw from a shaft by which he was injured while in defendant's employ he could not recover at all, defendants could not object to the refusal of an instruction that if plaintiff had such knowledge he could not recover more than \$3,000.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4056-4058.]

3. SAME—DEFECTIVE MACHINERY—NEGLIGENCE OF MASTER—DELEGATION OF DUTY.

The duty of a master to prevent danger from projecting set screws or bolts on a revolving shaft by countersinking or cutting off the bolt heads as required by Rev. St. Ohio 1906, § 4364-89c, is one which the master cannot delegate to another servant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 392-396.]

4. SAME—ASSUMED RISK—SCOPE OF EMPLOYMENT.

If an employé without the direction of the employer engage in a dangerous work outside the scope of his employment and is injured, he cannot recover therefor.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 654.]

5. SAME—FELLOW SERVANTS.

A superior servant in a factory designated as "inside foreman," with authority to direct plaintiff to leave his accustomed work to assist in replacing a belt, the entire operations of the factory being under the control of the superintendent, was plaintiff's fellow servant in respect to any question of the liability of the master for the negligent injury of one by the other.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 449-455.]

6. SAME—VOLUNTEER.

Where defendant's inside foreman, having control over plaintiff, directed him to suspend his employment, which was not dangerous, and assist in replacing a belt, in doing which plaintiff was injured by the negligence of the master in failing to remove a projecting set screw from a revolving shaft, as required by Rev. St. Ohio 1906, § 4364-89c, plaintiff in obeying the command of his superior did not become a mere volunteer, so as to preclude his recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 655-658.]

In Error to the Circuit Court of the United States for the Northern District of Ohio.

N. B. Billingsley, for plaintiff in error.

J. W. Craine, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This was an action for the negligent injury of the plaintiff, Roy Andrews, a boy of 16, while engaged in the service of the defendant company. Andrews had worked, in all, some six or eight months, first on the "dry floor," a place where he had nothing to do with machinery, and then as a pugger, where he had to

feed a claymill in which clay was mixed with water and reduced by revolving knives upon a shaft which ran through the mill. A belt upon a pulley on the main shafting of the factory came off. The petition alleges that the plaintiff was directed by one Derringer, his immediate superior and the inside foreman under the general superintendent, to quit his regular work and assist one Gordon in replacing this belt. While engaged at this he sustained the injury for which he sued. There was a verdict and judgment for \$5,000.

The negligence upon which the case turned consisted in this, that a bolt or set screw upon the shafting, and very near the pulley upon which the belt was to be replaced, projected an inch or more, and that plaintiff's clothing was caught on said set screw while the shaft was rapidly revolving, whereby he was frightfully hurt. Knowledge of this set screw by the defendant was averred. The plaintiff also charged that he was young and inexperienced with such machinery; that it was not his business to handle this belting; that he knew nothing about the projecting set screw or the dangers incident to such a thing, and that his youth and inexperience was well known to defendant. By statute, in Ohio, it is made the duty of owners and operators of shops and factories, etc., to guard against injury to persons who may come in contact with machinery by countersinking or cutting off bolt heads and set screws upon wheels, shafting, and other revolving machinery, which might otherwise project beyond the surface of a revolving part. Rev. St. Ohio 1906, §§ 4364-89c. By section 4364-89d, violation of this provision is made a punishable misdemeanor. By the Ohio act of April, 1904, 97 Ohio Laws, p. 547, it is in substance provided that knowledge by an employé that the machinery of his employer is not guarded, as required by the statute, shall not be a defense, but that a continuance in service, with knowledge, shall operate to prevent a larger recovery in case of death than \$5,000, or \$3,000 when there is injury without death.

Only two exceptions to the charge or refusal to charge were reserved. The first is that it was error to refuse a peremptory instruction for the defendant, and the second is that the court should have instructed the jury that they could not return a verdict for more than \$3,000, if they found that the plaintiff knew of the projecting set screw. This latter may be disposed of at once. First, there was not the slightest evidence that the plaintiff had continued in service after knowledge that this set screw did project contrary to the statute. Second, the court told the jury that, if they found that Andrews knew there was a projecting set screw there, he would have no right to recover at all. This was more than defendants asked for, and of this it cannot complain. The verdict of the jury, under such a charge, conclusively establishes, for the purpose of this assignment of error, that Andrews did not continue in the service of defendant with knowledge that the statute had, in this particular, been disregarded.

To return to the first exception mentioned, there was evidence enough to carry the plaintiff's case to the jury upon every material issue, unless it be, as now contended, that Derringer, Andrews' immediate superior, was not a vice principal when he temporarily took Andrews from his regular place and job to assist in the dangerous job

of replacing a belt upon its pulley, and that Andrews was therefore a volunteer and the company not liable. The plaintiff averred that Andrews was placed under the direction and control of Derringer, who was what was called "inside foreman," the whole operations of the factory being under the control of a superintendent. The answer admits that the defendant was a minor, "employed as a pugger or operator of a machine for mixing clay, and was placed under the direction and control of George Derringer, one of defendant's foremen." There was a general denial of all the other material averments of the petition. One of these averments was that Andrews came to his injury by obeying the direction of Derringer to assist about replacing the belt. There was a conflict in the evidence as to whether Derringer had or had not directed Andrews to engage in this dangerous job, and the case upon that point went to the jury under an instruction that if the plaintiff voluntarily went upon this shaft staging "of his own motion, and not by direction of Derringer, he was a volunteer," and could not recover. The court further instructed the jury that, if he was ordered to go upon this staging and assist in the replacement of this belt which had come off of its pulley, and was not himself guilty of any negligence, "considering all of the elements and circumstances to which reference had been made, his age, his experience, his knowledge or want of knowledge, etc. \* \* \*," he would be entitled to recover. There being no request for any other or further charge, nor exceptions to the charge as delivered other than the request for an instructed verdict for the defendant, the case went to the jury upon whether Andrews was a volunteer engaging in a work which he was not employed to do, notwithstanding the fact that he was directed to do the work in which he received the injury by his immediate superior, Derringer. Derringer was the fellow servant of Andrews, it is said, and the master not responsible for an injury which resulted from his wrongdoing. But the negligence which is a sufficient foundation of this action was the master's negligence in not guarding his machinery as required by the Ohio statute. It is not, therefore, a question of the injury of Andrews through any personal negligence of Derringer, as distinguished from the negligence of the employer in a duty which he could not in law delegate. In addition to this, there was the question whether the act of Derringer in directing this boy to assist in so dangerous a job was not in itself a wrongful act, knowing as he did, his inexperience and his youth. For just such conduct the master was held liable by the Supreme Court in *Railroad Co. v. Fort*, 17 Wall. 553, 21 L. Ed. 739, and by this court in *Felton v. Girardy*, 104 Fed. 127, 130, 43 C. C. A. 439. But, passing this, it is sufficient that the statutory requirement referred to was a nondelegable duty, and the employer liable if the defendant did not assume the risk or contribute to his own injury, provided only he was not a volunteer. But it is said, and rightly, that the settled law is that if an employé, without the direction of the employer, engage in a dangerous work outside of the work he was employed to do and sustains an injury, he has no right to complain and cannot recover against the master. This is a well-settled rule of law consistently laid down by this court in *Baltimore & Ohio Railroad Co. v. Doty*, 133 Fed. 866, 871, 67 C. C. A. 38, and in line with many cases, a few

of which are *Knox v. Pioneer Coal Co.*, 90 Tenn. 546, 18 S. W. 255, *Mellor v. Merchants' Mfg. Co.*, 150 Mass. 362, 23 N. E. 100, 5 L. R. A. 792, *Cleveland, A. & C. Ry. v. Workman*, 66 Ohio St. 509, 64 N. E. 582, 90 Am. St. Rep. 602, and *McCue v. Nat. Starch Mfg. Co.*, 142 N. Y. 106, 36 N. E. 809. Neither is it to be for a minute disputed that Derringer and Andrews were fellow servants in respect to any question of the liability of the common employer for the negligent injury of one by the other. *Louisville & Nashville Railroad Co. v. Stuber*, 108 Fed. 934, 48 C. C. A. 149, 54 L. R. A. 696, and *Kinnear Mfg. Co. v. Carlisle*, 152 Fed. 933, 82 C. C. A. 81, are both cases decided by this court, following and affirming *Alaska Mining Co. v. Whelan*, 168 U. S. 86, 18 Sup. Ct. 40, 42 L. Ed. 390, *Railroad Co. v. Conroy*, 175 U. S. 323, 328, 20 Sup. Ct. 85, 44 L. Ed. 181, and *Railroad Co. v. Dixon*, 194 U. S. 338, 24 Sup. Ct. 683, 48 L. Ed. 1006.

But Derringer had authority and control over Andrews, and in the exercise of that authority and within the general scope of his powers temporarily took Andrews from his usual place and job to which he had been assigned and directed him to assist on other and more dangerous work for the common master. It cannot be said if Andrews obeyed his immediate superior, and the order was not so unwarrantable as to justify an out and out refusal because of its apparent great peril, that he was a volunteer. The question is not one of liability of the master for an injury of one servant due to the negligence of another. The nonliability of the master in such cases is because it is an implied term of the contract of hiring that the servant will assume the usual hazards of the employment, one of which is the danger from the negligence of fellow servants. Within that rule of law the fact that Derringer had control over Andrews would not affect the matter. But here the question is merely one of principal and agent, and if Derringer, as the agent of the defendant corporation, had control over Andrews, he would not be exceeding the general scope of his power if he should temporarily require of Andrews such a service as that here involved, and Andrews in obeying would not be a volunteer, but entitled to claim that such a temporary enlargement of his work did not put him outside of the pale of an employé. Not one single authority has been cited to support the contention that Derringer could not bind the master in directing Andrews to render the service he did because he was a fellow servant within the rule of negligence cases. Upon the other hand, there are many cases in which the order of such an immediate superior as Derringer has been treated as the order of the master, although in few of them has there been any discussion of the question. *Railroad v. Fort*, 17 Wall, 553, 559, 21 L. Ed. 739, was an action by a minor who, by direction of Collett, who was in charge of the machine shop, was taken from his regular employment and directed to assist in the adjustment of a belt upon a shafting. In doing so he was hurt. The court held that it was a wrongful act upon the part of Collett, in view of the plaintiff's youth and inexperience, to put him to do a thing so dangerous. But, said the court:

"For the consequences of this hasty action the company are liable, either upon the maxim of *respondeat superior*, or upon the obligations arising out of

the contract of service. The order of Collett was their order. They cannot escape responsibility on the plea that he should not have given it. Having intrusted to him the care and management of the machinery, and in so doing made it his rightful duty to adjust it when displaced, and having placed the boy under him with directions to obey him, they must pay the penalty for the tortious act he committed in the course of the employment. If they are not the insurers of the lives and limbs of their employes, they do impliedly engage that they will not expose them to the hazard of losing their lives, or suffering great bodily harm, when it is neither reasonable nor necessary to do so. The very able judge who tried the case instructed the jury on the point at issue in conformity with these views, and we see no error in the record."

This case is explained as not inconsistent with the rule in respect to nonliability for the negligent injury of one servant by another. *Baltimore & Ohio Railroad Co. v. Baugh*, 149 U. S. 368, 388, 13 Sup. Ct. 914, 37 L. Ed. 772. In *Patnode v. Warren Cotton Mills*, 157 Mass. 283, 291, 32 N. E. 161, 34 Am. St. Rep. 275, the company was held liable for an injury sustained by a minor who assisted in a repair outside of his regular occupation by direction of an "overseer of a room." The court said:

"If the plaintiff complied with the order, the defendant would stand to him in relation of a master, although McKeon might have acted negligently in calling upon him, and might not have made a wise selection or have done what the overseer or defendant intended. The usual doctrines of agency would govern the case."

In *Reed v. Stockmeyer*, 74 Fed. 186, 191, 192, 20 C. C. A. 381, 386, the Circuit Court of Appeals for the Eighth Circuit, when the same question arose, said:

"Robert Reed, the son of the owner, was superintendent of his father's quarries. He gave general directions with respect to the management of them to the foreman, Dreoble, from whom the workmen received their orders, he working with them, and personally assisting, daily, in their labors; and we assume—although there is some conflict in the testimony—that Dreoble employed and discharged the men. It follows, therefore, that, in the hiring of the men and in the direction to Stockmeyer to engage in work without the scope of his original employment, Dreoble, so far as that duty was concerned, was the representative of the master, and a vice principal, and for whatever wrong, if any, he did in that capacity, the master was liable."

In *Felton v. Girardy*, 104 Fed. 127, 130, 43 C. C. A. 439, we assumed without discussion that the order of the immediate superior putting the employé to a new and dangerous work, without instructions, the ignorance of the servant being known, was the negligence of the master. See, also, the following where the question was properly present, and either liability assumed without statement or decided in short terms as plain law. *Gilmore v. Railroad Co.* (C. C.) 18 Fed. 866; *Richardson v. Swift & Co.*, 96 Fed. 699, 37 C. C. A. 557; *O'Connor v. Atchison, etc., Ry. Co.*, 137 Fed. 503, 70 C. C. A. 87; *Fisk v. Cen. Pacific Railroad Co.*, 72 Cal. 38, 13 Pac. 144, 1 Am. St. Rep. 22; *Southern Railway Co. v. Guyton*, 122 Ala. 231, 25 South. 34; *Broderrick v. Union Depot Co.*, 56 Mich. 261, 22 N. W. 802, 56 Am. Rep. 382.

Judgment affirmed.

## SALMON et al. v. HELENA BOX CO.

(Circuit Court of Appeals, Eighth Circuit. November 20, 1907.)

No. 2,572.

## 1. EVIDENCE—RELEVANCY—ACTION FOR BREACH OF CONTRACT.

Where a contract in suit, which was for the sale and purchase of lumber, was clear and explicit in its terms, evidence as to the nonperformance by plaintiff of a previous contract between the parties, not in suit, was properly excluded as irrelevant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 388-415.]

## 2. LOGS AND LOGGING—SALE OF LUMBER—EVIDENCE TO EXPLAIN TERMS USED IN CONTRACT—USAGES OF TRADE.

In an action on a contract, by which plaintiff agreed to deliver as ordered by defendants for a stated price lumber of the width of "10" and up," where a question at issue was as to whether defendants were justified in giving orders for lumber limited to certain widths above 10 inches, it was not error to admit evidence showing the meaning of the phrase "10" and up" as used in the lumber trade, and that it was more expensive in view of the local practice in stacking lumber at the mills to fill orders for special widths than for widths as they ran.

## 3. SAME—PERFORMANCE OF CONTRACT—PARTY IN DEFAULT.

Under a contract by which plaintiff agreed to ship lumber to defendants as ordered, not less than a certain quantity each month if requested, it was the duty of defendants to take the first step in performance by giving the necessary shipping orders within a reasonable time, and until such orders were given plaintiff was in no default nor under any duty to tender shipments.

## 4. TRIAL—INSTRUCTIONS.

Abstract propositions of law in instructions, when not pertinent and necessary to the case as made, tend rather to confuse than aid the jury, and it is the better practice to reduce the issue of fact to as limited a compass as is consistent with full instruction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 582-586.]

## 5. SALE—BREACH OF CONTRACT—MEASURE OF DAMAGES.

In an action to recover damages for the refusal of defendants to order and take lumber under a contract of sale, where there was proof of the market value of the lumber at the time and place of delivery, the jury were correctly instructed that, if plaintiff was entitled to recover, the measure of damages was the difference between such value and the contract price of the lumber, and it was not error to refuse further instructions on the subject.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

Morris M. Cohn and Charles J. McDermott, for plaintiff in error.  
John I. Moore, U. M. Rose, W. E. Hemingway, G. B. Rose, D. H. Cantrell, and J. F. Loughborough, for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

ADAMS, Circuit Judge. This case has been here before. 147 Fed. 408, 77 C. C. A. 586. To the opinion then rendered reference is made for the terms of the contract in question and other facts essential to a

full understanding of the case. For the present purposes it needs only be stated that the box company sued Salmon and others on three counts: (1) For damages for failure to accept lumber according to the requirements of a contract dated April 28, 1903, whereby defendants purchased and agreed to take from plaintiff 1,000,000 feet of lumber; (2) for damages in the sum of \$14,000 for failure to accept lumber according to the requirements of a contract dated January 14, 1904, whereby defendants purchased and agreed to take from plaintiff 5,000,000 feet of lumber; (3) for money due and owing to plaintiff for lumber actually accepted by defendants amounting to \$2,187.77. The case was tried, resulted in a judgment in favor of plaintiff for \$8,603.74, was brought here for review, reversed and remanded, tried a second time with similar result as before, and is now brought here by writ of error for another review. At the second trial plaintiff dismissed as to the first count, agreed with the defendants upon the amount due on the third, and litigated the second only. The defense consisted of a denial that defendants had failed to accept lumber according to the contract, and an affirmative plea that plaintiff first broke the contract by refusing to deliver lumber as required, and that defendants were damaged thereby in the sum of \$10,000, which they sought to recover by way of counterclaim. The contract in question was for the purchase by defendants from plaintiff of specified quantities and kinds of lumber at prices fixed for each kind, and contained a stipulation that deliveries should be made from time to time according to shipping instructions to be given by the vendees.

Whatever may have been the evidence on the main issue, as to which party first broke the contract, there was no substantial evidence showing that defendants sustained any loss by reason of plaintiff's assumed failure to make deliveries of lumber. The market value became lower instead of higher. Moreover, the finding of the jury that plaintiff was damaged by the failure of defendants to accept the lumber is inconsistent with the claim that the defendants were damaged by plaintiff's failure to deliver. Because of the failure to show that defendants would have suffered some loss if they had been required to go into the market and purchase lumber, wrongfully withheld by plaintiff, the trial court instructed the jury that defendants could not recover on their counterclaim. In this there was obviously no error.

The only issue of fact left for consideration was whether defendants broke the contract of 1904 by failing to give shipping instructions as required, or whether plaintiff broke it by failing to deliver lumber as ordered by defendants. In other words, the only issue left was, which party, if either, first made a breach of the contract. Most of the assignments of error relate to the ruling of the court on the admission of evidence, and these will first be considered. Defendants offered testimony tending to show delays by plaintiff in filling orders for lumber made under the contract of April, 1903. Plaintiff objected to that evidence on the ground that it had dismissed the cause of action based on that contract, and that evidence showing how plaintiff failed to perform it could have no bearing on the issues in question with respect to the separate contract of January, 1904. This objection was sustained. The contract of 1904 was clear and explicit, without ambiguity or



uncertainty with respect to the mutual obligations of the parties. That was settled on the former appeal. Each of the two contracts had distinct and separate subjects-matter, and the attempt to tack the contract of 1904 upon that of 1903 as one of a series of transactions initiated in 1903, and to subject the former to the infirmities of the latter or to any equitable or legal defense growing out of it, was unwarranted. The trial judge so ruled, and there was no error in doing so. This conclusion eliminates many of the questions brought to our attention by the assignment of errors, and renders unnecessary any particular reference to them.

Defendants contend that the trial court erred in permitting the plaintiff's witness to testify concerning the meaning of the words employed in the contract "10" and up" when used in the lumber trade. The order as made by defendants and accepted by plaintiff was in part as follows: "You may enter our order for the following cottonwood lumber \* \* \* 1,500,000 1", 10" and up, 1s and 2s," etc. These figures and words are obviously abbreviations and susceptible of explanation by persons familiar with the business in connection with which they were employed. There was no error in permitting the explanation. The testimony was material in the light of the respective claims of the parties. The issue before the jury was whether the defendants wrongfully refused to give shipping instructions for the lumber, or whether plaintiff wrongfully refused to deliver lumber after such instructions had been given by defendants. The plaintiff claims that defendant ordered special widths not justified by the contract, of 14 to 15 and 16 to 18 inches in width, and insisted that orders should be filled with those widths exclusively, irrespective of the widths prescribed by contract, namely, 10 inches or above; that defendants had ordered lumber not according to the requirements of the contract, and irrespective of the latitude permitted them by the contract, so as to apparently put plaintiff in default if it failed to fill such orders. Plaintiff admitted its liability to deliver lumber within the range of widths prescribed by the contract according to shipping instructions to be given by the defendants; and, so far as the proof shows, was always ready and willing to do so; but denied that defendants could limit that range; and claimed that their orders making such limitation constituted unwarranted and substantial departures from the contract. It was in view of these claims that the court permitted plaintiff's witnesses, over defendants' objection and exception, to testify concerning the practice of the mills in Helena, Ark., in stacking lumber, and also to testify that it was more expensive to fill orders with the special widths than with the widths as they came from the ordinary run of the mill, as stacked. In view of the issue before the court, we think there was no error in admitting the testimony referred to.

Some exceptions were taken by defendants to the ruling of the court excluding testimony concerning the prices obtained by plaintiff for lumber as shown by its sales book. In the light of the proof that there was a market value for the lumber in question at Helena, Ark., all that evidence was properly excluded. The trial court proceeded according to the law declared by us on the former appeal concerning the measure of damages; holding that it was the difference between the

market price at the time and place of delivery and the price as fixed by the contract.

Much correspondence between the parties, and other evidence tending to justify their conduct respectively, was offered in evidence. To some of this defendants objected, and the action of the court in ruling against them has been assigned for error. We do not deem it necessary to pass separately upon these assignments. After a patient examination of the record in view of the latitude of inquiry proper on the issue as made by the parties we are unable to discover in them any prejudicial error.

It is objected that the court erred in refusing to give certain instructions to the jury requested by defendants. They requested the court to charge as follows:

"(1) The plaintiff who sues upon a contract has not launched his case until he has shown that he has tendered the thing which has been contracted for, and if he is unable to show that, he cannot claim any damages for the non-fulfillment of the contract. (2) Before the plaintiff can recover upon the contract of January 14, 1904, it must show that it in all things complied with the same, in the fulfillment of orders sent to it by defendants, and that it tendered to the defendants the lumber called for by the contracts, in the proper proportion respecting the different dimensions called for therein, at the times when it had a right to tender the same."

The learned trial judge instead of giving the requested instructions charged the jury as follows:

"There is nothing said in the contract as to when the shipping instructions were to be sent by the defendants to the plaintiff; but the law implies when a contract of that kind is entered into, whereby one party agrees to sell and obligates himself to ship a certain amount every month if requested, and it is silent as to when the other party should give the directions to ship, that the party will be expected to give shipping instructions or make his purchase within a reasonable time. \* \* \* The seller was required to have sufficient lumber on hand for shipping purposes so as to fill at least forty car loads a month if ordered. \* \* \* The law does not expect the plaintiff, after entering into a contract like this, to stack up five million feet of lumber and keep it there for an indefinite time until the defendants can find a profitable market; but, on the other hand, the law does not expect, in view of the fact that the contract provides that they shall await shipping instructions, that the defendants must take it out immediately, or that they must order every month between forty and fifty cars."

We held on the former appeal, in effect, that the present contract was dependent and mutual; that it obligated the defendants to give shipping instructions within a reasonable time, and obligated the plaintiff within a like reasonable time thereafter to make the shipments accordingly. It was the duty of the defendants to take the first step in the performance of this executory contract. If they refused or failed to do so by giving the required shipping instructions within a reasonable time they were in default, and thereby discharged plaintiff from its obligation to perform, which was dependent upon defendants taking the initiative. The contract was executory, and the obligations of the parties were mutually dependent. *Canal Co. v. Gordon*, 6 Wall. 561, 569, 18 L. Ed. 894; *Hinckley v. Pittsburgh Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967; *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953; *The Eliza Lines*, 199 U. S. 119, 26 Sup. Ct. 8, 50 L. Ed. 115; *Washington County v.*

Williams, 111 Fed. 801, 49 C. C. A. 621. The plaintiff's obligation arose only upon the defendants giving the necessary shipping instructions, and it was in no default until those instructions were given. In the absence of such instructions no obligation to tender lumber to the defendants arose. *Hinckley v. Pittsburgh Steel Co.*, supra. The requested instructions were not applicable to the case before the court, and were properly refused.

The failure to give other instructions requested by defendants is also complained of as error. Some of these declare that the mere assertion of a purpose not to perform by defendants at some indefinite time in the future in the absence of an unequivocal present refusal to do so would not constitute a breach of contract; that the contract could not be abandoned by defendants prior to the expiration of the time for its complete execution unless the defendants refused to perform; that under certain assumed conditions plaintiff would be estopped from asserting that defendants had broken the contract; that plaintiff might under certain circumstances be entitled to recover for any additional expenses incurred by it, by reason of defendants ordering widths not contemplated by the contract. These and other like declarations were perhaps well enough as abstract propositions of law (as to this we express no opinion); but they had no place in this case. The jury was fully instructed without them. The issue was very simple, namely, which party, plaintiff or defendants, first broke the contract? The result depended exclusively upon the answer to this one question. The learned trial judge in his charge left nothing uncertain on this issue. The charge was full and explicit, to the effect that if defendants failed to give shipping instructions warranted by the contract within a reasonable time it thereby made such a breach of the contract that plaintiff could recover, but if plaintiff failed to comply with proper shipping instructions and to fill defendants' orders within a reasonable time after receiving them then plaintiff could not recover. He appropriately confined the attention of the jury to a consideration of this one question. Abstract propositions of law, when not pertinent and necessary to the case as made, tend rather to confuse than aid a jury in its deliberations. It is better practice to do as was done here—reduce the issue of fact to as limited a compass as is consistent with full instruction to the jury. In this way the most intelligent verdicts are likely to be secured.

The court also refused to give an instruction in the language as requested by defendants' counsel concerning the measure of damages. This was not error if it gave, in its own language, the correct instruction on that subject. The court told the jury, in effect that, if plaintiff was entitled to recover at all it should recover the difference between the contract price and the market value of the lumber at the time and place of delivery. The proof at the second trial differed from that at the first in this: that it was made to appear that there was a market for the lumber in question at Helena, Ark.—the place of delivery. The rule as given to the jury, just stated, was the true and exhaustive rule, and nothing more need have been said on the subject; but in view of the fact that plaintiff had actually sold its lumber before suit was brought, the court further told the jury that

the duty rested on plaintiff to exercise reasonable diligence in securing the best price the market afforded. Of this the defendants could not complain. It gave them all they were entitled to.

Some other less important questions, called to our attention by the assignment of errors, have been carefully considered. The case has been twice tried, and the dominant and meritorious issue of fact has been twice found in favor of the plaintiff. In view of this fact, hypercritical attacks upon the proceedings below should not be encouraged. Finding no reversible error, the judgment is affirmed.

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SCOFIELD et al. v. BROWNE.

(Circuit Court of Appeals, Third Circuit. December 11, 1907.)

No. 35.

1. PATENTS—DESIGNS—EVIDENCE OF PATENTABLE NOVELTY.

The fact that articles when made after a patented design were more salable and in greater demand is evidence that such design possesses the qualities of novelty and attractiveness to the eye, which rendered it patentable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 52.

Utility, extent of use, and commercial success as evidence of invention, see note to *Doig v. Morgan Mach. Co.*, 59 C. C. A. 620.]

2. SAME—INFRINGEMENT—ORNAMENTAL HEAD FOR BROOCHES.

The Frenot design patent No. 35,922 for a design for an ornamental head for brooches, etc., discloses patentable novelty. Also *held* valid as against the defense of public use for more than two years and infringed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Louis M. Sanders, for appellants.

H. V. Osborne, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. This is an appeal from a decree for the complainant in a suit founded upon design patent No. 35,922, dated May 27, 1902, issued to Louis D. Frenot, assignor, etc. In the specification as at first presented, the leading or material feature of the design was said to consist "in the representation, in relief, of the face or head of an animal in front view, the mouth being opened to expose the teeth and the long hair at the cheeks being combed outwardly"; and to this was added the statement that "the animal is preferably a lion." The design as thus described was rejected by the Patent Office "as offering nothing patentable, in view of the various lions' heads shown in English heraldry"; and the applicant, to escape the imputation that this child of his invention was related to such fantasies, submitted the substituted specification upon which the patent in suit was allowed and issued, viz.:

"Figure 1 is a front elevation, and Fig. 2 is a side elevation, of an ornamental head for pins, brooches, etc., of my new design. As shown in the drawings, the leading or material feature of my design consists in an ornamental head for brooches, scarf pins, and similar articles, having at its front the

shape of the forward portion of a carnivorous animal's head, with mouth open to expose the teeth, and long hair at the cheek spread outwardly and displayed as a broad base, the back of the ornamental head being plane. In said drawings, 'a' indicates an ornamental head of my new design, having at its front the configuration of the forward portion of the head of a carnivorous animal, with open mouth, 'b,' displaying teeth, 'c, c.' At the cheeks is long hair, 'd,' combed outward and displayed as a base, and beyond this is a background of further diverging ray-like members, 'e.' The back of the ornamental head is plane, as at 'f.' Having thus described the invention, what I claim as new is: The design for an ornamental head for brooches, scarf pins, and similar articles, as herein shown and described."

Figure 1 of the drawings is here reproduced:



It is not for us to say that this "most delicate monster" does not "please the eye of the beholder," for the proofs show that it has enhanced the salable value and enlarged the demand for the trinkets it was intended to adorn. Walker on Patents, § 22. And as to infringement there can be no reasonable doubt. The head of the defendants does not materially differ from that of the patent, being distinguishable from it only by the absence of the ray-like

members, "e"; and we cannot suppose that the removal of these appendages was at all likely to be observed by an ordinary purchaser. *Gorham Co. v. White*, 14 Wall. 511, 20 L. Ed. 731. The two designs are certainly very much alike in general appearance. Each is "an ornamental head," and both, if either, may be regarded as that of "a carnivorous animal"; and each has the mouth open to expose the teeth, and "like the toad, ugly and venomous, wears yet a precious jewel in his head." The only difference worthy of mention, as has been noted, is in what may be called the whisker portion of the face, and it is not possible to believe that the intention of the defendants in creating this difference, was to make a design "so various that the mind of desultory man, studious of change and pleased with novelty, might be indulged."

It has been argued that the patent in suit is invalid, because, as contended, the design patented had been for more than two years in public use when the application was filed; but upon this subject we do not deem it necessary to add anything to what was said by the learned judge of the court below. After independent consideration of the proofs, we agree with him that this defense was not made out, and think that his conclusion in this regard was amply vindicated in his opinion, as follows:

"The alleged invalidity of the patent is based on the contention that the design was in public use more than two years prior to the filing of the application for the patent. The application was filed February 8, 1902. The patent was granted to the complainant as assignee of Louis D. Frenot. Frenot, who was offered as a witness by the complainant, stated on cross-examination

that he thought he sold the design to the complainant in the fall of 1899, and that shortly thereafter the complainant began to manufacture articles from the design and to put them on the market. Indeed, he said he was sure that he turned over his first mold to the complainant in the fall of 1899. The complainant himself also testified that he thought he purchased the mold from Frenot in the fall of 1899. If there is no mistake in this testimony it follows, as a matter of course, that the patent is invalid. But I think these witnesses were mistaken. They were both testifying from memory, and without the aid of books or other memoranda. The complainant was subsequently recalled, and said that after giving his first testimony he had examined his books and found that the first sale of any article made from Frenot's design was on September 22, 1900; that the first pattern of the design was made on July 12, 1900; and that the first work ever done by Frenot for him was on June 2, 1900. Frenot, in his testimony, said that at the time he sold his invention to the complainant he was working for the complainant. Esther Hargreaves was also called as a witness. She is the complainant's bookkeeper, stenographer, and general office clerk. She in all respects corroborates the complainant as to the facts disclosed by his books. I am satisfied that Frenot went to work for the complainant about June 2, 1900, and that the design was made by him after that date. Consequently, the defense of invalidity is not supported by the proofs."

The decree is affirmed.

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ARROWSMITH MFG. CO. v. E. T. GILBERT MFG. CO.

(Circuit Court, W. D. New York. December 11, 1907.)

No. 292.

PATENTS—INVENTION—INSTEP SUPPORT.

The Arrowsmith patent, No. 748,553, for an instep support or arch prop, claims 3 and 4 are void for lack of novelty and patentable invention, in view of the prior art.

In Equity. On final hearing.

Stephen J. Cox, for complainant.

Albert E. Lynch and Victor C. Lynch, for defendant.

HAZEL, District Judge. This suit relates to claims 3 and 4 of patent No. 748,553, issued to James W. Arrowsmith, dated December 29, 1903, for improvement in instep supports or arch props. The third claim, which is broader than the fourth, consists of the following elements: (1) A metallic plate to fit the under surface of the normal arch of the instep; (2) a metallic side portion to fit the side surface of the instep; (3) a nonmetallic or leather cover formed to fit the upper surface of the support; and (4) fastenings connecting the plate and cover located at points near the line of junction of the body and side portions, the covering piece being free from the plate at all other points. The answer denies patentability, novelty, and infringement, and alleges anticipation. Counsel for complainant with commendable frankness admits that the involved claims are narrow, and are limited to the cover fastenings of the device "at points near the line of junction of the body and side portions." It was essential that the leather or nonmetallic cover should be attached to the unyielding metal plate near the line of junction; that being regarded as the point of greatest

depression. Obviously the functional objects of the patent were to prevent the fastenings coming in contact with the foot, and to secure close contact between the cover and metallic plate.

Complainant contends that the location selected for the rivet holes, namely, "at points near the line of junction," was not an obvious thing to do, because apparently the crystallization caused by the yielding action of the plate was most likely to occur at such points, but he discovered that such points were the only places where crystallization was impossible. This claim, however, in view of the state of the art, is not convincing. The patent is an improvement in Arrowsmith's prior patent, No. 717,523, which discloses a metallic arch prop with the side brace turned upward and molded to fit the instep; and hence, as complainant concedes, the patent and claims in suit are plainly narrow. To ascertain the intention of the inventor regarding his purpose in locating the fastening means near the point of junction, reference may be had to the specification of the patent. Such specification provides for locating the fastening devices "near the edge of the body portion 1 on the side next the side from which the tongues 2 extend upward." By the adaptation of such method of fastening, a free edge and a free body portion are provided which enable the user of the arch prop to easily fit the same into the shoe, and the covering is held in close contact with the metallic plate. A leather cover for a metallic instep support, having a configuration to conform to the instep of the foot, did not at the date of the patent in suit involve invention. See English patent to Davies, No. 14,351, of 1898, and patent to Holland, No. 579,874, of March 3, 1897. True, these patents specify a plate inclosed in a case of leather by stitching, and do not describe a cover such as that described in the patent in suit, but they nevertheless point the way to prevent interference with the yielding action of the metallic plate. The plate of the Holland patent is not curved or formed to fit the entire surface of the instep arch, yet such plate is fastened by rivets near the line of junction of the body and side portions of the plate, and such covering would be free at all points were it not stitched to the under leather covering. The Holland patent is a close approach to the claims in suit, although the metallic portion and leather piece are unlike complainant's plate and cover, in that the former fits only the side of the instep arch, and the latter is used to inclose the plate between the leather parts which are stitched together.

At the hearing it was conceded by counsel for complainant that defendant's Exhibit 1 in evidence does not come within the scope of claims 3 and 4, and the question, therefore, of whether the limitation of such claims to the means of fastening the cover to the plate near the line of junction or at the points stated in the specification was a patentable invention, is much simplified. It is true enough that the metallic portion of the Arrowsmith patent as to its curvature to fit the instep arch and its cover are not found in the prior art, but to make contact of these parts by riveting near the line of junction of the body portion and side portion of the arch prop was not in my opinion a patentable discovery. It is quite probable that the Arrowsmith device is better and more salable than any shown by the prior

art, but simply to fasten the covering piece to the plate near the line of junction, as described in the specification and claims, is something which it is thought would occur to the ordinary skilled mechanic employed to construct such a device. If he desired to place the rivets out of contact with the foot, and firmly hold together the plate and leather covering, he would beyond question immediately determine that securing the fastenings at the point of greatest depression in the manner shown by the patent was the proper and usual thing to do.

In considering the question of novelty, I have not overlooked the presumption in favor of the validity of the patent that arises from its grant. The Holland patent, upon which reliance is placed, was not considered by the Commissioner of Patents, and it is thought to be such a close approach to the claims in suit that the fact that the commissioner did not cite it could not have been due to its dissimilarity.

Accordingly claims 3 and 4 of the patent are void for want of patentability, and the bill must be dismissed, with costs.

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VICTOR TALKING MACH. CO. et al. v. HOSCHKE.

(Circuit Court, S. D. New York. December 27, 1907.)

PATENTS—INFRINGEMENT—TALKING MACHINES.

The Berliner patent, No. 534,543, for an improvement in talking machines, claims 5 and 35 *held* valid and infringed on a motion for preliminary injunction on prior adjudications of the validity and scope of such claims.

In Equity. On motion for preliminary injunction.

Horace Pettit, for complainant.

Waldo G. Morse, for defendant.

HOUGH, District Judge. The patent in suit is No. 534,543, granted to Berliner, and the infringement asserted is of claims 5 and 35, so frequently before the courts of this circuit. 140 Fed. 860; 145 Fed. 350, 76 C. C. A. 180; 146 Fed. 534; 148 Fed. 1022, 79 C. C. A. 536; 150 Fed. 147; (C. C. A.) 154 Fed. 58. The rulings which are the foundation of the decision in *Victor Talking Machine Co. v. Leeds & Catlin Co.* (C. C.) 146 Fed. 534, and the contempt proceeding following affirmance of that decree are about to be reviewed in the Supreme Court. Careful examination of the voluminous record here submitted strengthens the impression formed at hearing, that this is an endeavor to escape the necessary effect of the decisions of the Circuit Court of Appeals above referred to. While recognizing fully the gravity of the questions now awaiting decision in the highest court, and the novelty in that court of at least two of the questions involved, I am not authorized to indulge in speculations of my own regarding them, but am bound to follow and apply the decisions controlling in the courts of this circuit. It is admitted that those courts have declared the Berliner patent not to have been anticipated nor abandoned, to be patentable and not invalidated by prior use (140 Fed. 861), and



not to have expired with the expiration of numerous foreign patents (146 Fed. 534).

The present assertions are (1) that evidence is now offered for the first time tending to show that the Suess Canadian patent (No. 41,901) absolutely expired six years from the granting thereof, whereby the patent in suit also expired; and (2) that, while this circuit has decreed the validity of the Berliner patent, it has never been called upon to interpret its scope. The evidence regarding the Suess patent as a defense is the affidavit of Mr. Walker of the Canadian bar declaring that in his opinion the effect of not paying the second partial fee provided for by the Canadian patent act is to absolutely terminate the patent at the expiration of six years. It is admitted that this has never been the subject of a decision by the Canadian courts. It may well be that this is the universal opinion of the Canadian bar, but it does not meet the ruling of Judge Townsend in 146 Fed. 538, who there held:

"That the duration of the United States patent is limited by the duration of the legal term of the foreign patent, and is not limited by any lapse or forfeiture of any portion of said term by means of any condition subsequent."

The nonpayment of the second partial fee under the Canadian act is clearly a condition subsequent, and the legal term of a Canadian patent is not 6, but 18 years. It may be that such legal term absolutely ends when the second partial fee is not paid, and that the words "lapse" or "forfeiture" would not be used by Canadian lawyers, and a lease may by its language end for nonpayment of rent or other breach of condition; but such termination does not change the original "legal term" either of the patent or the lease. Judge Townsend's declaration of the law is not a construction of the Canadian patent act or a declaration of what the Canadian law on that subject may be, but a statement of the law of this country as affected by a Canadian statute, and there is no intimation in his ruling that the result would have been different had the Canadian practice appeared to be as it is now declared to be by the affidavit of Mr. Walker.

As to defendant's second contention, I do not think it true that the courts of this circuit have not interpreted the scope of the Berliner patent. Judge Hazel declared that:

"The lateral undulations in (complainant's) record automatically guide or propel the stylus and diaphragm in its course over the disc, from its outer circumference toward the center, and the stylus travels in an apparently direct radial path while at the same instant of time it is pulsed or incited by the sound wave."

This is a description of the method of operation of complainant's talking machine. The principle of operation of complainant's machine as declared in the same decision (140 Fed. 863) is the "lateral vibration of the stylus point and the propelling of the same over the surface of the record without mechanical assistance and through the means of the groove alone." Such is said to be the primary object of the inventor; and, again (page 864 of 140 Fed.) it is stated that the "principle of Berliner's invention rests upon the practicability of propelling the stylus in the groove across the surface of the record without a feed screw or other mechanism." It has thus been definitely held that Berliner's invention covers the reproduction of sound by means of a

vibrating reproducing stylus, shaped for engagement with the laterally undulated groove of a sound record, and free to be vibrated and propelled by the revolving record itself, without the assistance or guidance of a feed screw or other mechanism. The stylus of the patent being engaged with the spirally shaped groove of a horizontally revolving record is compelled by such revolution to move in a radial path toward the center of disc and spiral, while its contemporaneous contact with the sides of the disc groove causes a pulsation of the diaphragm and reproduction of the sound recorded by indentations or undulations of the groove walls.

Defendant's machine in every material feature is complainant's, and so is the disc obtained from defendant for use with that machine. The only difference between the two machines is that defendant's has within its free arm a spring tending to press the stylus against the inner wall of any groove with which it may be engaged, and causing arm and stylus, when disengaged from any groove, to pass the stylus point through the arc of a circle whose radius is the free arm. This is the distinction upon which defendant relies. That it is not a feed screw or other equivalent mechanism seems to me plain. If a record be constructed with a groove so wide that it is not possible for an absolutely free stylus to engage both sides of the groove by merely rotating the grooved disc, it is shown that complainant's machine will not reproduce articulate sound, while the defendant's will reproduce the same, provided that the sound record is entirely upon that side of the groove with which the spring aforesaid compels engagement. And the result is the same if the disc be constructed with a wall formed by lowering the plane of the outer edge of the disc. Such wall is in effect the inner side of a groove. In other words, the spring enables a stylus otherwise free to reproduce articulate or musical sound recorded upon one wall, instead of two.

But it is also true that the spring of defendant's machine is not strong enough, and evidently not intended to be strong enough, to prevent its use with disc records of narrow grooving bearing sound markings or indentations on both sides of the groove, and with such records the presence or absence of the spring in defendant's machine makes no difference, as has been demonstrated in the presence of counsel. Were defendant selling a machine containing this spring, together with wide grooved or wall records with reproducing indentations only upon the side against which the spring presses the stylus, it may be that no infringement would be found; but, when defendant's machine is used in the same way, with the same disc, and produces the same effect by the same means, as does complainant's machine, it is an infringement notwithstanding the spring, and this is what defendant has done according to the proof.

It seems clear, therefore, that defendant has infringed complainant's patented combination, and the fact that one element in the combination (i. e., the machine) may be used in combination with articles bearing no resemblance to the other elements of the combination as patented cannot make any difference. This litigation is not concerned with what defendant might do, but what he has done. He

might perhaps have avoided infringement by varying his combination; so might the defendants in the last case concerning this patent. 154 Fed. 58.

An injunction may issue as prayed for.

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THE GEN. J. A. DUMONT.

(District Court, E. D. Virginia. December 17, 1907.)

1. MARITIME LIENS—REPAIRS ORDERED BY CHARTERER—PROVISIONS OF CHARTER PARTY.

A steamer owned by a nonresident was chartered for a number of months by a corporation and used to carry passengers between Norfolk and the Jamestown Exposition. The charter party required the charterer to make all repairs and to return the vessel in as good condition as when received. During such time libellant, doing business in Norfolk, made repairs on the vessel on order of the charterer, having knowledge that it was not the owner and being chargeable with such knowledge as proper inquiry would have disclosed as to the terms of the charter. The evidence, moreover, indicated that credit was given to the charterer and not to the vessel. *Held*, that libellant was not entitled to a lien for such repairs.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Maritime Liens, §§ 5, 12.]

2. SEAMEN—LIEN FOR WAGES—EFFECT OF PROVISIONS OF CHARTER PARTY.

The provisions of a charter party cannot deprive a seaman of his right to a lien on the vessel for his wages.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, §§ 157-164.]

In Admiralty. Libel to recover for repairs to chartered vessel.

E. R. Baird, Jr., for libellant.

W. Leigh Williams and Foster & Foster, for respondent.

WADDILL, District Judge. The steamer Gen. J. A. Dumont, owned by the claimant, Edward B. Booz, of Baltimore, admitted to be a foreign steamer, and whose home port is presumably Baltimore, was on the 16th day of October, 1906, chartered to the Jamestown Exposition Excursion & Steamboat Company, a corporation existing under the laws of the state of New Jersey, doing business at the city of Norfolk, Va., familiarly known as the "Water Belt Line," for a period of seven months from the 1st day of May to the 30th day of November, 1907, to be used on the waters of Elizabeth river, Hampton Roads, and vicinity as a passenger steamer between the city of Norfolk and the Jamestown Exposition grounds. While under such charter certain repairs were made upon the steamer by the libellant at the instance of the charterer, to recover the cost of which, namely, \$808.91, the libel was filed. The owner of the Dumont resists payment on the ground that the charterer ordered the work done, and was solely responsible therefor under the terms of the charter party.

The provisions of the charter party bearing upon the issues raised are, in substance, that the charterer should pay all expenses of operation, crew hire, coal bills, office expense, victualing, and such other matters as might be necessary to the operation of the Dumont, and

that no expense of any character whatsoever should be chargeable to the owner of the Dumont; that all bills should be contracted in the name of the charterer, who further agreed to assume all risk of damage or loss from any cause whatsoever, to make all repairs necessary to keep said steamboat in good running order during the term of the charter, and at the expiration thereof to deliver the Dumont to her owner in Baltimore in as good condition as when received, ordinary wear and tear excepted, free from all bills, liens, or incumbrances of any nature whatsoever, the charterer agreeing to pay for any repairs necessary to place the Dumont in the condition she was when delivered to it; and the charterer, as a condition precedent to the delivery of said Dumont, was also required to give bond to the owner thereof in the sum of \$5,000, conditioned for the faithful performance of all the terms, clauses, conditions, and covenants contained in the charter party.

After a careful review of all the evidence in the case, the conclusion reached by the court is that the libelant is not entitled to recover. It is quite clear from the evidence that the work done on the Dumont was ordered neither by her owner, nor the master or other officer of the vessel, nor agent of the owner authorized to charge the same, but by the charterer. While it is true the owner seems to have known that work was being done, and at intervals his representatives were present at the shipyard, still they were not so connected with the work as to impose liability therefor on their principal. The libelant knew that the company operating the steamer was not its owner, and either knew or was put upon inquiry as to the interests and relation of the charterer, the Jamestown Exposition Excursion & Steamboat Company, to the Dumont, and is chargeable with such knowledge as diligent inquiry would have elicited. Had it done this, it would easily have discovered the conditions under which the steamer was operated, and that the charterer, and not the owner, nor the vessel, was responsible for repairs such as libelant made.

Moreover, the lien upon the vessel cannot be sustained in this case. The repairs were made at the port of Norfolk, the home of the libelant, and where the Dumont was being operated by the charterer in local service that lasted for some months, the charterer being engaged in the conduct of what was supposed and believed would be a large and lucrative business, namely, transporting passengers between the city of Norfolk and the Jamestown Exposition; and it is quite apparent that in this particular transaction the dealing was with the charterer, the owner *pro hac vice* of the vessel, in person, and that the credit was not given or extended on account either of the owner or of the vessel, but to the charterer individually. Assuming, however, the authority of the charterer to charge the vessel, which as a matter of fact did not exist in this case, nothing was suggested indicative of a purpose so to do, and *prima facie* the credit was given upon the charterer's credit, as distinguished from that of the vessel or her owners, under the facts and circumstances of this case. *The Aeronaut* (D. C.) 36 Fed. 497; *The Samuel Marshall* (D. C.) 49 Fed. 757.

The facts applicable to the claims of the several petitioners are not in all respects the same as those of the libelant; but they are so essentially, in so far as their right of recovery against the Dumont is con-

cerned. They either knew or were placed upon inquiry as to the existence or nonexistence of the charter party in question, which inquiry they failed to make, and, moreover, should be held under the facts and circumstances of this case to have extended credit upon the faith of the charterer, with whom they contracted, rather than upon that either of the vessel or her owner. This case, with the exception of the claim for seaman's wages, is completely covered and controlled by the comparatively recent decisions of the Supreme Court of the United States of *The Kate*, 164 U. S. 458, 462, 464, 17 Sup. Ct. 135, 41 L. Ed. 512, and *The Valencia*, 165 U. S. 264, 271, 272, 17 Sup. Ct. 323, 41 L. Ed. 710; and under them the libellant, as well as the several petitioners other than the seaman, who have intervened herein, cannot recover.

The seaman is entitled to a lien upon the *Dumont* for the amount of his wages, and should not be deprived of the same, or denied the right of recovery against her, because of any provisions contained in the charter party. The claim is for labor performed in the ship's navigation, and the maritime lien in his favor is given by law, based upon the necessity of the service thus rendered by one of this class, favored by law because of the hazards they encounter and hardships they endure in the interest of the ship and her owners and the furtherance of commerce. *The Fanny Gardner*, Fed. Cas. No. 4,642; *Flaherty v. Doane*, Fed. Cas. No. 4,849; *The Samuel Ober* (D. C.) 15 Fed. 621; *The International* (D. C.) 30 Fed. 375; *The Atlantic* (D. C.) 53 Fed. 607.

A decree may be entered accordingly, dismissing the libel and petitions, except the petition of George Hoffert for wages, for which a decree should be entered.

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UNITED STATES v. LONABAUGH et al.

(District Court, D. Wyoming. July 19, 1907.)

1. CONSPIRACY—CONSPIRACY TO DEFRAUD UNITED STATES—SECURING TITLE TO PUBLIC LANDS.

A conspiracy to induce the Land Department of the United States by fraudulent means to dispose of public lands in a way not authorized by the statutes is one to defraud the United States, within the meaning of Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], although it receives payment for the lands and suffers no pecuniary loss, and, if accompanied by an overt act, is indictable under said section.

2. STATUTES—CONSTRUCTION OF PENAL STATUTES.

Although penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of Congress, and this intention is to be collected from the words employed in the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Statutes, §§ 322, 323.]

3. CONSPIRACY—CONSPIRACY TO DEFRAUD UNITED STATES—ENTRY OF COAL LANDS.

Under the coal land statute (Rev. St. § 2350 [U. S. Comp. St. 1901, p. 1441]), which expressly provides that only one entry of coal lands shall be allowed to the same person or association of persons, and that no association of persons, any member of which shall have taken the benefit of the statute, either as an individual or as a member of any other associa-

tion, shall enter or hold any other lands under its provisions, any agreement, the purpose of which is to evade such provisions and to secure indirectly lands which could not be secured directly thereunder, constitutes a conspiracy to defraud the United States, within the meaning of Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676].

4. PUBLIC LANDS—EQUITABLE TITLE—EFFECT OF FRAUDULENT ENTRY.

The rule that where one has lawfully and in good faith made an entry of public lands and has obtained his final receipt he is vested with the equitable title thereto, and may make a valid conveyance thereof, is not applicable where the entry was not in good faith, but is a fraud of the law, since in such case the equitable title did not pass to the entryman.

5. CONSPIRACY—CONSPIRACY TO DEFRAUD UNITED STATES—UNLAWFUL ENTRY OF COAL LANDS.

Defendants entered into an agreement, the purpose of which was to obtain title to a large tract of coal lands from the United States and to vest such title in a company organized by them for the purpose. Pursuant to such agreement, they procured third persons to make individual entries under the statute which were secured by false testimony. Defendants furnished the money to pay for the lands, and, when final receipts were obtained, they took the same, paid small sums to the entrymen, and took deeds from them to the company. *Held*, that such agreement was a conspiracy to defraud the United States, within the meaning of Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676].

6. CRIMINAL LAW—LIMITATION OF PROSECUTIONS—COMMENCEMENT OF PERIOD OF LIMITATIONS.

The offense in such case was not complete until the final receipts held by defendants were surrendered and patents obtained, from which time only the statute of limitations began to run.

7. SAME—HOMESTEAD ENTRY OF COAL LANDS.

A conspiracy to secure the title to coal lands from the United States through a homestead entry may constitute a conspiracy to defraud the United States, within Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], although such lands are not subject to lawful homestead entry, where the title is secured by means of false proofs.

On Motion for New Trial.

Sylvester R. Rush and Timothy F. Burke, U. S. Attys.

John W. Lacey, Gibson Clark, and N. K. Griggs, for defendants.

RINER, District Judge. Numerous grounds are set out in the motion for a new trial and were argued by counsel with distinguished ability. I shall not attempt, in disposing of the motion, to discuss them separately. Two principal questions are presented: First, whether the acts which the defendants are charged with conspiring to do, would amount to a fraud upon the government if carried out; and, second, if a conspiracy is established, when was the offense complete? The first question may be disposed of in a word, for it was admitted at the argument, as I understood counsel, that in order to bring the defendants within the meaning of section 5440, Rev. St. [U. S. Comp. St. 1901, p. 3676], the words "conspiracy to defraud the United States" do not necessarily mean that there shall be pecuniary loss or damage to the government, resulting from false representations made to its officers in the performance of their duties, but that any false practice or trick set in motion for the purpose of inducing the government officials, in executing the laws of the United States in cases where they must act upon statements made by the parties interested, to act in a way which would be unlawful if the real truth were known, is a fraud

upon the government. If any doubt heretofore existed upon that question, it has been forever set at rest by the decisions of the Supreme Court of the United States. The court in the case of *Hyde v. Shine*, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90, said:

"Whatever may be the rule in equity as to the necessity of proving an actual loss or damage to the plaintiff, we think a case is made out under this statute by proof of a conspiracy to defraud and the commission of an overt act, notwithstanding the United States may have received a consideration for the lands and suffered no pecuniary loss."

There are other cases where the Supreme Court has given expression to the same views, so that I think it may be said to be settled that, where the proof shows a conspiracy to defraud and the commission of an overt act, it matters not that the government was paid its price for the land. Whenever it is made to appear that the wrong disposition of the public lands was induced by fraudulent practices on the part of the party charged therewith, and done for the very purpose of circumventing the law and warping its due administration, the United States is defrauded. I think there can be no question in this case that there was such a conspiracy or unlawful agreement on the part of these defendants, and its very purpose was to induce the land department of the government, which is charged with the disposition of public lands, to dispose of the lands described in the indictment in a way not contemplated by the statute, and in violation of the statute. They knew that no individual could acquire more than 160 acres of land, and that an association or corporation could not acquire more than 320 acres, except in one case, for which the statute clearly provides, for such is the plain provision of the statute. But it was urged in argument that because the statute does not in express terms require an affidavit that the entryman is not taking the land for the benefit of another that, therefore, he may lawfully make a contract to sell or convey by deed, if not prior, certainly subsequent, to his making final proof. While it is undoubtedly true that penal laws are to be construed strictly, yet the intention of Congress must govern in their construction. If a case be within the intention it must be considered as within the letter of the statute. In other words, although penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of Congress, and this intention is to be collected from the words employed in the statute. Where there is no ambiguity in the words, there is no room for construction. A case would have to be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in searching for an intention which the words themselves did not suggest. As was well stated by the Court of Appeals for this circuit in the case of *Swarts v. Siegel*, 117 Fed. 18, 54 C. C. A. 404:

"Attempted judicial construction of the unequivocal language of a statute or of a contract serves only to create doubt and to confuse the judgment. There is no safer or better settled canon of interpretation than that when the language is clear and unambiguous, it must be held to mean what it plainly expresses, and no room is left for construction."

The coal land laws (section 2350 [U. S. Comp. St. 1901, p. 1441]) provide that only one entry shall be allowed to the same person or association of persons; and an association of persons, any member of which shall have taken the benefit of such sections of the statute (that is, the sections which contain the provisions allowing them to enter coal lands) either as an individual or as a member of any other association, is prohibited from entering or holding any other lands under the provisions of those sections. So that when these defendants attempted to secure the lands described in the indictment in the manner disclosed by the evidence in this case they knew that they were committing a fraud, because the very agreement itself provides for doing indirectly what they, as individuals or as members of an association or corporation, could not do directly.

In the determination of the second question, it is necessary to look to the object and design the parties had in mind when they entered into this unlawful agreement. What was the object and purpose of the agreement? Merely by false affidavits to get the government to convey the land described in the indictment to the different entrymen and stop there? I think no one will contend for a moment that they had any such purpose in mind. The purpose and design was not only to do that, but by the same methods to vest the title in this corporation, organized by them for the sole purpose of taking the title. But it was insisted, as I understood counsel, that upon final proof and the issuance to the entryman of a certificate of final payment by the receiver, regardless of the question of fraud in securing the entry, the final certificate conveyed as against the United States the apparent title and right of possession, that the entryman had a right to convey, and that the United States in order to reinvest the title in itself must institute judicial proceedings to set aside the apparent or defeasible title vested in the entryman or other grantees. I do not so understand the law. It would, it seems to me, open wide the door for the perpetration of frauds of various kinds in the sale and disposition of public lands. The conveyance, it may be true, conveyed such title as the entryman had, but what title did he get? The proofs offered were false and fraudulently made, for the very purpose of misleading the government to part with its title to the lands described in the indictment. I have examined with care every case to which my attention was called during the oral argument. Most of them are civil cases, and I think in all of them (except one or two, where rights of bona fide purchasers without notice of the fraud were involved) the entries up to and including the final receipt were made in good faith and in strict conformity with the law, and in determining the question here presented the distinction between such cases and entries made in fraud of the law, although otherwise regular in form and procedure, must be kept constantly in mind. In the former cases vested rights may be said to accrue upon performance of the conditions required by law. In the latter, no vested rights can be acquired by the entryman however regular in form the proceedings may have been. It may well be conceded that in all cases where the entryman has acted in good faith and has fully complied with the provisions of the statute, has not been guilty of any fraud, and has done no act



inconsistent with the law, he has acquired a right of which he cannot be deprived, because as was said by the Supreme Court in the pre-emption case of *Myers v. Croft*, 13 Wall. 291, 20 L. Ed. 562, "The object of Congress was attained when the pre-emptor went with clean hands to the Land Office and proved up his right and paid the government for his land." But it would, it seems to me, be to violate every principle of interpretation to declare that such authorities support the views so earnestly contended for here. The rule is well stated by Judge Shiras of this circuit, in the case of *United States v. Steenerson*, 50 Fed. 504, 1 C. C. A. 552. After citing several decisions of the Supreme Court, which he said were called to his attention by counsel, in which it was held that when the right to a patent of lands has once become vested in a purchaser or pre-emptor, the same are segregated from the public domain, are no longer subject to entry, and the vested right to the patent thereto is equivalent to a patent actually issued. He then adds:

"The principle on which these decisions are based is that when a homesteader or pre-emptor has, in good faith, performed all the acts which, under the provisions of the statutes of the United States, are necessary to complete his right to the land, then he becomes, equitably, the owner of the same, and the United States holds the naked legal title as a trustee for his benefit. For the protection of his rights, thus acquired, it is held that in a contest involving the title of the land an established right to a patent will be deemed to be the equivalent of a patent. This rule, however, has been adopted solely as a means for the protection of those who have, in good faith, established a right to a patent by performance of the requisite conditions. The final certificate or receipt acknowledging payment in full, and signed by the officers of the local land office, is not in terms nor in legal effect a conveyance of the land. It is merely evidence on behalf of the party to whom it is issued. In a contest involving the title to land, wherein a person claims adversely to the United States, it is open to such claimant, notwithstanding the legal title remains in the United States, to prove that by performance on his part of the requisite acts he has become the equitable owner of the land, and that the United States holds the legal title in trust for him, but as the claimant in such case has not received a patent or formal conveyance, and has not become possessed of the legal title, he is required to show performance, on his part, of the acts which, when done, entitle him, under the law, to demand a patent of the land. When evidence of this kind is offered on behalf of the claimant it is open to the United States to meet it by proof of any fact or facts which, if established, will show that the claimant has not become the real owner of the realty. If it be true, in a given case, that the entry of the land was not made in good faith, but in fraud of the law, certainly it cannot be said that the claimant has become the equitable owner of the land, and that the United States is merely a trustee holding the legal title for his benefit. Fraud vitiates any transaction based thereon, and will destroy any asserted title to property, no matter in what form the evidence of such title may exist."

There can be no question, I think, in the mind of any one who heard the testimony, that if the real facts, as disclosed by the record in this case, had been presented to the Land Department, prior to the issuance of the patent, that each and every entry here involved would have been canceled.

The case of *Hawley v. Diller*, 178 U. S. 476, at page 490, 20 Sup. Ct. 986, at page 991, 44 L. Ed. 1157, approves of the conclusion reached by Judge Hawley, to the effect that the result of the decisions of the Supreme Court were (1) that the Land Department of the government has the power and authority to cancel and annul an entry of public

land when its officers are convinced, upon a proper showing, that the same was fraudulently made; (2) that an entryman upon the public lands only secures a vested interest in the land when he has lawfully entered upon and applied for the same, and in all respects complied with the requirements of the law; (3) that the Land Department has control over the disposition of the public lands until a patent has been issued therefor and accepted by the patentee. While it is undoubtedly true that in all cases where an entryman has, in good faith, performed all the acts which, under the provisions of the statutes of the United States, are necessary to complete his right to the land, the courts will hold that he becomes equitably the owner of the same, and for the protection of his rights thus acquired in a contest involving the title of the land, that an established right to a patent will be deemed to be equivalent to a patent, but, as suggested by Judge Shiras, if in a given case it shall be made to appear that the entry was not made in good faith, but in fraud of law, certainly it cannot be said that the claimant has become equitably the owner of the land, and that the United States is merely a trustee holding the legal title for his benefit.

The case of *United States v. Detroit Lumber Company*, 200 U. S. 321, 26 Sup. Ct. 282, 50 L. Ed. 499, and *Id.*, 131 Fed. 668, 67 C. C. A. 1, is not in point. In that case the rights of a bona fide purchaser were involved, the Detroit Company having purchased most of the land after the issuance of a patent therefor, and dealt directly with the patentees. And it was admitted that at the time of the purchase it had no knowledge or suspicion of wrong in the titles, and the court held that as to these tracts it was strictly a bona fide purchaser. It distinguishes, but does not overrule or modify, the decision in *Hawley v. Diller*, and prior cases to which I have referred.

The object of this conspiracy, as disclosed by the evidence, as I have already suggested, was not only, by false testimony, to induce the government to part with its title to the entrymen and entrywomen, but also to vest the title in this holding company, which the defendants had formed for the purpose of taking the title; so that at the time the final proof was made the object of the conspiracy had not been accomplished. They at that time and at the time the conveyances were made held only such title as the entryman had acquired, and something further was necessary in order to take the land out of the control of the Land Department and vest the title thereto in the coal company, namely, the patent. The patent could be obtained only upon the surrender of the final receipts which in all cases, with perhaps one exception, were in the hands of Mr. Lonabaugh, one of the parties to this unlawful agreement. So that the surrender of these receipts and the receiving and recording of the patents must, I think, be held to be acts to effect the object of the conspiracy, and as these acts all occurred within less than three years prior to the time of finding the indictment, it cannot be said that the statute of limitations has run. It seems to me that if a prosecution can be maintained under this statute the government has here made a case. All of these entries or purchases were made subsequent to the agreement offered in evidence. I say "entries," because the declaratory statement is not, I think, in any sense, a part of the entry or purchase. It is a mere declaration that within a certain time

the party will or expects to purchase, and for the time specified in the statute gives him a preference right to purchase, but unlike a filing, if he fails to proceed within the time limited, no action is necessary on the part of the Land Department. Any other person may come in and, after the expiration of the time of his preference, purchase the land and procure title thereto. These purchasers were all secured by Lonabaugh pursuant to the agreement. Holbrook furnished the money to pay for the land; the entrymen and entrywomen in some cases did not even know where the land was, and as one of these women testified that, while she had been over the country generally, she did not know the particular land upon which her filing was made; she did not know what papers she signed; she did not know what amount of money was paid for the land or who paid for it; and that all she knew about it was that she signed such papers as were presented to her by Mr. Lonabaugh and received therefor the sum of \$100. The record discloses that the papers she signed were a declaration, a final proof and a deed conveying the land to the Wyoming Coal Mining Company. The same facts are disclosed as to almost all of the entries, except that in some cases the entryman received \$500, and in the case of the Roberts' homestead, the testimony shows, as I recall it, that he received \$800.

It further appears from the testimony that as late as January, 1907, Mr. Holbrook carried away and secreted the books of the coal company, showing these transactions and the amount of money paid out in connection therewith, so that the secretary of the company was unable to comply with the requirements of a subpoena served upon him to produce these books for inspection at the trial. To hold that a case is not made out upon such facts would be to hold that the provision of the statute limiting the amount of coal land to be taken under the provisions of the act, by an individual or association, means nothing. In other words, in order to avoid the provisions of this statute, all a man would have to do after exhausting his own right would be to hire some one who had not exhausted his right to make the entry for him, the man desiring the land paying all of the expenses in connection therewith. Such, I think, cannot be the law. *U. S. v. Trinidad Coal Company*, 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640.

It was insisted at the argument that the court erred in submitting the second count of the indictment, which related to the homestead entry of Thomas E. Roberts, to the jury. The record discloses that, while the homestead application was filed prior to the agreement entered into between Lonabaugh and some of the other defendants, the proof was not made until after the agreement, although it was included in the agreement, and that the defendant Robert McPhillamey acted as one of the witnesses. Roberts testified in his affidavit, which was admitted in evidence without objection, that about a month after he had filed on the land, Robert McPhillamey told him that the probabilities were that the country all around there contained coal, and that the land he had filed on might be valuable some day; that Jesse McPhillamey furnished the shack which was placed upon the land, stating to Roberts that it would not cost him a cent, and that he could use his (McPhillamey's) team for hauling it onto the claim. He fur-

ther testified that he had lived upon the land but six days; that after he had made final proof the receipt went to clerk Holmes, and the clerk turned it over to E. E. Lonabaugh. He also testified that later he demanded the receipt from Holmes and Lonabaugh, but they refused to give it up, and soon thereafter he conveyed the land to Jesse McPhillamey for \$800. He further testified that he informed McPhillamey at the time the deed was made that he had no receipt and no patent, and McPhillamey replied: "That is all right, Lonabaugh has the receipt." He said he did not know who the grantee was, but that he had signed the deed, and was paid \$800, and he thought the land went to Jesse McPhillamey, but was not sure. That the proof in this case was false, there can be no doubt. The defendant Robert McPhillamey who was one of the witnesses, testified that actual settlement on the homestead was made February 16, 1902, and that the claimant had resided continuously on the homestead since he first established his residence thereon. This testimony was given on the 27th of November, 1903, and the testimony of Roberts is that he never lived upon the land but six days. The claimant in his testimony, when asked for what period or periods he had been absent from the homestead, replied, "None," but in his affidavit, made on the 22d of March, 1907, testified that he had only lived upon the land six days. That this entry was fraudulent and was a part of the scheme to defraud is, I think, abundantly shown by the record. McPhillamey, although he had advised the claimant that the land was probably valuable for coal, acted as one of his witnesses, and the final receipt was at once turned over to the defendant Lonabaugh, and was followed soon thereafter by a conveyance from the entryman to Jesse McPhillamey and from Jesse McPhillamey to the Wyoming Coal Mining Company. And thereafter, when the patent was issued and ready for delivery, Lonabaugh sent the final receipt to the Land Office at Buffalo, and received the patent. To show that this was a fraud upon the government, I need not do more than to call attention to the case of *Royal B. Stearns v. United States* (decided by the Court of Appeals for this circuit) 152 Fed. 900, 82 C. C. A. 48. In that case, Judge Van Devanter, in the course of his opinion, said:

"Not all public lands are subject to homestead entry, but it does not follow that attempts to make homestead entries of such as are excepted from that mode of disposal are never effective. When the exception turns upon a question of fact, such as whether the lands contain valuable coal or mineral deposits, the determination of which is committed to the land officers and must rest upon proofs outside the records, it is always possible for applicants, by making false proofs, to impose upon these officers and secure the allowance by them of homestead entries of lands of the excepted class. Of course, such entries are fraudulent, but, being allowed in the exercise of a lawful authority, they are not void, but voidable merely, and may be the means of defrauding the United States. Citing numerous authorities. And they may also be fraudulent for other reasons, applicable to all original homestead entries, as where they are made in pursuance of collusive agreements by the applicants to give to others the benefit thereof, or are made by persons who falsely represent themselves as possessing the requisite qualifications when they do not possess them."

It was also insisted that the court should have given to the jury the instruction requested by the defendant, to the effect that if they

found that the lands mentioned in the indictment were entered and proved up on by the entryman in good faith, in their own interest, and after being proved up on were sold, that would not constitute a violation of the law. There was no evidence upon which to base such an instruction. The entire evidence offered upon the trial of the case tended to show bad faith and a deliberate attempt to defraud upon the part of every person connected with the transaction. The only reason that can be given for such an instruction is that the law presumes that the transaction was made in good faith until the contrary is made to appear, and upon that question I think the instruction given to the jury by the court was as favorable to the defendants as they had a right to ask. Some other questions were ably argued by counsel, but to comment upon them in detail would carry this memorandum to unwarranted length.

From what I have already said, it follows that the motion for a new trial should, in the opinion of the court, be denied, and it is so ordered.

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In re MACAULEY.

(District Court, E. D. Michigan. March, 1907.)

1. **BANKRUPTCY—TRANSFERS BY BANKRUPT—ASSIGNMENTS—PAROL AGREEMENT.**

An oral contract made and performed in Michigan, by which a bankrupt assigned the outstanding accounts of his business to claimant in consideration of claimant's indorsement of the bankrupt's paper, which claimant performed more than four months prior to the institution of bankruptcy proceedings, was valid, though some of the accounts had not yet accrued.

2. **SAME—DELIVERY.**

It was no objection to the validity of an equitable oral assignment of certain accounts that actual possession thereof was not transferred.

3. **ASSIGNMENTS—"EQUITABLE ASSIGNMENTS."**

An equitable assignment is an assignment of a portion of a debt which a court of equity will recognize and a court of law will not.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 3, pp. 2434-2437; vol. 8, p. 7652.]

4. **SAME—RECORD.**

A parol equitable assignment of accounts made and to be performed in Michigan was not objectionable because it was not recorded, such assignment not being an agreement to which the Michigan statute, requiring record of chattel mortgages, is applicable.

5. **EVIDENCE—BEST EVIDENCE—DECLARATIONS.**

Parol evidence of financial statements alleged to have been made by a bankrupt was properly excluded in the absence of nonproduction of written statements.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, § 556.]

6. **BANKRUPTCY—TRANSFERS BY BANKRUPT.**

Where a bankrupt orally agreed to assign certain accounts to claimant in consideration of the latter's indorsement of the bankrupt's paper in Michigan, and stated to claimant that he had assigned such accounts to him, the bankrupt being under no legal or equitable obligation to give notice of the agreement, it was not void because he did not put it in writing, for the reason that he considered if he did so he would not be able to retain the money he collected on the accounts, and apply it according to the exigencies of his business.

## 7. SAME—EXECUTORY CONTRACT.

A bankrupt orally contracted to assign the accounts of his business to claimant in consideration of the latter's indorsement of his paper for \$15,000, and told claimant that he had assigned the accounts to him, whereupon claimant indorsed the bankrupt's paper to the amount specified, but no written assignment was ever made. *Held*, that the agreement was not objectionable as an executory agreement to assign the accounts in futuro.

On Exceptions to Referee's Findings and Report on the Claim of W. E. A. Bulkeley. The opinion states the case.

Miller, Smith, Alexander & Paddock, for petitioner.

Maybury, Lucking, Emmons & Helfman, for trustee.

SWAN, District Judge. Macauley was adjudicated a bankrupt on his own petition November 23, 1904. The petitioner is his brother-in-law, and resides in Connecticut. The bankrupt had been engaged in business in Detroit for several years. He had received financial aid in starting in business from his father-in-law, the petitioner's father, who died in November, 1902, leaving a last will and testament, in which he required repayment of the loan to the bankrupt, and provided that in default thereof the amount—some \$15,000—should be charged against the share of the bankrupt's wife in his estate. This fact was known to the petitioner and the heirs of the father. In January, 1903, the bankrupt visited Hartford, and stated to petitioner, as the latter testifies—

"that his business had outgrown his limited capital \* \* \* and wanted to borrow money; \* \* \* that if he could get additional capital, that is for a number of years, in some way he thought he could make his business a success, and very comfortably provide for his family in the years to come, \* \* \* that is, he asked me if I could give him any money, and I told him I did not have any to loan him myself \* \* \* —no ready money—and he said if I would indorse for him he could borrow money in the Detroit banks, and he talked \$15,000. It seemed more than I wanted to indorse for, and I persuaded him to say he could get along with \$10,000, and I asked him how I should be secured in any way, and he said all he could offer me as security was some insurance policies he had in the *Ætna Life Insurance Company*—four policies aggregating \$15,000. He further said that he would assign to me the book accounts or any future book accounts as long as I continued these indorsements, because the indorsements were for an indefinite period. He thought that he would not need any indorsement after three or four years, but of course could not tell, and with this understanding he returned to Detroit and arranged to borrow \$15,000 with my indorsement. He sent the notes to Hartford, and I indorsed them and returned them to him. He got the money from the First National Bank. Those were the first notes I indorsed for him—four notes for \$2,500 each."

These notes were sent the bankrupt January 27, 1903, as is evidenced by the registry receipt of that date. The petitioner testifies positively that the indorsements were made on the assurance of Macauley's assignment of the book accounts to him, "because," as he states, "I would have had no security of any sort at all for my indorsement, with the exception of these insurance policies, which were new policies practically, and had no value to me, and of course with the idea of continuing the indorsements from time to time I would have to have the book accounts; and it was my understanding as he talked to me that these book accounts and bills receivable at any

time while I endorsed for him were pledged to me to cover my indorsements." That the bankrupt submitted to him a statement at the time of the agreement for indorsement showing bills receivable approximately \$30,000 in amount, and assured petitioner that it was his privilege at any time to take the business to protect himself. Pursuant to this arrangement petitioner indorsed between January 27, 1904, and the bankruptcy for renewals and for accruing obligations of the bankrupt some 40 promissory notes, all of which were produced and identified. Four policies of life insurance—one for \$1,000; two for \$5,000 each, and one for \$4,000—are produced and identified at those which were turned over to petitioner when the parol assignment was made. But one of these has any cash value, and that is but \$29.02. The evidence is undisputed that petitioner has paid \$15,000 and upwards on his indorsements, and the proceeds of all the notes went into the bankrupt's business. The testimony of the bankrupt fully corroborates in all essentials that of the petitioner as to the assignment, the time, place of its execution, and the consideration for which it was given. The proofs are explicit that the agreement covered all the book accounts and bills receivable "at that time or might exist at any time while I [petitioner] was indorser," and that this was the result of two conversations between him and the bankrupt; that petitioner had no knowledge before November, 1904, that Macauley was in financial straits. His first protested note—indorsed by petitioner—matured November 29, 1904, after the adjudication. There is therefore no question of preference in the case, nor is there any controversy as to the terms of the agreement under which the petitioner indorsed, save as to its legal effect. The only criticism upon the testimony in its support is that it comes from interested parties—the petitioner who is naturally desirous of recouping his loss, and the bankrupt, his brother-in-law, whose relation to him suggests a bias in the former's favor. The finding of the referee does not discredit the testimony of petitioner or the bankrupt. He expressly disclaims any reflection upon its truthfulness. His conclusion is in terms based upon two propositions: (1) The competency of the conversations to establish the assignment, and (2) the fact that possession of the accounts was not taken under the assignment. November 16, 1904, about a week before the bankrupt filed his petition for adjudication, he executed a written assignment to petitioner and to Sarah B. Macauley, his wife, of the book accounts and bills receivable of R. H. Macauley & Co. (the bankrupt's firm name), which confirmed the parol agreements it recited to have been made with the grantees for their indorsements, and expressed its purpose to secure Bulkeley and Mrs. Macauley against loss on such indorsements. This instrument was made without the knowledge or consent of Bulkeley, and solely because of the bankrupt's desire to further secure the grantees in pursuance of the agreements under which he obtained the indorsements. In itself it has no legal efficacy, and is not to be considered as against petitioner. Its primary purpose was to protect Mrs. Ma-

cauley if there should be a surplus after paying petitioner. The referee's expressed reasons for the rejection of the claim are that he—

"was not convinced that there was such an absolute transfer of those book accounts as the law requires. \* \* \* There is no delivery of possession, and without reflecting in the least upon the testimony of parties as given, one can readily see that the door would be opened to fraud of the worst character, if upon the simple statement of the two parties in interest a transaction of this kind could be proved. \* \* \* Again, in my opinion, if such an assignment were made it would not take effect until the party proceeded to take possession under it."

The question presented, therefore, is simply as to the legal effect of the testimony—whether assuming its credibility it suffices to establish an assignment. It must be conceded that an agreement resting for its support upon the testimony of the two parties to it is suggestive of bias and open to suspicion, especially where the amount at stake is large, and there is no written evidence of the fact in controversy. But when it is not opposed by any evidence, except the considerations suggested by the interest of the petitioner and his relationship to the bankrupt which the referee rejected as factors in his judgment, and undisputed facts tend to corroborate it, the referee's denial of the petition must be referred to the competency of the evidence accepting its truthfulness. It follows, therefore, that the exceptions to his ruling present a pure question of law.

The considerations tending to corroborate the testimony of Bulkeley and the bankrupt, are: (1) The bankrupt visited petitioner intending and prepared to obtain financial aid upon the security of his bills receivable and his policies, as is evident from the fact that he presented the statement of the former showing \$30,000 outstanding, and by his delivery of the policies—the only security of which he could make delivery. (2) Bulkeley immediately after the Hartford agreement of January, 1903, began and thereafter continued his indorsements of the bankrupt's notes to the extent of \$15,000, as he agreed. (3) That with Bulkeley's knowledge that the bankrupt owed the estate of his father-in-law (Bulkeley's father) \$15,000 for moneys advanced for the bankrupt's business before 1903, which moneys by the last will of Bulkeley, Sr., who died in November, 1902, were charged to the share of his estate falling to the bankrupt's wife, it is highly improbable that petitioner would have loaned his credit by indorsement or otherwise to his brother-in-law without security, and in reliance solely upon the sanguine hopes of the bankrupt that, "in two or three years his business would be in such a condition as to dispense with the aid of further indorsements." (4) Bulkeley had not the ready money asked by Macauley. His reluctance to lend his credit to the limit of the indorsement desired, and his effort to reduce the limit, strongly indicated in connection with his knowledge of Macauley's indebtedness to the estate of the elder Bulkeley, that the conditions were such as to justify security despite relationship. It cannot be assumed that he was willing to hazard his own patrimony as the bankrupt's wife had done, without security. (5) The delivery by the bankrupt of his life insurance policies to petitioner as part of the security for petitioner's indorsement



is part of the *res gestæ* of the assignment. Their delivery as part security for the agreement of petitioner to indorse is undisputed. (6) That the bankrupt had no other security to give than the accounts and policies, and that the policies were known to petitioner to be practically worthless, and that Bulkeley required security, and the bankrupt verbally pledged or assigned the accounts receivable of his business as such security, is not contradicted by any testimony in the record.

These and other circumstances are strongly corroborative of the truth of petitioner's testimony that there was a present assignment coterminous with the continuance of the indorsements made by the bankrupt to the petitioner which was followed pursuant to the agreement therefor by the petitioner's indorsements. That it was a valid agreement, though resting only in parol, cannot be gainsaid. It was to be performed in Michigan, and was there performed by the discount of the paper. It was not required to be recorded. *Preston Nat. Bank v. Geo. T. Smith Co.*, 84 Mich. 364, 47 N. W. 502; 12 A. & Eng. Ency. Law (2d Ed.) 1055. It was an appropriation of the current accounts as they accrued by way of pledge or security which continued in time until the bankruptcy of Macauley. The interest conveyed by an assignment to secure the assignee against liability as an indorser is commensurate in degree and duration with the liability it secures. *Hamlin v. European Co.*, 72 Me. 83. The transaction has all the elements of an equitable assignment of that kind of property as effectually as if it were created by mortgage although not evidenced by writing (*Merchants' Nat. Bank v. Gregg*, 107 Mich. 148, 64 N. W. 1052; *McDonald v. Daskam*, 8 Am. Bankr. R. 543, 116 Fed. 276, 53 C. C. A. 554), and meets all the requirements to its validity as an assignment declared in *Wright v. Ellison*, 1 Wall. 16-22, 17 L. Ed. 555, where it is said "it is indispensable to a lien thus created that there should be a distinct appropriation of the fund by the debtor, and an agreement that the debtor should be paid out of it." It is not material that some of the accounts have not yet accrued. A court of equity would enforce the assignment according to its intent.

In *Peugh v. Porter*, 112 U. S. 742, 5 Sup. Ct. 364 (28 L. Ed. 859), it is said:

"Here, as between *Masser and Porter*, on the one hand, and *Peugh*, on the other, there were words in the agreement of express transfer and assignment of the very fund now in dispute, though not then in existence, which in contemplation of equity is not material."

This language is apposite to the facts in this case. See, also, *Ketchum v. St. Louis*, 101 U. S. 306-316, 25 L. Ed. 999, where the court quotes with approval, as follows:

"In *re Strand Music Hall Company*, 3 De G. J. & S., 147, the question arose whether the company had made a valid charge on their real property. Lord Justice Turner said: 'There can, I think, be no doubt that it was intended by these agreements to create a charge upon the property of the company, but it was said by the official liquidator that this intention was not well carried into effect. I apprehend, however, that when this court is satisfied that it was intended to create a charge, and that the parties who intended to create it had power to do so, it will give effect to the intention notwithstanding any

mistake which may have occurred in the attempt to affect it.'" Walker v. Brown, 165 U. S. 674, 17 Sup. Ct. 453, 41 L. Ed. 865.

The intention of the parties will be enforced in equity. Fourth St. Bank v. Yardley, 165 U. S. 635, 17 Sup. Ct. 439, 41 L. Ed. 855. It is no objection in a court of equity to the validity of the assignment that manual possession of the accounts was not given. There is no way by which an open account can be physically delivered. Preston Nat. Bank v. Geo. T. Smith Co., 84 Mich. 385, 387, 47 N. W. 502; Spring v. South Carolina Ins. Co., 8 Wheat. 268, 5 L. Ed. 614; McDonald v. Daskam, 8 Am. Bankr. R. 543, 116 Fed. 280, 53 C. C. A. 554. The agreement of the parties transferred to petitioner the equitable title thereto. That effect inheres in the term "equitable assignment"—"an assignment of that much of the debt which a court of equity will recognize and a court of law will not." First Nat. Bank v. Coates (C. C.) 8 Fed. 540, 542; Holmes v. Evans, 129 N. Y. 140, 29 N. E. 233; 2 Am. & Eng. Ency. Law (2d Ed.) 1010 (Title "Assignments").

It was assumed by both parties that the bankrupt would meet his paper, otherwise the latter would not have indorsed. The equity of the transaction needs no vindication. Equally manifest is the intention of the parties that the indorser should be protected by the appropriation of these accounts to his indemnity. "That the owner of a chose in action or of property in the custody of another may assign a part of such rights, and that an assignment of this nature if made, will be enforced in equity, is also the settled doctrine of this court" (citing cases). Fourth Street Bank v. Yardley, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855; Preston Nat. Bank v. Geo. T. Smith Co., 84 Mich. 385-387, 47 N. W. 502.

It is clear also that the agreement of the bankrupt was to be performed in and is controlled by the law of Michigan, as the notes indorsed were to be paid in Detroit, Mich. By that law no record of the assignment was required to be made. An assignment of open accounts is not an agreement to which the statute of Michigan regarding the record of chattel mortgages applies. That statute has reference only to goods and chattels capable of delivery. Preston National Bank v. George T. Smith Company, *supra*. There is, therefore, neither statutory, legal or equitable defect in the assignment, nor valid objection to its enforcement. The objections that the bankrupt did not disclose its existence to the commercial agencies or the banks with which he dealt, and that in his financial statements he classified those accounts as part of his assets, making no mention of any incumbrance thereon, have had due consideration. Some of these objections are not sustained by the proofs, because the written statements were not produced, and parol evidence thereof was properly excluded by the referee upon objection. Conceding, however, that the facts were as claimed as to each and all of those matters, and also that the bankrupt admits that he did not put the assignment in writing because he "would have to transfer certain accounts, and I would not have been able to retain the money I collected on my accounts receivable and use it in paying the debts of the concern," that he "wanted to use all the money he took in to

pay those or any other debts that the business owed," and "did not think he could do it if he put the assignment in writing," these circumstances neither singly nor collectively avail to disprove the execution of the assignment. They were all acts or omissions of the bankrupt not chargeable to the petitioner, nor, so far as the testimony shows, known to or even suspected by him. He was under no legal or equitable obligation to give notice of this agreement, and the law of Michigan made no provision for its record.

The contention that the agreement of January 3, 1903, was purely executory—an agreement to assign the accounts in futuro—not a present executed transfer thereof even by parol, is negated by the testimony of both petitioner and the bankrupt. The latter states in terms:

"He [petitioner] asked me what I would give him for security. I told him I would assign those accounts, and before we finished the conversation he asked me if I had assigned those accounts to him, and I said yes."

The petitioner's testimony is equally explicit to the same effect as has been shown. The facts epitomized are that the bankrupt assured petitioner that if he would indorse the bankrupt's negotiable paper to the amount of \$15,000 he would assign his book accounts to secure the indorser's liability, and then and there assigned them to petitioner by parol for that purpose. The petitioner, on the faith of that assurance and the contemporaneous assignment of that security, indorsed Macauley's paper to the amount of \$15,000. The proceeds of these indorsements went into the bankrupt's business, and his creditors have had the benefit of them. It is conceded that the value of the assigned accounts is less than petitioner's liability as indorser. I am constrained by these facts to sustain the exceptions of the petitioner. The proofs establish an executed valid assignment of the accounts to petitioner January 3, 1903. The trustee must pay the proceeds thereof to petitioner. The petitioner is entitled to costs.

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CARROLL et al. v. HOLWAY et al.

(District Court, D. Maine. January 6, 1908.)

No. 44.

1. SHIPPING—INJURY OF VESSEL AT UNSAFE DOCK—LIABILITY OF CHARTERER.

The charterers of a vessel who were charged by the charter party with the duty of discharging her and with furnishing her with a suitable berth are liable for her injury while lying in a dock to which they assigned her, and which was not used by vessels of her size, by reason of the dangerous condition of the bottom where they failed to exercise reasonable care, or, in fact, any care, to ascertain its condition.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 219-221.]

2. SAME—LIABILITY OF CONSIGNEES AND ASSIGNEES OF BILLS OF LADING.

Assignees of the bills of lading of the cargo of a vessel are under the same duty as the original consignees with respect to furnishing the vessel with a suitable place at which to discharge, and are liable for damages sustained by her by reason of their having assigned her to an unsafe berth.

## 3. SAME.

The master of a vessel in placing her for discharging in a dock designated by the consignee of the cargo, with which he was unacquainted, had a right to assume that such dock was a suitable and safe place and to rely upon the performance by the consignee of his duty to exercise reasonable care to know that it was so, and he did not assume the risk nor waive any right as against the consignee by refusing to take the responsibility of moving his vessel on hearing a rumor that the dock was unsafe, where he communicated such rumor to the consignee, and was told by him that it was unreliable, and that the dock was all right.

## 4. SAME—DEMURRAGE—LAY DAYS FOR DISCHARGING UNDER "NEW BILL OF LADING."

Where a charter party provided that the terms of the "new bill of lading" should govern as to the receipt and discharge of the cargo of a schooner, which was less than 400 tons of coal, the lay days for discharging began 24 hours after the vessel arrived at the port of discharge and notice of her arrival was given to the consignee, whose duty it was to designate a suitable berth for unloading within that time; but, where a berth was so designated, the docking of the vessel devolved upon the master, and any delay in docking is to be deducted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 576.]

## 5. SAME.

A vessel is entitled to recover demurrage for delay beyond the lay days allowed by the contract for discharging caused by her sinking at the dock through the negligence of the consignees.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 576.]

## 6. SAME—NOTICE TO CONSIGNEE OF ARRIVAL OF VESSEL—SUFFICIENCY.

No particular form is required for a notice to a consignee of the arrival of a vessel to be discharged by him, but it is sufficient if he actually receives such notice from a third person, and a notice given on Sunday is also sufficient.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 579.]

In Admiralty.

B. Thompson, for libelants.

W. R. Pattengall and Jos. B. Reed, for respondents.

HALE, District Judge. This libel is brought by the owners of the schooner Flyaway to recover damages sustained by her at Machias, Me., while occupying a wharf designated by the respondents for the discharge of a cargo of coal. The schooner is a two-masted vessel of the burden of 132 tons. She is 96 feet long, and about 27 feet beam. Her draft loaded is  $10\frac{3}{4}$  to 11 feet forward and  $11\frac{1}{2}$  feet aft. At the time of her injury she was chartered to the respondent, Samuel M. Holway, under a charter providing that the schooner should load at Weehawken, N. J., a cargo of 225 tons of anthracite coal for Machias, Me., with the privilege of discharging part of the cargo at Machiasport. The other respondents were owners of the cargo. The freight was to be 80 cents per ton and discharge, for all delivered, "new bill of lading." The charter also provided that the schooner should have a cargo of laths back to New York at the fixed rate of 75 cents per 1,000 for all delivered, custom of the port for loading and discharging to be observed as customary, suitable berth to be furnished the vessel at Machias for discharging and loading. In pursuance of this contract, the vessel received on board at Weehawken 232 tons of coal, and proceeded on her voyage to Machias. Her master Capt. Ansell E. Carroll,

had never been to Machias, and was not acquainted with that locality. She arrived at Machias Bay on Sunday afternoon, August 19th, and came to anchor off Round Island between 3 and 4 o'clock. One of the respondents, George P. Boynton, states that he got notice of her arrival on Sunday from Capt. Bulson of the steamtug Samuel B. Jones, who towed the schooner up the Machias river, which is so crooked that deep draft vessels are always towed from the bay to the wharves. Mr. Boynton also arranged for the discharge of the Flyaway's cargo at Donworth's Dock, and directed Capt. Bulson to berth her at that place. In compliance with the instructions of Mr. Boynton, Capt. Bulson towed the schooner to the dock on Tuesday, August 21st, where Mr. Boynton had teams and men ready for the discharge of the cargo. It appears by the testimony that Donworth's Wharf was formerly used to load vessels for the West Indies; but that of late years it had not been occupied, except for small vessels for a brief stay. It is located on the easterly side of Machias river, about 100 feet below Longfellow's Wharf, which is owned and occupied by I. P. Longfellow in carrying on the coal business. The latter wharf projects out into the river a little more than Donworth's Wharf; and it appears in testimony that the effect of this projection is such that the current produces an eddy which has had a perceptible effect in scouring out the bottom of Donworth's Dock. It appears, further, in testimony that the Flyaway arrived at this dock on Tuesday, August 21st, between 11 and 11:30 a. m., and that it was near high water at that time. When she reached the dock, she was dropped alongside; and the stevedore's crew, employed by the respondent, made the vessel's lines fast. Mr. Boynton was on the wharf; and Capt. Carroll asked him about the dock. Mr. Boynton told him that, so far as he knew, the dock was all right. After dinner, and when the tide had been ebbing for some time, a stevedore by the name of Edgar Reynolds, who had been loading a vessel on the opposite side of the river, came on board the Flyaway, and told Capt. Carroll that the dock was a bad place for vessels to lie in, and that, if he could move, he had better do so. Capt. Carroll testifies that:

"Reynolds said he didn't know anything about the bottom; but vessels had been damaged there before, and he was sure this would be."

It appears further by the testimony that Reynolds had no definite knowledge of the wharf, except what he had heard; that he had never sounded out the dock, nor had he seen anyone else do it. After this talk with Mr. Reynolds, Capt. Carroll made soundings on the outside of the vessel. He found sawdust and edgings, but nothing that would injure the vessel. Mr. Boynton came on the wharf soon after, and Capt. Carroll testifies:

"I went on the wharf and informed him that I understood this was a poor place to lay in."

And this testimony follows:

"Q. What did he say?

"A. He said he didn't know of any trouble. I told him of the man coming and informing me, and he asked me who it was. I said 'I didn't know.' He said it must have been Reynolds, and he said, 'They know too much.'"

"Q. Any further talk? A. No, sir.

"Q. Say anything about shifting her?

"A. Yes; we talked about that. I said, if he wanted to shift her, I wouldn't take the responsibility on an ebb tide. I asked him about the ebb and flow of the tide, and he said he didn't know. \* \* \*

"Q. Did you have any talk with him at that time in regard to your charter that you were to have a suitable berth to load and discharge?

"A. Yes, sir.

"Q. What did you say to him?

"A. I told him we was to have a suitable berth for loading and discharging at Machias.

"Q. What did he say?

"A. He said so far as he knew this berth was all right, and he told me where the cargo was to be loaded and pointed the laths out to me.

"Q. Did you ever say anything to him in regard to responsibility in case the vessel was in trouble?

"A. Yes, sir.

"Q. What did you say?

"A. I told him that if there was any damage done to this vessel I should hold him responsible for it.

"Q. What did he say?

"A. He said that everything was all right."

The schooner was docked between 11 and 12 o'clock on August 21st. The discharge of her cargo actually began about 2 o'clock. Within less than two hours after that time the pumps could not get a suck; and an examination showed three feet of water in the hold. Soon after the pumps were shoved up, the vessel opened up around the house, the arch boards were off 2 or 3 inches, the rigging was slack, the spring stay was hanging in a bight, the partitions in the cabin were broken down; the vessel was cracking and snapping, and the water in the hold was on a level with the water in the river. It was found impossible to relieve the vessel. On the next high tide the water covered the top of the schooner's house; and she did not float. By discharging part of the cargo on the low water, by obtaining extra pumps, and with the assistance of the steamtug, the vessel was floated on the following Friday, and taken to another berth, where, on August 28th, her discharge was completed. When she was hauled out, her bottom was found to be badly strained, and broken aft of the center. It was necessary to put in keelson, riders, and bilge streaks. Upon examination it was found that the bottom of the dock was hard, and, where the vessel's midships came, there was a hole five feet deeper than at the schooner's stem, and four feet deeper than at her stern.

1. Were the respondents at fault in failing to furnish a safe and suitable berth for the schooner?

It is evident that, under their contract, the respondents, the owners and consignees of the cargo, were required to furnish the libellant schooner with a reasonably safe berth for its discharge. The evidence shows, and it is now substantially admitted by the respondents, that the dock was unsafe and unsuitable.

In *Look v. Portsmouth, K. & Y. St. Ry.* (D. C.) 141 Fed. 182, this court considered a similar case, and held:

"That it is incumbent on a consignee, required by the charter to discharge a vessel, to designate a suitable place for her to lie while discharging, and to know, so far as by reasonable effort it can be ascertained, that such place is reasonably safe, and that this obligation extends to all the conditions in

which the vessel is placed and to all the dangers to which she is exposed while effecting her discharge, and that the consignee is responsible for the negligence or want of knowledge of its agent in charge of the work through which the vessel is injured."

In discussing the testimony, this court said:

"It is not necessary for the libelants to prove actual knowledge on the part of the respondent of any unfitness of the dock or of the wharf. It is sufficient that the respondent's agent had means of knowledge; for, while a consignee, upon whom is imposed the duty of discharging a vessel, does not guarantee its safety in coming to or lying at his wharf, he is bound to exercise diligence in ascertaining the condition of the dock and of the berths, and to give notice of any obstruction or of any danger to vessels. This subject has just received the attention of this court in *Philadelphia & Reading Ry. Co. v. Walker* (D. C.) 139 Fed. 855. This court has also considered a similar question, and has cited leading authorities upon it in *Thompson v. Winslow* (D. C.) 128 Fed. 73. The subject has also been fully discussed in the following cases: *The Calvin P. Harris* (D. C.) 33 Fed. 295; *Hartford & New York Transportation Co. v. Hughes* (D. C.) 125 Fed. 981; *The Nellie* (D. C.) 130 Fed. 213; *Smith v. Burnett*, 173 U. S. 430, 19 Sup. Ct. 442, 43 L. Ed. 756; *Sawyer v. Oakman*, Fed. Cas. No. 12,404; *Garfield & Proctor Coal Co. v. Rockport & Rockland Lime Co.*, 184 Mass. 60, 67 N. E. 863, 61 L. R. A. 946, 100 Am. St. Rep. 543."

In the case at bar the respondents contend that they exercised reasonable care in the examination of the dock, and that they should not be held liable by reason of the want of such care. Under the testimony of the case, the court cannot sustain their contention. The respondents must have known that, in the Machias river, where spring and fall freshets occur, drift material is liable to be left upon the bottom of the river. Mr. Longfellow, the owner of the adjoining wharf, testified that every spring he takes two men and a boat and goes up and down his dock to see if there is a stick or log or anything in it to endanger a vessel, because he knows that at the time of the freshets there are sunken logs which are liable to lodge near the wharves. He says he often finds pieces of plank and butt ends which come from the mills; and, in order to clear the dock, he takes a grapple, and tows whatever he finds into the middle of the river to get it clear of the wharves; that he regards this as a reasonable precaution, and it takes him only one tide with two men to sound out the dock and clear it. Such conduct is only reasonable care. It is not shown that the respondents took such care. They knew, too, the location of the dock in respect to the longer wharf of Mr. Longfellow, and the dangers of scouring and gullying which have been pointed out in testimony.

In *Smith v. Havemeyer* (D. C.) 32 Fed. 844, Judge Addison Brown said:

"Such a wharf was plainly not a proper one, or in a proper condition below the water line to receive vessels for the discharge of cargo. The defendant, as the lessee and occupant of the wharf, is therefore prima facie chargeable with negligence. To exonerate himself, it was incumbent upon him to show reasonable care and examination in regard to the condition of the wharf and the slip. No proof on this subject being adduced, the prima facie liability must stand, and the respondents held to answer for the damages."

As I have indicated in the *Look Case*, supra, masters of vessels assigned to a dock have the right to assume that proper investigation has been made by the consignees respecting the safety of the dock.

In the case before me it does not appear that the consignees had taken any precautions in reference to investigating the condition of the dock. The testimony shows simply that they did not know its condition; that their agent, charged with the duty of caring for the dock, did not inform himself on the subject, but offers no justification for his lack of knowledge. The evidence convinces me that the defects in the wharf were such as could have been discovered by ordinary diligence. The respondents were clearly at fault for not exercising reasonable care in furnishing a suitable dock, which it was their duty to furnish, both under the general maritime law and under the contract of carriage. The evidence indicates that the defect was caused by the ebb tide running rapidly down by Longfellow's Wharf, causing the bottom to scour and gully out. If an examination had been made at proper intervals during the year, its condition could have been discovered; for the evidence tends to show that the dock had been in an unsafe condition for years.

The testimony leads me to the conclusion that all the respondents are at fault. The respondent Samuel M. Holway, the charterer, agreed to furnish the libelant schooner with a suitable dock in which to load and discharge. It is clear that he cannot relieve himself by any subsequent agreement with George P. Boynton and William C. Holway. Having intrusted the matter of the designation of a dock to George P. Boynton, he is liable for any negligence or want of reasonable care on the part of Boynton. The testimony shows that the respondents George P. Boynton and William C. Holway were the owners of the cargo and the assignees of the bill of lading of the cargo. As such, they were required to furnish the libelants' vessel with a reasonably safe berth for the discharging of her cargo. They would have had the same obligation if they had been the original consignees of the cargo. They are liable equally with Samuel M. Holway for any negligence or failure to furnish the schooner with a suitable berth. In fact, they admit that they are liable for the damages sustained by the Flyaway if Samuel M. Holway is so liable. Inasmuch as the respondents are under the same liabilities as if they had all been original consignees of the cargo, I sometimes in general terms refer to them, in this opinion as the "consignees."

2. Were the libelants also in fault?

In this case, as in the Look Case, *supra*, the libelants have the right to assume that the invitation of the respondents to come to a proper place and discharge was an assurance of safety, and that it was made with due knowledge of the premises. They are not at fault unless they have waived their rights under the charter party and under the general maritime law to have a suitable berth for the discharge of their cargo. It is insisted by the respondents that the rumor which Capt. Carroll heard put the duty of inquiry upon him, and that, if he consented to lie at this dock after hearing such rumor, he did it at his own risk, and must be held to have waived his right to look to the consignees for a suitable berth. I have already detailed the testimony as to Mr. Reynolds' visit to the Flyaway and as to his remark in reference to the dock. It appeared, however, from his conversation that he had no knowledge of it, and that he was merely relying upon rumors.



It will be remembered, too, that these rumors as to the character of the dock came to Capt. Carroll after the vessel had docked and after the tide had been ebbing for some time, so that it is doubtful if the vessel could have been moved to any other dock, even if such a course had been thought necessary, and, when Mr. Boynton came to the vessel very soon after Capt. Carroll had learned of these rumors, he gave the captain to understand that the statements of Reynolds were not to be relied upon. Under such circumstances, I cannot hold that it was the duty of Capt. Carroll to take the responsibility of moving his vessel. He had docked the schooner at the wharf which the consignees had designated, and which the covenants in his charter provided should be a suitable berth. He was assured by Mr. Boynton that the berth "was suitable as far as he knew," and that "everything was all right." I think he had the right to rely upon such assurance, and that it was not his duty to assume the responsibility of moving the vessel upon the mere rumor of a stranger that the wharf was unsuitable. The testimony shows that Mr. Boynton told Capt. Carroll that, if he did not think this was a suitable berth, he could haul his vessel into the next wharf; that Capt. Carroll said he would not do so, as he knew nothing about that dock; that, if Mr. Boynton wanted to, he could haul her to any place where she would be safe; and that Boynton expressly refused to take the responsibility of changing berths. The most that can be said as to the effect of that conversation is that it was an invitation by the respondents to Capt. Carroll to assume the risk of hauling his vessel out of a dock which they had designated, and to free them from the obligations of the charter, as well as from the duties which the law imposed upon them. Under the circumstances, it was not incumbent upon Capt. Carroll to assume the obligations which an attempt to move the vessel involved. Under his charter, as well as under the implied obligations which the law imposes on the consignees, he had a right to rely upon those whose duty it was to furnish his vessel with a safe berth for the discharge of her cargo.

The case at bar presents a situation somewhat similar to that of the *Benedict* in *Look v. Portsmouth*, etc., *Railway*, *supra*, where I referred to numerous cases which I need not incur by opinion by citing. In that case I had occasion to say that the danger was not in the minds of either party. In that case the danger resulted from electric wires. In the case at bar it arose from a hollow dock. But neither the consignees nor Capt. Carroll had the slightest knowledge of the particular danger which menaced the vessel at Donworth's Dock. Even Mr. Reynolds, who carried the rumor of trouble to Capt. Carroll, did not know the particular difficulty. He merely knew that there was some trouble. In the case at bar, as in the *Look Case*, *supra*, I must hold "that the injury resulted from another and totally different cause of which both parties were ignorant, but concerning which it was the duty of the respondents to know, while it was not incumbent upon the captain to know."

Under all the circumstances, I am constrained to find that the libelants were not at fault.

3. Are the libelants entitled to recover demurrage for detention of the vessel?

The libel alleges, and the answer admits, that under the charter the terms of the "new bill of lading" were the conditions under which the cargo was to be discharged. The courts have invariably allowed oral evidence to be received to show what the "new bill of lading" in fact is. *Kenyon v. Tucker*, 17 R. I. 529, 23 Atl. 61.

The "new bill of lading" is often referred to by the courts as the "bill of lading of the vessel owners' and captains' association." The part which is material to the present matter reads as follows:

"And 24 hours after the arrival at the above named port, and notice thereof to the consignee named, there shall be allowed for receiving said cargo at the rate of one day, Sundays and legal holidays excepted for every one hundred tons thereof; after which, the cargo, consignee or assignee, shall pay demurrage at the rate of eight cents per ton a day, Sundays and legal holidays not excepted, upon the full amount of cargo, as per this bill of lading, for each and every day's detention, and pro rata for parts and portions of a day, beyond the days above specified, until the cargo is fully discharged."

Under the old bill of lading vessels were required to have actually arrived at the wharf before the lay days began; under the new bill of lading the lay days begin 24 hours after arrival in port and reporting. One of the earliest cases which clearly draws the distinction between the old bill of lading and the new is *Choate v. Meredith*, 1 Holmes, 500, Fed. Cas. No. 2,692, where Judge Shepley referred to the new bill of lading, and said:

"In the case of *Aylward v. Smith* (decided in this court at the October term, 1873) Fed. Cas. No. 687, affirming the decree of the District Court, it was held, in the case of a bill of lading in the old and usual form, with an agreement for demurrage 'after three days' that the lay days did not begin until after the arrival at the wharf; and as in that case the schooner was frozen up 35 feet from the wharf, which was too far for safe delivery of the cargo, that the voyage was not completed, and the lay days had not begun.

"In this case, as the contract stipulates that the lay days shall commence 'twenty-four hours after arrival at the port, and notice thereof to the consignee,' and as the vessel arrived at the port, and gave the notice to the consignee, and there were suitable wharves accessible, to which the consignee could have ordered the vessel, although his own wharf was obstructed, the time commenced to run 24 hours after the arrival and notice to the consignee.

"The new form of bill of lading seems to have been adopted to secure the shipowner against the delay consequent upon an obstruction of the consignee's wharf by other vessels or from other causes, and against his being compelled to await his turn to unload at the consignee's wharf. Under this form of bill of lading, if the consignee desires to exercise the right of requiring the master to unload at the consignee's wharf, he must pay for the detention consequent upon that wharf's being inaccessible, if there are other suitable and convenient wharves accessible after the arrival of the vessel in port at which the vessel may be unladen."

The following cases have also fully recognized the distinction between the two bills of lading: *Reed v. Weld* (D. C.) 6 Fed. 304; *Hall v. Eastwick*, Fed. Cas. No. 5,930, 1 Lowell, 456; *Manson v. N. Y., N. H. & H. R. Co.* (C. C.) 31 Fed. 297, 299; *Lake v. Hurd*, 38 Conn. 536.

Within the meaning of the contract, then, the vessel must be held to have arrived when she came to the end of her voyage, and was reported. I find that she came to the end of her voyage on Sunday afternoon, August 19th, between 3 and 4 o'clock, when she anchored off Round Island in Machias Bay. Mr. Boynton himself testifies

that Round Island was the only feasible anchorage, and that it is customary for vessels to report their arrival from that point. Mr. Boynton further testifies that on Sunday afternoon he got notice of the Fly-away's arrival, and understood that she was then in the bay, and would be towed up on Tuesday. I find that the notice received by Mr. Boynton was sufficient in law and in fact. No particular form of notice was required. 268 Logs of Cedar, 2 Lowell, 378, Fed. Cas. No. 14,295.

Notice given Sunday is held also to be sufficient. *Kenyon v. Tucker*, *supra*.

The evidence shows that the schooner was, in fact, docked between 11 and 12 o'clock on Tuesday, August 21st. Her discharge was completed at noon on Tuesday, August 28th. By the contract and under the settled authorities, the vessel's time would begin to count 24 hours after notice was brought home to the consignees on Sunday afternoon, which would make her time count from Monday afternoon. But, although by the contract suitable berth was to be furnished by the consignees to the vessel at Machias for discharging and loading, the matter of the docking of the schooner devolved upon the master; and his delay in getting her docked cannot be charged to the consignees. In *Smith v. Lee*, 66 Fed. 344, 13 C. C. A. 506, in speaking for the Court of Appeals for this circuit, Judge Webb said:

"The 24-hour clause of the bill of lading, while it requires the consignee to be ready to receive the cargo at the expiration of that time after notice, and casts upon him any loss of time arising from delay in pointing out the place of discharge after the notice, does not relieve the vessel from herself being ready to deliver at the selected berth, provided it is safe and can be safely reached. Notice imposes on the master the duty to bring his vessel to the berth given her, and for any delay in so doing, not arising from the unsuitableness of the berth, or its approaches, or fault of the consignee, he is responsible, and must bear the loss."

See, also, Judge Lowell's decision in this circuit in *Hall v. Eastwick*, *supra*.

I find then that the schooner's time began to run at about 11:30 on Tuesday, August 21st.

The testimony shows that the schooner had on board 232 tons of coal. Under the new bill of lading applicable to vessels of a carrying capacity of 400 tons or less, the respondents would be entitled to 2 days, 7 hours, and 35 minutes in which to discharge her. She was not discharged within that time. I find her detention beyond her lay days was due to the default of the respondents, for the reasons which I have already given. In fact, the respondents concede that the delay in the discharging of the schooner was due to their fault, unless the court shall find that the sinking of the schooner was due in whole or in part to the fault of her master.

I find, then, that the libelants were without any fault which caused the sinking of the schooner or contributed to it, and that they are entitled to a decree for the damages so sustained, together with demurrage for the detention of their vessel beyond the lay days stipulated, commencing her time from her docking on Tuesday, August 21, 1906.

An assessor may be appointed to report the amount of the libelants' damages, in accordance with the terms of this opinion.

## SCHULTZ et al. v. HIGHLAND GOLD MINES CO. et al.

(Circuit Court, D. Oregon. December 26, 1907.)

No. 3,116.

## 1. COURTS—FEDERAL COURTS—JURISDICTION—JUDGMENT IN STATE COURT—INJUNCTION.

A federal court, though without power to vacate a judgment entered in a state court, under Rev. St. § 720 [U. S. Comp. St. 1901, p. 581], prohibiting a federal court from nullifying or staying proceedings in a state court, has power by injunction to restrain the holder of the judgment from enforcing it, as such process operates on the person, and not against the state officers or authorities.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 1418-1430; vol. 27, Injunction, § 72.]

Federal courts restraining proceedings in state courts, see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

## 2. QUIETING TITLE—CLOUD ON TITLE—REMOVAL—JURISDICTION—FEDERAL COURTS.

The jurisdiction of a federal court to restrain the enforcement of a judgment of a state court is not effective to remove a cloud from the title to realty cast by reason of the judgment, which would still remain, notwithstanding the owner is not permitted to enforce it.

## 3. SAME—PLEADING—BILL.

A bill to restrain enforcement of a judgment is not sustainable as a bill to remove a cloud from the title to realty, where the realty alleged to have been clouded is not described, and the bill does not proceed on the theory of the removal of an incumbrance.

## 4. PROCESS—SERVICE BY PUBLICATION—NONRESIDENTS.

Where a minority stockholders' bill sought the appointment of a receiver for the corporation, with authority to appear in an action in a state court, and there obtain relief against a judgment rendered against the corporation with an injunction against further interference with the corporation's property, and an accounting as to certain stock alleged to have been pledged for the indemnity of the corporation, the suit was not local in character, warranting service on defendants, not citizens of the state, by publication.

## 5. COURTS—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

Where a minority stockholders' bill was brought by citizens of three states against citizens of two other states, in a state where part of the defendants resided, but was not local in character, jurisdiction on the ground of diversity of citizenship attached as to all the complainants and as to all the defendants who were citizens of the state in which the suit was instituted, but not as to the defendants who were citizens of another state.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 855.]

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.]

## 6. SAME—DISTRICT IN WHICH SUIT TO BE BROUGHT.

Act March 3, 1887, c. 373, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], authorizes the bringing of suit in the district of the residence of either the plaintiff or defendant, where federal jurisdiction is founded on diversity of citizenship alone.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 811.]

#### 7. SAME—COMBINATION OF PLAINTIFFS.

Where federal jurisdiction rests on diversity of citizenship, it is no objection that citizens of different states other than the state in which the suit is instituted are combined as co-complainants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 855.]

#### 8. SAME—JOINDER OF DEFENDANTS.

Where, in a suit not local in character, in which federal jurisdiction depends on diversity of citizenship, citizens of other states than that in which the suit is instituted are joined as defendants, such joinder is not a jurisdictional defect, and may be waived by the defendants erroneously joined.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 855.]

#### 9. CORPORATIONS—MINORITY STOCKHOLDERS—BILL—RIGHT TO RELIEF.

A bill by minority stockholders of a mining company alleged that, after sale of the corporation's property under a creditor's judgment, the corporation's attorney secured a judgment against it on certain alleged false and fraudulent claims, some of which had been assigned to him by the officers of the company, and had redeemed the property from the purchaser under the prior judgment; that the corporation had executed a mortgage on its property to secure the debt of S., who had transferred stock of the corporation to indemnify it from its liability on such mortgage, the proceeds of which stock certain of the defendants, who had been officers of the company, had appropriated to their own use. The bill prayed for the appointment of a receiver to vacate the judgment in the state court in favor of the corporation's attorney, and to restrain the defendants from further interfering with the corporation's property or disposing of such capital stock, and for an accounting. *Held*, that the bill was sufficient, under equity rule 94, providing for suits for the benefit of stockholders, etc.

#### In Equity.

This is a suit by minority stockholders of the Highland Gold Mines Company (the complainant, Schultz, being a citizen and inhabitant of the state of Washington, Mrs. Marion B. Cleveland a citizen of California, and the remaining complainants citizens of North Dakota) against the Highland Gold Mines Company and others. The defendant mines company and defendants Neil J. Sorenson, Robert McGaughey, and Thomas H. Crawford are citizens of the state of Oregon, the remaining defendants, Edgar B. Diehl and Daniel Grabill, citizens of the state of Pennsylvania. The bill of complaint shows that prior to January 14, 1907, Diehl, Sorenson, and one J. Frank Shelton were the directors of the mines company, and since said date Diehl, McGaughey, and Grabill have been, and now are, such directors. Sorenson was the president while director, Diehl the vice president, and McGaughey the secretary and treasurer; no election of officers by the board having been had subsequent to January 14, 1907. The purpose for which the mines company was incorporated and organized was to engage in the business of mining, and it has acquired eight unpatented lode claims, situated in Baker county, Ore. (the same being not otherwise more specifically described), together with a mill and appurtenances and other improvements alleged to be of large value. Prior to February, 1906, the company became largely involved in debt, and on or about September 1, 1906, the Haines Mercantile Company recovered a judgment against it for the sum of \$5,500, causing execution to issue and the property of the mines company to be sold at sheriff's sale, at which sale one Baer became the purchaser. Further than this, one Dunphy obtained a judgment for \$600, and one Hobson for \$300. The bill of complaint thereupon sets up in brief that the defendant Thomas H. Crawford has been the regularly employed counsel and attorney for the mines company since January 1, 1903; that on November 8, 1906, he, together with Diehl, Grabill, McGaughey, and Sorenson, entered into a fraudulent agreement and conspiracy, whereby it was mutually agreed that Diehl and Grabill would pretend and assert that the company was indebted to them in the sum of \$10,000; that Crawford would pretend and assert that the company was also indebted to him for legal services in the sum of \$10,000; that, having procured a pretended as-

signment to him of the simulated claim of Diehl and Grabill, Crawford instituted an action in the circuit court of the state of Oregon for Baker county against the mines company for the sum of \$20,000, and that, the directors and officers of said company being parties to the said conspiracy and making no bona fide defense, judgment was in course of time obtained and entered in favor of Crawford and against the company for said sum, all in pursuance of said fraudulent agreement and conspiracy; that said judgment was thereupon docketed, and that on January 19, 1907, Crawford, as such pretended judgment creditor, redeemed the property from the sale to Baer. It is further alleged that the complainant, Schultz, was present during the pendency of said action, and importuned Diehl and McGaughey, two of the directors of the company, to make a defense thereto, and that they neglected and failed to do so, but, on the contrary, aided and assisted the defendant Crawford in procuring said judgment; that the company at no time was indebted to Diehl and Grabill, or to Crawford, in any sum whatever, but that said pretended claims were wholly fabricated and without any real existence; that the said officers and directors of the said mines company have wholly abandoned their duties and trust towards such company, and that they, in pursuance of said conspiracy to defraud the company, are intending to allow and permit said property to remain in the hands and possession of said Crawford without redemption from his purchase, and thus to permit him to secure title to such property in fraud of the company and its stockholders. It is further averred that Sorenson was in April, 1905, indebted to one Knapp in the sum of \$35,500; that the defendants Diehl, Grabill, and McGaughey, through the advice and counsel of the defendant Crawford, fraudulently executed and delivered to Knapp the mortgage of the mines company upon its property as pretended security for the payment of such claim and demand of Sorenson; that suit was subsequently instituted by Knapp against the mines company for foreclosure of such mortgage, and is now pending, and that the defendant Crawford, as counsel, is defending against said suit, but at the sole instance and request of Sorenson, and for which services the mines company is not obligated in any respect to Crawford; that, for the purpose of indemnifying and saving harmless the said mines company against the payment of said mortgage, Sorenson delivered to defendants Diehl and Crawford 1,000,000 shares of the capital stock of the company then held and owned by him, the entire capital stock consisting of 3,000,000 shares; that the said defendants, other than the mines company, have fraudulently disposed of about 250,000 shares of such capital stock so held in trust for the indemnity of the said mines company, and have out of the proceeds of such sales wrongfully paid to Diehl all of the money claimed by him to be due from said company, and have paid to Crawford \$6,000 upon his pretended claim against Sorenson for services rendered him in the Knapp foreclosure proceeding, and other sums claimed against the company by Grabill and McGaughey, and have otherwise appropriated the proceeds of said 250,000 shares of stock to their own use and benefit; that the full amount of the proceeds of said stock so received by said defendants the complainants are unable to state without an accounting on the part of defendants; and that said defendants are endeavoring to sell and dispose of other of the shares of said stock, and thereby to appropriate the same to their own use. A decree is sought appointing a receiver, so that he might enter an appearance in the Crawford case in the state court, and file a motion to vacate the judgment rendered therein, and make any proper defense to said cause that might seem necessary to defeat the same; also, enjoining the defendants from further interfering with the property of the mines company, or disposing of any more of the said 1,000,000 shares of the capital stock of such company, and requiring an accounting as to the latter, and declaring fraudulent and void the said judgment had and received in the state court in favor of Crawford and against the Mines Company for the said sum of \$20,000. The defendants appeared, first, specially by motion to dismiss the bill of complaint, for the reason that the court was without jurisdiction of the cause or of the parties thereto. This motion was denied April 6, 1907. Subsequently the defendants Crawford and McGaughey demurred to the bill, assigning as grounds therefor, first, that the plaintiffs have no legal capacity to sue; and, second, that the bill does not state facts sufficient to constitute a cause of action.

Douglas W. Bailey, for plaintiffs.

Butcher, Clifford & Correll, for defendants.

WOLVERTON, District Judge (after stating the facts as above). The present hearing is upon the demurrer to the bill, and, upon looking further into the cause of suit as exhibited by such bill, I am now of the opinion that the motion was improperly denied, in so far as it pertained to the defendants Diehl and Grabill, who are shown to be citizens of the state of Pennsylvania. I then entertained the view that the suit was one for the removal of cloud from title, and hence local in its nature, which would give jurisdiction to bring in parties not citizens of the state where the suit was instituted by publication, but it cannot be so maintained. True, the prayer of the bill is for a vacation of the judgment made and entered in the state court, but this court is without power or authority to make such an order, because that would be in effect to nullify and stay the proceedings of a state court, in violation of the provisions of section 720, Rev. St. (page 581, U. S. Comp. St. 1901). It may, however, through the injunctive process, restrain the plaintiff in a judgment from enforcing the same, and thereby prevent perpetration of a wrong upon the judgment debtor, for in such case the process operates upon the person, and not against the state officers, or any authorities thereof. *National Surety Co. v. State Bank*, 120 Fed. 593, 56 C. C. A. 657, 61 L. R. A. 394. See, also, *Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630, and *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870. But such action of the court is not effective to remove a cloud from title to realty cast by reason of the judgment, for the judgment still remains, although the plaintiff will not be permitted to enforce it. Back of this, however, the bill of complaint does not state a cause for such relief. It nowhere describes the realty clouded, nor does it proceed in theory for the removal of any incumbrance. Two purposes stand paramount: One to obtain the appointment of a receiver, with authority to appear in the action in the state court and there obtain relief against the judgment, with injunction against further interference with the mining property; and the other to secure an accounting as to the stock alleged to have been pledged by Sorenson for the indemnity of the company. All other matters of averment are merely subordinate, so that the suit cannot be held to be local in character, warranting service on defendants not citizens of the state by publication.

It was contended at the hearing of the motion that there was not proper diversity of citizenship upon which to sustain jurisdiction. Citizens of three states have combined in a suit against citizens of two states, and the suit has been instituted in one of the latter states. I am of the opinion that jurisdiction attached as it respects all the complainants, and all the defendants who are citizens of the state of Oregon, wherein suit was instituted, but not as it respects the defendants who are citizens of another state. Under the statute of March 3, 1887 (24 Stat. 552, c. 373), as amended by the act of August 13, 1888 (25 Stat. 433, c. 866 [U. S. Comp. St. 1901, p. 508]), where the suit is founded upon diversity of citizenship only, it may be brought in

the district of the residence of either the plaintiff or the defendant. *McCormick Harvesting Machine Co. v. Walthers*, 134 U. S. 41, 10 Sup. Ct. 485, 33 L. Ed. 833. It seems to me that it can be no objection that citizens of different states, other than the state in which the suit was instituted, have combined as co-complainants in the suit. But, unless the suit is local in its nature—that is, brought for removing a cloud or incumbrance, or the like—there may be valid objection interposed to combining as defendants parties other than citizens of the state in which the suit is instituted. The case of *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303, 33 L. Ed. 635, is relied upon as opposed to the first proposition, and as authority against the maintenance of this suit while citizens of two or more states, other than the state in which the suit is instituted, remain combined as co-complainants. I do not so read it, however. Mr. Chief Justice Fuller, in his opinion rendered in the case of *McCormick v. Walthers*, supra, has this to say:

"We held [referring to the case of *Smith v. Lyon*] that where there were two plaintiffs, citizens of different states, the defendant, being a citizen of another state, could not be sued in the state of either of the plaintiffs."

If the suit had been laid in the state of the citizenship of the defendant it is very probable from this statement of the eminent chief justice that the ruling would have been different. The exact question, however, has been resolved in the case of *Jackson & Sharp Co. v. Burlington & L. R. Co.* (C. C.) 29 Fed. 474, wherein it was held proper that citizens of other states than the one in which suit was laid should be brought in as parties complainant, but that citizens of the state wherein the suit was instituted could not be properly so made parties complainant. This was a case local in its nature, it is true, but that circumstance does not alter the essentiality of a diversity of citizenship in order to confer jurisdiction. As to the latter proposition, that citizens of other states than those of the state wherein suit is instituted in causes not local should not be joined as defendants, the authorities seem to concur in its support. But the joinder is not jurisdictional, unless the noninhabitant shall see fit to make it so. He may waive the question of his being thus sued, and, if he does, the court has competent authority to proceed against him. *Smith v. Atchison, T. & S. F. R. Co.* (C. C.) 64 Fed. 1.

This brings us to a consideration of whether the bill states facts sufficient to constitute a cause of suit. Without going into the subject in detail, or at length, it is sufficient to say that I am impressed, after a careful study of the bill, that it conforms in substance and effect to the requirements of equity rule 94, relating to suits instituted by stockholders in a corporation. This rule is evidently the outgrowth of the doctrine established by the Supreme Court of the United States in the case of *Hawes v. Oakland*, 104 U. S. 450, 26 L. Ed. 827, and the bill is supported by that case also. This, however, as it relates to the bill, in so far as it sets up fraudulent transactions of the directors and officers of the mines company. The right of accounting must depend entirely upon whether the Sorenson stock was pledged for the indemnity of the mines company against its liability upon the Knapp mortgage. If the mortgage is held to be invalid as against the com-



pany, then there could be no basis for the accounting, because the stock is alleged to be the individual property of Sorenson. But, however that may be, the allegations of the bill must be taken as true when challenged by demurrer.

The demurrer will therefore be overruled, and such will be the order of the court.

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In re JOHNSON.

(District Court, W. D. Arkansas, Harrison Division. January 2, 1908.)

1. **BANKRUPTCY—RULES—VALIDITY.**

Under Bankr. Act July 1, 1898, c. 541, § 30a, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434], providing that all necessary matters, forms, and orders as to procedure and for carrying the act into effect shall be prescribed by the United States Supreme Court and general orders No. 38 (89 Fed. xiv, 32 C. C. A. xiv), declaring that the several forms annexed thereto shall be observed and used with such alteration as may be necessary to suit the circumstances of the particular case, bankruptcy rule 15 of the Western district of Arkansas, authorizing referees to order notice to creditors of the application for the bankrupt's discharge and fix the date of hearing, is void as in conflict with form 57, requiring that such notice shall be ordered and the date of hearing be fixed by the court.

2. **SAME—REFEREE—JURISDICTION.**

By Bankr. Act July 1, 1898, c. 541, §§ 14-17, and section 38a (4) 30 Stat. 550, 555 [U. S. Comp. St. 1901, pp. 3427, 3428, 3435], all questions arising out of the application for a bankrupt's discharge are expressly required to be originally presented to the court, and are withheld from the referee.

3. **SAME—COMPLETION OF PROCEEDINGS—REFEREE'S REPORT—DISCHARGE.**

The Arkansas bankruptcy rule 12 (1) requires that, when an application for discharge is filed with the clerk, he shall forthwith send it to the referee, who shall immediately examine it, and ascertain if it is in proper form, and, if so, he shall immediately report that fact to the judge, with the statement as to whether the bankrupt has complied with the act, and whether, in the referee's judgment, the case is sufficiently advanced and the proceedings in proper condition to entitle the bankrupt to his discharge. *Held* that, where an application for discharge was filed while the examination of the bankrupt was in progress to discover assets supposed to have been concealed, it was improper for the referee prior to the completion of such examination and the showing of record that it was closed to report that the proceedings were sufficiently advanced to entitle the bankrupt to his discharge.

Application to Vacate Order Granting Discharge.

E. S. Alexander, for creditors.

Crump, Mitchell & Trimble, for bankrupt.

ROGERS, District Judge. It appears from the record in this case that Thomas W. Johnson was adjudged a bankrupt on October 3, 1907, and the case sent to the referee. An examination of the bankrupt, the purpose of which was obviously to discover assets he was supposed to have concealed, was begun on October 21st, and continued at intervals, before the referee, until the 20th of November, 1907. Among the witnesses called were his wife, his son, and others into whose hands it was supposed part of his assets had gone. Meantime the bankrupt, on the 7th of November, 1907, filed his petition for discharge. This petition,

under rule 15 in bankruptcy of this court (then in force, but now abrogated), was on that day referred to the referee. In conformity to said rule, on the same day, the referee made the following order:

"Comes F. M. Garvin, referee in bankruptcy of this court, and reports that he has examined the application of the bankrupt for a discharge in the above-entitled case, and finds the same to be in proper form. He further reports that the bankrupt has in all things complied with the bankruptcy act, and that in his judgment the case is sufficiently advanced and the proceedings in a proper condition to entitle the said bankrupt to his discharge. He further finds that the honorable judge is absent from this division of the district, and in pursuance of an order of this court made and entered of record on the 10th day of June, A. D. 1906, the referee makes the following order: The clerk will give notice that a hearing will be had upon the said application for a discharge on the 23d day of November, A. D. 1907, before said court at Harrison, in said district, and notice thereof be published in the Boone Banner, a newspaper published in the county of Boone, in said district, and that all persons in interest may appear at the said time and place and show cause, if any they have, why the prayer of said petitioner should not be granted. And it is further ordered that the clerk shall mail to all known creditors copies of said petition and this order, addressed to them at their places of residence as stated.

"Dated at Harrison, in said district, this the 7th day of November, A. D. 1907.  
F. M. Garvin, Referee."

Thereupon the clerk caused a notice to be published in the Boone Banner, the newspaper designated for the publication of notices in bankruptcy, and on November 18, 1907, the editor and publisher of that paper filed a copy of said notice, duly attested, under oath, showing that it had been published on November 14, 1907, in that paper; the publication having occurred nine days before the date set for the hearing of the application for discharge. Clerk also certifies that on the 7th of November, 1907, he sent by mail to all known creditors copies of the order of the referee, *supra*, and the petition for discharge, as in said order directed. In this shape the record stood when the application for discharge was presented to the District Court for its action, under rule 12 in bankruptcy of this court. The record disclosing no appearance by any creditor, and, no objections having been filed to the petition for discharge, the court on the 26th of November, 1907, ordered the bankrupt discharged, as a matter of course. At the time the order of discharge was made, the court knew absolutely nothing of the status of the case, except as it appeared from the record above referred to. Three days after the discharge was granted, a paper entitled, "Petition for Rehearing on Application for Discharge" of the bankrupt, was filed with the clerk, and forwarded to the court for its consideration. Thereupon the court ordered all the testimony before the referee of the bankrupt and other witnesses sent to him, and has carefully examined all the evidence and the other parts of the record. Ordinarily I should set the motion down for hearing, and give the bankrupt notice; but the conclusion I have reached cannot be altered by any facts, in view of what the record affirmatively shows. In this case a very careful and critical examination of the matter has convinced me that rule 15 in bankruptcy of this court is in conflict with the bankruptcy law and the rules and forms adopted by the Supreme Court of the United States pending and in force, and is therefore invalid. Sec-

tion 30a of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3434]) provides:

"All necessary rules, forms, and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time, by the Supreme Court of the United States."

In pursuance of this section, the Supreme Court prescribed certain forms and general orders which were put in force on the first Monday in January, 1899, and are still in force and binding on the bankrupt courts. General order 38 (89 Fed. xiv, 32 C. C. A. xiv) provides that:

"The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case."

Form 57 (89 Fed. lvii, 32 C. C. A. lvii) prescribes for notice to be given to creditors of the application for discharge; but the day fixed for the hearing of the application shall be made by the court, and not by the referee, as prescribed by rule 15 in bankruptcy in this district, which is now abrogated. Moreover, this order is an order of court, and must go on the bankruptcy record, which is the practice now obtaining in this district; but no orders of the referee can properly go on the bankruptcy record which is kept by the clerk, and this, I think, demonstrates that the referee cannot be granted the power to make the order as provided in rule 15.

Again, the examinations of sections 14 to 17, inclusive, and section 38a (4) of the bankruptcy law, show that all questions at every step arising out of applications for discharges are original questions for the court, and expressly withheld from the referees. The whole proceeding which was had in the case at bar therefore, after the application for discharge was filed with the clerk, was irregular and invalid, primarily because rule 15 was invalid. The referee, therefore, had no power to make the order requiring notice to be given to the creditors, or fixing the date when the application for discharge should be heard, because his action in so doing failed to comply with form 57, prescribed by the Supreme Court of the United States.

But this case presents another question, which ought not to be overlooked, and which is now considered for the future guidance of referees. Rule 12 (I) in bankruptcy in this district, which is now in force, requires that, when the application for discharge is filed with the clerk, the latter shall forthwith send it to the referee having charge of the bankruptcy proceeding. Upon receipt of the application, the referee shall immediately examine the same, and ascertain if it be in proper form; and, if not in the prescribed form, he shall return the same to the clerk, and notify the bankrupt of the defect therein for correction, and upon such correction the clerk shall forthwith return the same to the said referee. When the application is found to be in proper form by the referee, "he shall immediately report that fact to the judge of the court, with a statement as to whether or not the bankrupt has, in all things, complied with the bankrupt act, and whether, in his judgment, the case is sufficiently advanced and proceedings in proper condition to entitle the bankrupt to his discharge. And thereupon the court will direct the clerk to give the notice prescribed therein by

form No. 57 of the forms in bankruptcy." In substance the same provision was contained in rule 15 which has been abrogated. When the petition in the case at bar was filed with the clerk, it was forwarded to the referee, in order that he might examine it and see whether it was in proper form, and, if so, report to the court the status of the case, as required by rule 12, from which the above quotation is made. In the case at bar the referee made the certificate substantially in form as required by rule 12; in other words, stated that, in his judgment, the case was sufficiently advanced, and the proceedings in proper condition to entitle the bankrupt to his discharge. In the opinion of the court this action upon the part of the referee was a clear error of judgment. This report and statement as to the status of the case appears affirmatively upon the record as having been made by him on the 7th of November. An examination of the testimony taken before the referee shows, as heretofore stated, that the examination of the bankrupt began on the 21st of October, and that examination did not close until the 20th of November, 13 days after the referee had made the report and statement above referred to, and the examination of the bankrupt himself did not close, according to the depositions taken before the referee, until the 20th of November. So far as the referee's record discloses, the examination being had by the counsel for the creditors with a view of discovering the supposed concealed assets of the bankrupt has not yet been closed. The referee could not have known at the time his report and statement was made what the investigation would develop if it was not concluded. Until it was concluded, the proceedings were not in a proper condition to entitle the bankrupt to a discharge. The referee should have known, and the record so made to show, that the examination was closed, if necessary, by compelling counsel for the creditors to so state; or, if necessary, to make an order closing it himself, of which counsel should have been advised. Until that was done, and the examination appeared to him to be fruitless, no report should have been made to the court that the status of the case was such as to justify the discharge of the bankrupt. The making of this report and statement by the referee, under such conditions, entirely misled the court, and caught counsel off their guard. Counsel had a right to assume that no such order would be made pending the investigation, and they were not prepared, until the investigation had closed, to advise their clients whether it was worth while to oppose a discharge. Moreover, their clients might reasonably suppose that, if any such order was made pending the investigation, their attorneys would know of it; and hence, not thinking it necessary to send them the notices, they were therefore very naturally caught off their guard. For these and other reasons, it is obvious that the report should not have been made pending the examination of the bankrupt before the referee. The benefit which the bankruptcy law secures to the unfortunate debtor is relief from all his dischargeable obligations when discharged; but the condition precedent to his discharge is the surrender of his property in conformity with the requirements of the bankruptcy law, and every step taken in the administration of the bankruptcy law (which is an equitable proceeding) should be open and fair, and all

parties given a reasonable opportunity to be heard at every stage affecting the interests of creditors.

It is not meant to indicate, in this opinion, that there was in the case at bar any disposition upon the part of the referee to mislead the counsel for the creditors; but the making of this report, under the circumstances, was well calculated to so result, and similar action should be avoided in the future.

The order in this case will be that the order heretofore made granting Johnson the discharge will be vacated and set aside for want of proper notice, and that the application for discharge be referred to the referee, with instructions not to report the case as sufficiently advanced and the proceedings in proper condition to entitle the bankrupt to a discharge until the examination of the bankrupt has been formally closed, and no litigation pending against him to vacate and set aside conveyances as fraudulent.

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STATE OF OREGON v. THREE SISTERS IRR. CO. et al.

(Circuit Court, D. Oregon. December 30, 1907.)

No. 3,191.

**1. REMOVAL OF CAUSES—GROUNDS—DECLARATION.**

To warrant the removal of a cause as arising solely under the laws of the United States, the fact must appear from complainant's statement of his own claim in his bill or declaration.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 58, 59.]

**2. SAME.**

A suit is removable as arising solely under the Constitution, laws, or treaties of the United States, if from the questions raised by the bill it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or laws of the United States, and sustained by the opposite construction.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 30-53, 58.]

**3. SAME—IRRIGATION OF PUBLIC LANDS—CONTRACT.**

Where a contract between plaintiff, the state of Oregon, and defendants, for the reclamation of certain desert lands, depended for its validity on Act Cong. Aug. 18, 1894, c. 301, 28 Stat. 422 [U. S. Comp. St. 1901, p. 1554], as amended by Act June 11, 1896, c. 420, 29 Stat. 413 [U. S. Comp. St. 1901, p. 1556], and Act March 3, 1901, c. 853, 31 Stat. 1183 [U. S. Comp. St. 1901, p. 1557], providing for the reclamation and irrigation of certain parts of the public domain to be conveyed to the states on performance of certain conditions, and that, before such act, there could have been no dealings between the parties with reference to the subject of the contract, an action by the state to annul the contract because of defendant's failure to comply therewith was one arising solely under the laws of the United States, and therefore removable to the federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, §§ 37-40.]

**On Motion to Remand.**

This is a suit brought in the state court by the state to cancel a contract entered into between itself and the defendant, the Three Sisters Irrigation Company, with reference to the reclamation of certain desert lands situated in Crook county, Or., in pursuance and by authority of Act Cong. Aug. 18,

1894, c. 301, 28 Stat. 422 [U. S. Comp. St. 1901, p. 1554], known as the Carey Act, and Act June 11, 1896, c. 420, 29 Stat. 413 [U. S. Comp. St. 1901, p. 1556], and Act March 3, 1901, c. 853, 31 Stat. 1188 [U. S. Comp. St. 1901, p. 1557], amendatory thereto. By the Carey act the Secretary of the Interior, with the approval of the President, is authorized and empowered to contract and agree with the state to donate, grant, and patent to it such of the desert lands, not exceeding 1,000,000 acres in amount, as the state may cause to be irrigated, reclaimed, and occupied, but before any such contract can be entered into, or any act done towards segregating any tract from the public domain, it is required that the state file a plat of the land proposed to be irrigated, which shall exhibit the plan, indicating the contemplated mode of reclamation, which plan shall be sufficient to thoroughly irrigate and reclaim the land in view for segregation, and shall also show the source of water to be used. The state is then authorized to make all necessary contracts to cause the lands to be reclaimed and to induce their settlement and cultivation, in accordance with and subject to the provisions of the act, and it is provided that, as fast as the state may furnish satisfactory proof, according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any such lands have been irrigated, reclaimed, and occupied by actual settlers, patents shall be issued to such state or its assigns for such lands so reclaimed and settled, any surplus of money derived from the sale of any such lands in excess of the costs of reclamation to be held by the state as a trust fund for, and to be applied to, the reclamation of other desert lands therein. By the amendment of June 11, 1896, the state alone is authorized to create liens upon the lands to be segregated for the actual cost and necessary expenses of reclamation, and reasonable interest thereon, until disposed of to actual settlers; and it is further enacted that when an ample supply of water is actually furnished, in a substantial ditch or canal, or other means of supply, to reclaim a particular tract or tracts of such land, then that patents shall issue for the same to such state without regard to settlement or cultivation. The amendment of March 3, 1901, relates to the time within which reclamation shall be made and completed. The state of Oregon, at its legislative session of 1901, adopted an act accepting the benefits of the Carey act, which provides (section 2) that, after application made as prescribed by any person, company, or corporation for reclamation of government desert lands, the state land board is authorized to make proper application for the lands described to the Secretary of the Interior, and thereupon to enter into contract for the donation and patent from the government, and the board is further authorized to make and enter into such contracts and agreements, and to create and assume such obligations in relation to and concerning said lands, as may be necessary to induce and cause such reclamation thereof, as is required by the contract with the Secretary of the Interior and the acts of Congress alluded to. Section 3 requires that such person, company, or corporation shall file application for any such lands as it is desired to reclaim, and that such application shall be accompanied by maps and plats showing the plan or mode adopted for irrigation and the source of the water supply, being the same in substance and effect as is required by the provisions of the Carey act, all to conform with the rules and regulations of the Secretary of the Interior; the intendment being to authorize and require the applicant to do and perform all things necessary to be done to enable the state to select the lands, and without cost to the state. Section 4 provides for entering into contract with the state land board for carrying into effect the plan adopted, and requires that the person, company, or corporation so entering into such contract shall, among other things, undertake and agree to furnish an ample supply of water substantially in accordance with the act granting the same to the state, and make the proofs exacted by the Secretary of the Interior for the issuance of the patent. Section 5 provides that, when any such contract is entered into with the state board, thereupon the state shall make application to, and enter into a contract with, the Secretary of the Interior for the donation and grant of such lands to the state. The remaining sections of the act have to do with the effect of a non-compliance with the contract entered into with the state land board, and the manner of disposing of the lands, subject to reclamation to settlers, and the conveyance to be executed therefor. The bill of complaint shows that on December 5, 1902, the Three Sisters Irrigation Company, under and by virtue of

the acts of Congress and of the legislative assembly of the state of Oregon above noted, relating to the reclamation of arid lands within the state, entered into a contract with the state land board, providing for the reclamation of certain lands in Crook county, Or., and that thereupon the state board applied to the United States for a segregation of the lands desired, and subsequently procured a donation and patent for a portion of them. The bill then further sets up, in effect, that the board was induced to enter into the contract with the said Three Sisters Irrigation Company through false and fraudulent representations and machinations; that the company has not complied with its contract in securing the amount of water agreed to be diverted for irrigation purposes, or any sufficient proportion thereof for reclaiming more than a fractional portion of the lands designated; and that it has virtually abandoned further development of the project, but that it is fraudulently endeavoring to collect moneys from settlers without fulfilling its obligation to the state and to such settlers. The prayer is for a cancellation of the contract, for an accounting, and for general relief. In due time after the filing of the complaint in the state court an application was made for removal into the federal court, and the cause is now presented here on a motion to remand.

A. M. Crawford, Atty. Gen., and John Manning, Dist. Atty. (King, Guerin & Kollock, special counsel), for the State of Oregon;  
Seneca Smith and P. L. Willis, for defendants.

WOLVERTON, District Judge (after stating the facts as above). The removal was sought upon the sole ground that a federal question was involved by the controversy; and whether such a question is so involved is the one now presented for consideration and decision.

It may be premised as a legal principle, now firmly settled, that to warrant the removal of a cause from a state court into the federal Circuit Court as one arising solely under the Constitution, laws, and treaties of the United States, the condition or the fact that it so arises must be made to appear from the complainant's statement of his own claim, and not only this, but his bill or declaration must show a case of that character so that an inspection of the record thus limited and circumscribed must determine whether there is cause for removal. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511; *Postal Telegraph Cable Co. v. Alabama*, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231; *Oregon Short Line, etc., Ry. v. Skottowe*, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048; *Galveston, etc., Railway v. Texas*, 170 U. S. 226, 18 Sup. Ct. 603, 42 L. Ed. 1017; *Third St. & Suburban Railway v. Lewis*, 173 U. S. 457, 19 Sup. Ct. 451, 43 L. Ed. 766; *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 24 Sup. Ct. 598, 48 L. Ed. 870. The more difficult thing to determine, however, is when and under what conditions a federal question is involved. The following form of statement relative to the subject has the uniform sanction of the Supreme Court of the United States: I quote from the language of Mr. Justice Waite, in *Starin v. New York*, 115 U. S. 248, 257, 6 Sup. Ct. 28, 31, 29 L. Ed. 388:

"If from the questions it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875; otherwise not."

Numerous cases are cited in support of the principle. The act of 1887, as corrected by the act of 1888, has not changed the law relative

to the particular subject, so that the principle is as readily applicable now as under the old statute. In a later case the same eminent jurist makes use of the following language, which has application to the question first herein discussed, as well as the present one, namely:

"A suit by a state in one of its own courts cannot be removed to a Circuit Court of the United States under the act of 1875, unless it be a suit arising under the Constitution or laws of the United States or treaties made under their authority (*Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482), and a suit cannot be said to be one arising under the Constitution or laws of the United States until it has in some way been made to appear on the face of the record that 'some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by an opposite construction.'" *Germania Insurance Co. v. Wisconsin*, 119 U. S. 473, 7 Sup. Ct. 260, 30 L. Ed. 461.

In this case it was said that the only question presented by the record was one relating to service of summons upon the defendant; and hence that it could not be maintained that a federal question was involved. So in a still later case, which was one in assumpsit upon the common counts for the price of a machine, where, incidentally to a defense, the defendant claimed the invalidity of a certain patent, the court said:

"The action under consideration is not one arising under the patent right laws of the United States in any proper sense of the term. To constitute such a cause the plaintiff must set up some right, title, or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction of these laws." *Pratt v. Paris Gaslight & Coke Co.*, 168 U. S. 255, 259, 18 Sup. Ct. 62, 42 L. Ed. 458.

In the celebrated case of *Cohens v. Virginia*, 6 Wheat. 264, 379, 5 L. Ed. 257, Chief Justice Marshall has this to say:

"A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either."

In further development of the subject, I quote again from the language of Mr. Chief Justice Waite, employed in his opinion in the case of *Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 203, 24 L. Ed. 654:

"A cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved."

And again, says Mr. Justice Harlan, in *Railroad Co. v. Mississippi*, 102 U. S. 135, 140, 141, 26 L. Ed. 96:

"It is settled law that cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted."

While the soundness of the statement as it relates to the defense of the party is questioned by the dissenting opinion of Mr. Justice Miller, who has been sustained by subsequent adjudications of the Supreme



Court, the statement in all other respects has never been challenged that I am aware of. Indeed, Mr. Justice Miller himself concurs to this extent. He says:

"Looking, also, to the reasons which may have influenced Congress, it may well be supposed that, while that body intended to allow the removal of a suit where the very foundation and support thereof was a law of the United States, it did not intend to authorize a removal where the cause of action depended solely on the law of the state, and when the act of Congress only came in question incidentally as part (it might be a very small part) of the defendant's plea in avoidance."

The language of Mr. Justice Harlan is quoted with approval by Mr. Justice Brown in *Re Lennon* (a later case) 166 U. S. 548, 554, 17 Sup. Ct. 658, 41 L. Ed. 1110. No better instance is afforded of a cause of action growing out of an act of Congress than *Osborn v. United States Bank*, 9 Wheat. 738, 6 L. Ed. 204. There the bank was incorporated under an act of Congress. The validity of the contract furnishing the subject of the suit depended upon that act, and so the court said:

"The case arises emphatically under the law. The act of Congress is its foundation. The contract could never have been made, but under the authority of that act. The act itself is the first ingredient in the case, its origin, is that from which every other part arises."

Now, what is this suit as presented by the bill of complaint? Does it arise under or grow out of a law of Congress? It is one to annul a contract entered into between the plaintiff and defendant. The contract depends for its validity upon the Carey act. Without that act there could have been no dealing between the parties upon the basis adopted touching any of the public domain. The entire transaction grows out of, and is dependent for its validity upon, the initial legislation of Congress. That legislation promulgates a plan for reclamation by a state, and authorizes the state to contract with a person, company, or corporation to carry out whatever project may be agreed upon for doing the reclamation work. The state adopts the plan of Congress, and provides by its own enactment for contracting with individuals, firms, or corporations for reclaiming the desert lands, all in accordance with the provisions of Congress, and thereupon enters into the contract in question, and alleges that in doing so it complied with both the act of Congress and that of the legislative assembly of the state. All has proceeded in pursuance of the act of Congress, and the litigation arises upon an instrument which is the result of such a proceeding. It seems perfectly clear and consequential, therefore, that the suit has grown out of the legislation or a law of Congress. True, the especial grievance complained of is the alleged breach of the contract, and it might be that the ultimate issue would simply resolve itself into one of fact as to whether the defendant has complied with the stipulations of the agreement. But such stipulations are essentially obligations to comply with the provisions of the Carey act, and the suit is nevertheless one touching the right or privilege of the complainant accorded under the act, and the act itself is certainly involved by the litigation. It is hardly possible that the state can maintain its rights and privileges thus granted without in some way calling to its aid some, if not many, of the pro-

visions of the act, and drawing into controversy the proper interpretation and rendering of such provisions.

So I must conclude that the removal was properly granted, and the motion to remand will be denied.

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In re HOPPER-MORGAN CO.

(District Court, N. D. New York. January 15, 1908.)

No. 2,271.

1. **BILLS AND NOTES—BONA FIDE PURCHASERS—PURCHASE FROM AGENT.**

Where claimant purchased certain notes of his agent, who was a note broker, claimant was charged with any knowledge as to the invalidity of the notes that his agent possessed.

2. **SAME—TRANSFER—BONA FIDE PURCHASER—BURDEN OF PROOF.**

Where claimant purchased certain notes from his agent, a note broker, and claimed that such agent took the notes in good faith and for value, the burden was on claimant to establish such fact and to make a full disclosure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1675, 1676.]

3. **SAME—EVIDENCE.**

Evidence held to warrant a finding that claimant was not a bona fide purchaser of certain notes on which a claim was based, but was charged with knowledge of his agent, a note broker, that the notes were fraudulently issued and had been fraudulently diverted, and were therefore not proper claims against the maker.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 1832-1839.]

In Bankruptcy. Appeal from order of referee in bankruptcy disallowing the claim of John B. Pilling of \$6,252.63 on three promissory notes alleged to have been made by the bankrupt.

Kellogg & Reeves, for claimant.

Brown, Carlisle & McCartin, for trustee.

RAY, District Judge. About April 4, 1905, one Roger Morgan, treasurer of the Hopper-Morgan Company, a manufacturing corporation of New York state having its factory and place of business at Watertown, N. Y., now bankrupt, without authority or consideration to the company, issued some \$50,000 of the paper of the company in notes for various amounts, made out on the note blanks of said company, payable to the order of "ourselves," and indorsed, "Hopper-Morgan Co., Roger Morgan, Treas." The indorsement was without authority. One of the notes in question here for \$1,250 was also indorsed by Roger Morgan individually. These notes, aggregating \$50,000, were delivered to one Trautwine, under the agreement they should be used as collateral only, taken up and returned before maturity, and not become a charge against the company. They had no legal inception, although Trautwine agreed to pay Morgan a certain percentage for their use. The notes were at once fraudulently diverted by Trautwine. These facts are not in dispute.

Prior to this time Morgan, as treasurer, had issued another batch of notes, dated March 29th, aggregating about the same amount, without authority or consideration, indorsed in the same way, all payable to the order of "ourselves." These were also delivered to Trautwine by Morgan under a similar agreement, and were also fraudulently diverted by him. All the notes of both issues were made payable at 395 Broadway, New York City. As all of the notes of the first issue have either been gathered up and returned without payment, or have turned up in the hands of innocent holders for value, and have been proved against the estate, that issue becomes immaterial, except as it bears on the question of general knowledge among note brokers in Boston, Mass., of the invalidity of this class of notes, and knowledge on the part of this claimant and of the person from whom he obtained them. Hence it will be understood I am speaking hereafter of the second issue of notes above described, of which the notes here in question are a part; the note for \$1,250 being one of the originals, or one of a smaller batch issued about the same time, but of the same character as the \$5,000 note, and the two of \$2,500 having been made and delivered by Morgan in place of a note of \$5,000 of that issue before it became due.

Trautwine delivered the notes to one Morton, a note broker of Boston, Mass., who was a party to the fraud evidently. There is no evidence he was ever a holder in good faith or for value. The notes in question here were delivered by Morton to one Robinson, another note broker, who in turn delivered them to one Collins, another note broker, who in turn delivered them to one Hasseltine, another note broker, who was agent for the claimant here, John B. Pilling, and is therefore charged with any knowledge Hasseltine had. Hasseltine kept no record of his transactions, or of these transactions with reference to the notes in question. The claimant insists that Hasseltine took the notes in good faith and for value. The burden was on him to show—prove—this fact, and to make full disclosure. *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866; *King v. Doane*, 139 U. S. 166, 173, 11 Sup. Ct. 465, 35 L. Ed. 84; *Lytle v. Lansing*, 147 U. S. 59, 62, 13 Sup. Ct. 254, 37 L. Ed. 78; *Pana v. Bowler*, 107 U. S. 542, 2 Sup. Ct. 704, 27 L. Ed. 424. Failure to make full disclosure may fatally weaken proof. *Stewart v. Lansing*, 104 U. S. 510 (26 L. Ed. 866). So evidence on the subject is to be carefully scanned. *Lytle v. Lansing*, 147 U. S. 68, 13 Sup. Ct. 258, 37 L. Ed. 78. "If the amount paid is greatly disproportionate to the real value, the security may be regarded as having been obtained without paying anything for it." *King v. Doane*, 139 U. S. 174, 11 Sup. Ct. 468, 35 L. Ed. 84.

Hasseltine testifies, in substance: That he had sold notes to Pilling, father of claimant, in his lifetime, and since then had sold notes to Pilling. That he met Collins, who told him he had the \$5,000 note and \$1,250 note which he wished Hasseltine to take. That he paid Collins for the \$5,000 note as follows: Was allowed \$100 discount, gave him a note of \$1,000 made by one Helm, indorsed by G. I. Robinson, another note broker, with collateral; gave up to Collins his individual note of \$2,500, secured by collateral, \$140,000 of the common stock of the Lenox Hotel, of Boston, Mass.; also returned to Collins \$350

of his checks, and placed a \$25,000 insurance policy on the life of Collins as a broker. Premium was \$1,390.25, which Hasseltine paid in this way: \$1,050 was deducted from the \$5,000 note; that is, \$1,050 was deducted from the \$1,390 premium he was to pay. Says he cannot tell when he took the notes, but thinks it was in May, 1905; that he cannot tell when he paid the insurance premium; could pay it when he got ready and that the insurance was dated February 25th. Also that he paid for the \$1,250 note as follows: Discount allowed \$31.25; balance of the insurance premium \$340.25; and returned to Collins of his (Collins') checks, which he (Hasseltine) held, \$878.50. Says Collins told him he owned both notes. Cannot tell whether the notes he gave Collins were past due or not. Cannot tell how or when he paid the premium on the insurance. Now holds the policy as security for something. Got it January, 1906, in another deal. It belongs to the John Pilling estate. He got the Helm note from Robinson. He cannot tell when he got it, or what he paid for it, and cannot tell what the consideration for Collins' \$2,500 note was. Checks might have been for cash; might have been discounts. Did not have possession of any of these things—"stuff" he called it—when he made the trade with Collins, except the checks. It all belonged to Pilling, etc. It seems checks were given on balances and held, with understanding they were not to be presented until some fixed time, as other deals might be made and a balance found the other way, in which they were taken as if a payment were made in cash. The Helm note was made by another note broker, who had a batch of some \$50,000 of these notes, and who had dealings in regard to some of them with these other parties, or some of them. In short, the checks were a sort of I. O. U., if they ever existed. Pilling was sworn, and says he cannot tell when he got the notes, except it was prior to September 1st, and cannot tell what he gave for them; keeps no books, but purchases about \$100,000 of notes per year; is mixed up with Collins in the note business to quite an extent; did not know at the time of this deal between Collins and Hasseltine; cannot even tell what Hasseltine gave Collins.

There is no evidence that this so-called collateral, or the checks and notes, were of any value. A clerk of Collins says he was dealing in notes of no value, makers of no responsibility, and this was done intentionally. There is evidence showing or tending to show that Pilling, Hasseltine, and the other brokers knew, at the time of this deal, that these Hopper-Morgan notes were in ill odor, worthless, and for some reason being hawked about Boston and transferred for about 10 cents on the dollar, but not on account of the financial standing of Hopper-Morgan Company. Inquiry would have disclosed all the facts regarding these notes. True, Morgan wrote two or three letters to other parties regarding certain notes, stating those were good and would be met. But those letters did not refer to these notes, and there is no evidence Hasseltine knew of them, or relied on the statements therein contained. I have given a general outline of the testimony only. There is no doubt in my mind that Hasseltine, who had had some of these notes before, knew the true character of these notes. I have no doubt it was a mere trade in "cats and dogs," paper "cats and dogs," and understood so to be. There was neither "good

faith" nor "value" in the commercial sense. Of course, property of value is the same as cash. It matters not what the standing of Pilling is, or was, except as bearing on his credibility. If a man intrusts his note deals to a trader in notes, who acts as his agent with general authority, he is charged with the knowledge of his agent gained and in mind in so doing the business.

Bona fide purchasers and holders of commercial paper, fair on its face and not dishonored, are always to be protected; but in this case the fraud of those who obtained and diverted the notes in question is imputed to subsequent holders and cast on this claimant the burden of showing he was a bona fide holder for value, or that he took from some one who was. This he has wholly failed to do. A decided badge of bad faith is that the \$5,000 note, before due, was voluntarily returned to Morgan by claimant or his agent, and the two notes, of \$2,500 each, now presented, obtained from him in its place; such notes being payable at a later day. This was done, evidently, to enable them to put the smaller notes off on some innocent person. The storm they saw impending broke too soon. It is not credible that this claimant surrendered up and obtained two smaller notes payable at a later day in exchange for the \$5,000 note, seeking the change himself, if he was a holder in good faith and for value. At the time of such exchange it was common knowledge that these notes were fraudulently issued and had been fraudulently diverted. The testimony of Collins and Hasseltine is self-contradictory, is full of inherent improbabilities and inconsistencies, and as a whole is not entitled to credence. The referee did not give it full faith and credit, and certainly I cannot.

Whether the "stuff" which Hasseltine says he gave Collins for the notes was of any value is a question of fact, and I find it was not. It is strange that, if Hasseltine was purchasing the notes for Pilling, he should have paid part in "cats and dogs" belonging to Pilling, not in his possession, and part in checks of Collins, not presented, not produced here, and in an insurance deal, with which Pilling had nothing to do and in which he had no interest. Their story of the transaction is so inconsistent with honesty and fair dealing, and so improbable, except among those seeking to hide the true nature and purpose of their deals, that I find the claimant is not a holder of these notes in good faith and for value, and has failed to show that he was. Another badge of fraud is found on one of the \$2,500 notes, taken after claimant says he became the owner of the \$5,000 note and made the exchange. That is indorsed by some one, and the indorsement erased, inked over. This is not explained. In fact, both Pilling and his agent, Hasseltine, profess ignorance. That they are ignorant on the subject is beyond belief. When a witness willfully testifies falsely in one material regard, or conceals facts willfully in giving his testimony, the court may disregard all he says. The testimony of both Pilling and Hasseltine is remarkable for what they do not disclose regarding facts they must have known. This fact is of weight. *Stewart v. Lansing*, 104 U. S. 506, 26 L. Ed. 866.

The referee was right in rejecting this claim, and his order disallowing same is approved and confirmed.

## BAMFORTH et al. v. DOUGLASS POST CARD &amp; MACHINE CO. et al.

(Circuit Court, E. D. Pennsylvania. January 13, 1908.)

## No. 2.

## 1. TRADE-MARKS—IDENTIFICATION OF PRODUCT—POST CARDS.

Uncopyrighted post cards are not entitled to protection as trade-marks either singly or collectively, as they do not identify and distinguish the product of the manufacturer, but constitute the product itself.

## 2. SAME—UNLAWFUL COMPETITION.

The manufacturer of uncopyrighted post cards having no legal right to the exclusive production and sale thereof, the manufacture and sale of like cards by a rival manufacturer may not be restrained as unlawful competition.

## 3. LITERARY PROPERTY—UNCOPYRIGHTED PUBLICATION—EXCLUSIVE PROPERTY.

Neither a book nor a photograph can continue to be the author's exclusive property after it has been printed and offered to the public for sale without being copyrighted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Literary Property, § 4.]

## Motion for Preliminary Injunction.

E. A. Waters and A. H. Rosenfeld, for complainants.

Frank S. Busser and George J. Harding, for respondents.

J. B. McPHERSON, District Judge. The right declared by the complainants' bill to have been invaded is thus described in the first and second paragraphs:

"(1) Your orators are engaged in the publication of illustrated post cards in England, and their sale in England and in the United States. The said business was established in 1900 by your orators, and consists in illustrating post cards by pictures taken from life models and selling such illustrated cards, and was the first business of its kind to be established in either England or in the United States and the Eastern district of Pennsylvania. Said business has been carried on under the name of Bamforth & Co. continuously since then to the present time. Owing to the fact that your orators were pioneers in this business and to the wide advertisement and high quality of their goods, the name 'Bamforth & Co.' has become associated in the public mind with your orators' products, and they are commonly spoken of, bought, and sold by the trade as 'The Bamforth Card' throughout the United States and in the said Eastern district of Pennsylvania.

"(2) And your orators further show unto your honors that they have manufactured and sold throughout the United States and the said Eastern district of Pennsylvania certain post cards which, by reason of the pictures thereon placed and the titles thereto attached and the wide advertisement given them, have attained to great popularity, have been much sought after, and have been sold in great numbers. These post cards so decorated and labeled are entitled: 'A quiet time at last'; 'Everybody works but father,' etc.

It is this right which the defendants are charged with violating; the acts complained of being thus set forth in paragraphs 3 and 4:

"(3) Your orators further show unto your honors that the defendant Douglass is president of the Douglass Post Card & Machine Company, and the defendant Burge is secretary and treasurer of the Douglass Post Card & Machine Company, and that they are familiar with the reputation and value of the name 'Bamforth,' and with the above-mentioned illustrated post cards published by your orators, and the fact that they have a high reputation, also that they are generally known under the name of 'Bamforth'; that they, knowing

these facts and designing to obtain the benefit of your orators' reputation, combined with each other and with divers other persons at present unknown to your orators—whose names when discovered your orators pray that they may have leave to insert herein with apt words to charge them as parties defendant hereto—under the name of the 'Douglass Post Card & Machine Company, Inc.,' have published and are publishing, and have sold and are selling, in the United States and the said Eastern district of Pennsylvania, postal cards on which was and is stamped either your orators' name, 'Bamforth & Co.' or the aforementioned pictures and titles of your orators, which have become known to the trade as published by your orators, or both, copies of which are hereto attached.

"(4) And your orators further show unto your honors that the defendants have made and are making a fraudulent attempt to obtain the benefit of your orators' reputation made by reason of their herein before mentioned and other illustrated post cards, and of your orators' name 'Bamforth,' and to pass off or cause to be passed off on the public goods not of your orators' publication as and for the goods of your orators. And your orators further say that the amount involved and the damages threatened, and which will be incurred by your orators, if the relief herein prayed for be not granted, greatly exceeds the sum of \$10,000."

As thus appears, the bill is directed against unfair competition; its object being further shown by the principal prayer, which asks for an injunction restraining the defendants—

"from buying, selling, or dealing in post cards not published by Bamforth & Co., but bearing the name 'Bamforth,' or bearing any of the pictures or titles or both herein above mentioned and attached hereto, and from obtaining or endeavoring to obtain the benefit of your orators' reputation by any fraudulent use of the name 'Bamforth,' or of the herein above mentioned illustrated cards in the business of selling or manufacturing or publishing post cards illustrated from life models; and from using or selling or in any manner parting with machinery, blocks, and plates employed in producing illustrated post cards wherein the name of 'Bamforth,' or wherein the above named pictures and titles or both appear, and from shipping or parting with any such cards, advertisements, or circulars which they may have in their possession, but that such cards and circulars be delivered up to be destroyed; and that the defendants be compelled to render a full, true, and perfect account of all profits which they have made by the use of the said name 'Bamforth,' or by the use of the above mentioned titles and illustrations, or both; and that the defendants be decreed to pay over to your orators all such profits, together with the costs of this suit."

A further prayer asks:

"That the defendants be compelled to pay your orators compensation for all damages and injury they have by their fraud occasioned, together with such other equitable relief as to your honors shall seem meet."

Upon the hearing of the pending motion, the following facts appeared: The complainants may, or may not, have been the originators of the business described in paragraph 1, but it is undoubtedly true that for several years before the filing of the bill they have been making pictures from life models by a photographic process, and have been extensively engaged, in this district and elsewhere, in selling post cards illustrated by these pictures. The photographs were made by the well-known process. Living persons posed for the picture, a negative was obtained in the ordinary way, and duplicates were printed therefrom upon post cards, which were afterwards offered for sale to the public, and were sold in large numbers. So far as appears from the evidence, none of these photographs has ever

been copyrighted, either in this country or in Great Britain. It is true that some of them bear upon their face the statement that they have been copyrighted; but, if such statement has any value as evidence, it has been satisfactorily disproved, and the fact has been shown to be that, so far as several of the photographs are concerned, the statement is altogether untrue, no effort to obtain a copyright having ever been made; and, so far as others are concerned, if a formal copyright was ever obtained, it was invalid, because of previous publication and sale.

The defendants have made exact copies of the complainants' photographs by the half-tone process, and are selling the copies upon post cards at a much lower price than the originals can be sold. They have been engaged in this business for more than a year. At first they printed and sold their half-tone cards with the name "Bamforth & Co." thereon, as well as the titles of the pictures; but, upon the advice of counsel, the use of the complainants' name was soon discontinued. No cards bearing their name had been printed for several months before the bill was filed, and the defendants disclaim any intention to resume its use, conceding that such action on their part was improper, and that a threatened continuance thereof should be enjoined. But they claim the right to go on with the reproduction of the subjects and the titles of complainants' cards, taking the position that these cards are uncopyrighted photographs which have been dedicated to the public by repeated sales, and may therefore be copied freely by any person and by any process.

In my opinion this position cannot be successfully assailed. No question under the law of trade-marks or the law of unfair competition is now involved. These cards are not trade-marks, either singly or collectively, in any sense of the word. They do not identify and distinguish the complainants' product, but are the product itself; and there can be no question of unfair competition, because the complainants have no legal right to the exclusive production and sale. It would be useless to elaborate a subject so well understood. A photograph, if it be also an artistic production, the result of original intellectual conception on the part of the author, may be copyrighted with the same effect as if it were a book; but, without this protection of the federal statutes, neither the book nor the photograph can continue to be the author's exclusive property, after it has been printed and offered to the public for sale. No authorities need be cited for so plain a proposition. The copyright statutes would have been unnecessary if the author had been able to protect the fruit of his mental efforts in any other way; and, if he declines or omits to avail himself of the protection thus provided, he is conclusively presumed to have presented to the public the product of his creative powers, although he may have had no intention of making such a gift. No doubt a photograph might be adopted as a trade-mark to distinguish a manufactured article; but, how a photograph, if it be also a work of art and therefore capable of copyright, can be the subject of unfair competition, I am unable to understand. The only possible way to compete with such a photograph is to reproduce it, and any one may do this lawfully after it has been



published, unless the protection of the federal statutes concerning copyright has previously been obtained. The question, therefore, does not belong to the region of unfair competition, but concerns the subject of copyright alone. If the photograph is artistic and has been copyrighted, its reproduction is forbidden. If no copyright at all, or—what comes to the same thing—no valid copyright, has been obtained, the author has no exclusive right in the product of his artistic skill, and to copy is therefore not to compete unfairly in a legal sense, but to compete with the full sanction of the law.

A preliminary injunction must be refused. Disposition of the costs accrued upon this motion will be made upon final hearing. I need scarcely add that this decision rests solely on what I believe to be the defendants' legal right, and does not imply an approval of their deliberate appropriation of what is morally the complainants' property, although it has negligently or ignorantly been left without adequate protection.

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#### THE JEFFERSON.

(District Court, E. D. Virginia. January 14, 1908.)

##### SALVAGE—NATURE OF SERVICE—VESSEL IN DRY DOCK.

The word "salvage," as used in the maritime law, contemplates services rendered in connection with perils of the sea and to vessels or other craft and instrumentalities in use in the navigation of the sea or other waters, and there can be no lien for salvage for services rendered to a vessel while in a dry dock permanently attached to the shore for repairs in extinguishing a fire communicated to such vessel from buildings on the land; nor is a suit to enforce a claim for such services within the admiralty jurisdiction.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6312-6315; vol. 8, p. 7794.]

In Admiralty. Libel to recover salvage.

Thorp & Bowden, for libelants.

H. Putnam and Loyall, Taylor & White, for respondent.

WADDILL, District Judge. The libel in this case was filed by E. A. Simmons, late master of the steam tug Helen, "in behalf of himself and others interested as salvors," against the steamship Jefferson, one of the Old Dominion Steamship Company's vessels plying between the cities of Norfolk, Va., and New York, to recover for salvage services rendered in aiding to extinguish a fire on said steamship while in the dry dock of the Newport News Shipbuilding & Dry Dock Company, at Newport News, Va.

The cause is now before the court upon exceptions to the libel taken by the owners of the Jefferson, which present for determination the question of whether or not the Jefferson while thus in dry dock is subject to a claim for salvage. The precise point in issue seems not to have been decided before. Certainly no case has been brought to the attention of the court specifically passing thereon, though the cases of *Cope v. Vallette Dry Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501, and *The Warfield* (D. C.) 120 Fed. 847, bear strongly upon

the subject. In the first-named case the Supreme Court held that a dry dock permanently attached to the shore, and not intended for navigation, was itself not a subject of salvage service, and in the latter Judge Thomas, of the Eastern District of New York,\* decided that a vessel undergoing repairs in a dry dock was not the subject of a maritime lien for an injury sustained while therein by a person falling through one of her hatches. The correct determination of this case must depend more upon the proper consideration of the general principles of maritime law applicable to salvage awards than upon decisions definitely controlling the same. The elements of a salvage claim may well be taken into account in this connection, including the kinds of property against which it can be asserted, together with the character of service, and where the same may be performed.

Salvage is not based upon the mere right of compensation for work done and labor performed, but upon public considerations affecting the interests of commerce, the advancement and safety of navigation, and the security of lives and protection of property of those engaged in the hazardous service. In arriving at the amount of such an award the courts especially take into account the risks involved to the salvors, the enterprise, labor, and skill displayed, the value of the property saved, the extent of the danger from which it was saved, and also the value of the property and apparatus used in the expedition. These, however, have relation to perils encountered and services rendered and performed to vessels actually engaged in commerce, either on the high seas or other public navigable waters. The ship's business, the character of peril, and its locality, one and all, are important considerations. The *Jefferson* at the time of the service sued for was not a medium of commerce subject to dangers and hazards of the seas. She, on the contrary, was in an unseaworthy condition undergoing repairs. She could not move of her own volition, nor could she be used at the time in furtherance of commerce. She was neither pursuing nor capable of engaging in her ordinary business of navigation of the seas. In the *Hendrick Hudson*, 3 Benj. 419, Fed. Cas. No. 6,355, the court says:

"The fact that the structure has the shape of a vessel, or had been once used as a vessel, or can by proper appliances be again used as such, cannot affect the question. The test is the actual status of the structure as being fairly engaged in commerce or navigation."

In *The Warfield* (D. C.) 120 Fed. 847, supra, Judge Thomas said:

"In her position, on the dry dock, she was not only out of commission and withdrawn from navigation, but also incapable of navigation."

Nor can it be said that the libelants rendered their services in saving the *Jefferson* from a peril of the sea, which is manifestly the character of loss for which a salvage award is made. *Hughes, Adm'r*, 129; *The Charlotte*, 3 W. Rob. 68. The libel avers, in substance, that while the *Jefferson* was on fire, and in a dry dock from which all water had been withdrawn, the *Helen* hurried to the scene, and while lying at the bulkhead of one of the piers, and as close to the dry dock as possible, she, along with other tugs, played streams of water from their fire hose upon said steamship *Jefferson*, and continued so to do until the

fire was completely extinguished, and that "during all of which time libellant and said salvors rendered every possible assistance to said steamship, and during all of which time libellant and others entitled as salvors as aforesaid underwent great suffering from smoke, flame, and sparks, and endured great hardship from exposure to the wind and water in the bitter coldness of the weather, and libellant and other salvors incurred great danger from said smoke, flames, and sparks, and from electric wires, falling poles, adjacent burning buildings," etc. This language makes it clear that the peril in which the Jefferson was placed arose from a fire on the shore, and that there was no peril in connection with the sea, or the navigation thereof, other than that the libellants by means of the fire hose of their tug played the water from the harbor on the fire, with a view of extinguishing the same. In Benedict's Adm. (3d Ed.) § 300, this definition of salvage is given:

"The right to salvage depends solely upon the consideration that the property has been saved to the owners from maritime peril by the salvor."

In the case of *The Emulous*, 1 Sumn. 207, Fed. Cas. No. 4,480, Story, J., said:

"I take it to be very clear that, whenever the service has been rendered in saving property on the sea or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service."

And Chancellor Kent in his Commentaries (volume 3, p. 245) says that salvage is "founded on the principle of rewarding individual spontaneous and meritorious services rendered in the protection of the lives and property of others on the sea or wrecked on the coast of the sea." Judge Marvin in his valuable work on Wrecks and Salvage (page 104, § 97 [1858 Ed.]) says:

"Salvage is a compensation for maritime services rendered in saving property or rescuing it from impending peril on the sea, or wrecked on the coast of the sea, or on a public navigable river or lake, where interstate or foreign commerce is carried on."

The locality of the peril may also be said to be important in the determination of the liability for an award for salvage in a case like this. In Abbott's Law of Merchant Shipping (12th Ed.) p. 539, it is said:

"Before the acts of Parliament presently mentioned, if the salvage was performed at sea or between high and low water mark, the court of admiralty had an original jurisdiction over the subject, and would fix the sum to be paid, and adjust the proportions, and take care of the property pending the suit, or, if a sale was necessary, direct a sale to be made, and divide the proceeds between the salvors and the proprietors according to equity and reason."

See, also, 2 Ency. of Laws of England, p. 368; Benedict's Adm'r (3d Ed.) § 111. In Kennedy's Civil Salvage (2d Ed.) p. 1891, the perils for which an award for salvage under the modern English practice may be made, is thus limited:

"When in danger, either at sea, or on the shores of the sea, or in tidal waters, or on the shores of tidal waters."

In *Ex parte Easton*, 95 U. S. 68, 24 L. Ed. 373, the Supreme Court thus declares the sources of admiralty jurisdiction:

"Admiralty and maritime jurisdiction is conferred by the Constitution, and Judge Story says it embraces two great classes of cases—one dependent upon locality, and the other upon the nature, of the contract."

In *Fifty Thousand Feet of Timber*, 2 Low. 64, Fed. Cas. No. 4,783, Judge Lowell says:

"A suit for salvage is neither contract nor tort. It resembles the latter; it being a proceeding for unliquidated damages and in depending on locality."

The conclusion of the court is that the word "salvage," as used in maritime law, contemplates services rendered in connection with perils of the sea, and to vessels and other craft and instrumentalities in use in the navigation of the sea, as distinguished from those arising from ordinary casualty, such as fire or other damage to property on land, not itself subject to admiralty jurisdiction. The mere fact that the property upon which the fire was extinguished was that of a vessel will not suffice. There must have been a sea peril from which it was rescued, and the vessel itself must have been at the time the subject of a sea peril, in order to support a maritime lien, and afford jurisdiction in rem in the admiralty. The principles upon which salvage is awarded, the beneficiaries of such allowances, and the kinds of property subject to such claims entirely exclude the idea of extending that doctrine to services of any kind, however meritorious, arising from causes originating upon the land, or to property on the land, not cast thereon from a wreck on the sea. The claim for salvage services growing out of a collision with a dry dock in *Cope v. Vallette Dry Dock Co.*, 119 U. S. 625, 7 Sup. Ct. 336, 30 L. Ed. 501, was denied, and it would seem to follow that, if the dock itself was not, the legitimate subject of the admiralty, a vessel therein, out of the water, withdrawn for the time being from the designs and purposes of commerce, would not be the object of a maritime lien, and afford jurisdiction, for a maritime claim such as an award for salvage. Counsel for the libelants cite *The Robert W. Parsons*, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73, and earnestly insist that under the language used by Mr. Justice Brown in that case, at pages 33 and 34 of 191 U. S., at pages 13 and 14 of 24 Sup. Ct. (48 L. Ed. 73), in which he says that repairs made on a vessel in a dry dock are not necessarily to be deemed as made on the land, they are entitled to maintain this case. Whatever force there may be in the position of counsel, it can hardly be said that the ruling in that case would be in any sense conclusive of the one under consideration here. That was not a case of salvage, but one arising out of contract for supplies furnished a domestic vessel, and for which a lien was claimed under the laws of the state, and enforced in the admiralty. The claim in such case was in no sense dependent upon locality, but was one of a maritime character, and the statutory lien for which was enforceable alone in the courts of the United States. The *Glide*, 167 U. S. 606, 17 Sup. Ct. 930, 42 L. Ed. 296. The case of *The Plymouth*, 3 Wall. 20, 33, 34, 18 L. Ed. 125, will be found to be of special interest in connection with the subject under consideration. That was a case of tort arising by reason of the negligence of the master and crew of a vessel allowing fire to spread from their ship to property on shore, and burning the same. The Supreme Court held that such loss was not the subject of admiralty jurisdiction, that the dam-

age sued for was sustained wholly upon the land, and that the fact that the cause of the damage originated on water subject to admiralty jurisdiction did not make the case one for the admiralty, and, after emphasizing the fact that the jurisdiction of the admiralty over maritime torts depended upon locality, Mr. Justice Nelson discussed mixed cases where the cause of action arose partly on land and partly on water, and demonstrated conclusively that cases like *The Robert W. Parsons*, *supra*, for supplies furnished a ship, belonged to the class not dependent upon locality, but was controlled by the contractual relations of the parties.

Libelants also cite sundry cases in which salvage has been awarded for services in connection with saving vessels from burning piers or docks. These cases, however, turn upon entirely different considerations from the one in hand, as do also cases having relation to the saving of wrecked property on the sea or the shore of the sea.

It follows from what has been said that the libelants upon the facts and circumstances of this case are not entitled to assert a salvage claim, and that this court is therefore without jurisdiction to entertain this libel for such service, and the same should be dismissed, and a proper decree to that end will be entered.

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REINIGER v. BARRIE et al.

(Circuit Court, E. D. Pennsylvania. January 7, 1908.)

No. 68.

**PARTNERSHIP—ASSOCIATES WHO ARE NOT IN FACT PARTNERS—LIABILITY TO THIRD PERSONS WHO KNOW THE FACTS.**

An owner of an undivided interest in property who with the other owners transacted business with reference to such property under a company name, where there was in fact no partnership between them, cannot be held liable as a partner on a note given by the others in the name of such company, but for which he refused to assume personal liability, to one who had been their legal adviser, and was fully acquainted with all the facts as to their relationship.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, § 52.]

At Law. On motion for new trial.

Bamberger, Levi & Mandel, for plaintiff.

Wm. Y. C. Anderson and Wm. Jay Turner, for defendant George Barrie.

HOLLAND, District Judge. This is a suit on a note for \$3,500, dated December 10, 1903, against George Barrie as surviving partner of Ernest B. Denison, John Harvey Curtis, and William Wright, co-partners, formerly trading as the Pennsylvania-Kansas Improvement Company. The note was signed:

"Pennsylvania, Kansas Improvement Company, by William Wright, Vice President, and by Ernest B. Denison and John Harvey Curtis."

George Barrie, who resides in Philadelphia, refused to sign the note, but the plaintiff seeks to hold him as a partner with the parties signing it. Denison and Curtis were interested as owners in coal and oil lands

and leases in Kansas. Wright was also interested in the same kind of property, and both these parties had offices in Chicago. In April, 1902, the plaintiff went into the employment of William Wright, who was then doing business as William Wright & Co., 604 Chamber of Commerce Building, Chicago, at a salary of \$1,200 per year. About this time Wright, Denison, and Curtis all became interested in several enterprises, and among them the Pennsylvania-Kansas Improvement Company, of which the plaintiff was made the secretary and treasurer, and at the same time became the legal adviser of these parties in all their "several concerns." The plaintiff, 73 years of age, is an experienced lawyer, had been a judge in the state of Iowa for 15 years, a state senator for 8 years, and at the time of his employment by Wright, because of his experience in law, was to act as counsel for them in all matters of law pertaining to the management of their investments. Barrie became the owner of a one-fourth interest in the Kansas investments in the spring of 1903, and subsequently met Wright, Denison, and Curtis a number of times at the various offices of these parties. These parties were not partners in fact. They were one-fourth owners of the properties and leases owned by the four persons named, and the plaintiff, who was their counsel, knew all this, and knew that this relation never changed. The plaintiff prepared papers to incorporate the Pennsylvania-Kansas Improvement Company under the laws of the state of Kansas, but was subsequently abandoned, for the reason that the laws of that state held the incorporators liable to an additional amount equal to the capital stock. The defendant Barrie, however, who had taken a conveyance of a one-fourth interest in the properties, was under the impression that the incorporation had been effected, and he was acting as president.

In the fall of 1903 Wright, Denison, and Curtis induced the plaintiff to loan them \$3,500. He was to receive certain collateral, and, in addition, requested that the four parties should sign the note in order to make them individually liable, and, in order to secure the signature of Barrie, who lived in Philadelphia, the following telegram was sent:

"Chicago, Ills., Dec. 3.

"George Barrie, 1313 Walnut St., Phila., Pa. Can relieve present strain by getting funds from Reiniger on the note of Penn Kan so signed by Wright Denison & Curtis only provided we get your approval of our action. No endorsement by you necessary. Denison & Curtis secure him personally by putting up one half their interest in oil and get money until April first kindly wire us your approval on receipt of this.

Denison & Curtis."

The defendant Barrie, under the impression he was president of a corporation, replied by wire on December 4, 1903, as follows:

"Dec. 4, 1903.

"Denison & Curtis, 735 Stock Exchange Building, Chicago, Illinois. As an officer of the Penn Kan, I approve of loan, but will assume no personal responsibility of any kind.

"[Charge.]

Geo. Barrie"

On December 7th, after he had sent his telegram in regard to the note, he received information that the corporation had not been effected, and that the plaintiff, Judge Reiniger, was of opinion that they could be held as partners. This was the first intimation he had of any

such supposed liability, and on December 11th Judge Reiniger, over his own signature, wrote the defendant:

"At the request of William Wright, I write you in reference to the present status of the Penn-Kan-Company, and would say that, as the company was not incorporated, it is my judgment that in law it would be held as a co-partnership and that each member will be liable to third parties as a co-partner no matter what the private understanding may be between the parties, as to all matters within the legitimate scope of the business undertaken by the company."

On December 18th the plaintiff again wrote defendant:

"I agreed to loan the Penn-Kan-Co. \$3500.00 if you and Wright would approve of it, and C. & D. showed me a telegram from you approving the loan officially and with Wright's approval I made the loan, and the amount was placed to the credit of the Penn-Kan-Co."

It is clear the plaintiff was fully aware of the fact that no copartnership actually existed between these parties. He was a skillful lawyer, acting as their private counsel in all their transactions, and was fully acquainted with their exact status. He knew more about the concern than the parties did themselves. When he loaned the \$3,500 to the Penn-Kan-Company, he knew that they were not copartners, and had notice from the defendant that he would not be personally responsible. The defendant, however, supposing that he was the president of a corporation, sent his approval officially. So that the plaintiff knew more of the facts than the defendant Barrie, and it cannot be said that he was deceived in any manner whatsoever as to the relationship of Barrie to the other three parties.

Confiding in the legal advice of Judge Reiniger, the plaintiff, that the four owners of this Kansas property could be held as partners, Barrie, the defendant, who was one of them, subsequently endeavored to extricate himself from such a legal liability, and in a number of documents drawn by Judge Reiniger, and some by other parties, the defendant with the other owners of the properties were named as members of a partnership. During all this time Judge Reiniger was aware that as a matter of fact no partnership existed; and he cannot now hold them to be partners simply because he knew and advised them that they were liable as partners to other parties who were not as fully informed of the actual facts as the plaintiff. He has not been deceived either by any innocent or intentional act on the part of the defendant as to the relationship existing between the parties who owned the Kansas leases and property.

There is no case cited, and I take it that none can be found, where it is held that a number of persons, who associate themselves together as owners of property in fee simple and who are not partners in fact, can be held as such by one with whom they transact some business who has been their legal adviser and fully acquainted with all the facts as to their relationship. In the cases cited by the plaintiff's counsel where persons, not partners in fact, but who have associated themselves together in the transaction of some business under a name in which they intend to be incorporated, or in the name of the parties themselves, have been held liable as partners to third parties, there has been a failure to properly inform the third party as to the exact status and to

some extent he has been misled. In all such cases, of course, the parties are held liable as partners, but not so where a person knew the exact relation, and especially where he acted as counsel for the party whom he subsequently seeks to hold as a partner. At the trial of the case, after hearing all the evidence both for the plaintiff and defendant, the jury was instructed:

"That under the facts in this case there is not sufficient evidence to establish that the defendant Barrie was a partner and liable on this note, and your verdict should be for the defendant."

Thereupon a motion for a new trial was filed, and the direction of the court assigned as a reason therefor. The uncontradicted evidence clearly established that no partnership existed in fact, and this was known to the plaintiff, who was in no respect whatever misled or deceived when he took the note in question. There was therefore no question of fact as to the defendant's liability for the jury to pass upon.

Motion and reasons for a new trial are overruled, and a new trial refused.

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SMITH v. MUTUAL LIFE INS. CO. OF NEW YORK et al.

(Circuit Court, D. Massachusetts. December 31, 1907.)

No. 396.

**BANKRUPTCY—ASSETS—RECOVERY—CONSIDERATION FOR ANNUITY.**

A bankrupt, while insolvent, on January 2, 1901, purchased for \$2,830 a deferred annuity from defendant, a mutual life insurance company, defendant agreeing to pay the bankrupt \$1,000 a year for the rest of his life, beginning July 1, 1916. *Held*, that as the defendant's contract was wholly executory, so far as it was concerned, and as the defendant was benefited and not harmed by a termination thereof in 1907, the bankrupt's trustee was entitled to elect to cancel the contract and recover the consideration paid by the bankrupt therefor, for the benefit of creditors.

In Equity.

Jeremiah Smith, Jr., and Fish, Richardson, Herrick & Neave, for complainant.

Reginald Foster and William D. Turner, for defendants.

LOWELL, Circuit Judge. Dunning paid to the defendant \$2,830 on January 2, 1901. In consideration thereof the defendant agreed to pay him \$1,000 a year for the rest of his life, beginning July 1, 1916. Dunning was adjudged a bankrupt January 12, 1903. On February 4, 1907, Smith, his trustee in bankruptcy, filed in the Supreme Court of Massachusetts a bill in equity against the respondent, which was duly removed to this court. The bill sets out the facts above stated, and that Dunning was insolvent at the time of the payment to the defendant. The bill offers to return to the defendant the agreement above mentioned, and prays that the defendant be decreed to return to the trustee the sum of \$2,830 originally paid by the bankrupt. To this bill the defendant has demurred.

It is admitted on both sides (1) that the bill sufficiently alleges Dunning's insolvency; (2) that the court may assume that the defendant



was ignorant of this fact, and that it received payment from Dunning in good faith; (3) that the contract made between Dunning and the defendant was upon an adequate consideration, and might have been enforced by Dunning. By virtue of the Statute of Elizabeth, a trustee in bankruptcy can recover from the holder property transferred by the bankrupt in fraud of his creditors, unless the holder is a bona fide purchaser for value. This right of the trustee may come into controversy in many ways. Thus the trustee may recover goods from one who bought them, unless value was paid by the purchaser to the bankrupt before notice of the latter's fraud. In the case at bar the money was paid, not by an alleged purchaser for value, but by the bankrupt himself, and it is the very price paid, and not the object bought with it, which the trustee here seeks to recover. Nearly every transfer for a consideration, however, can be treated as an exchange, in which something is given by each party to the other. A fraudulent transfer of money is within the terms of the Statute of Elizabeth as well as a fraudulent transfer of land or of goods. Where the bankrupt has paid money to an honest vendor in the purchase of goods, such as a horse or a coat, the bargain cannot be canceled, although the goods be offered for return. Value has been given by the vendor for the bankrupt's money. The sale is complete and cannot be rescinded. The court has here to decide a case in which the value given for the bankrupt's money was not land or goods, but a valid executory agreement. Does that agreement, binding upon the defendant, constitute value paid by him for the money he has received? Is the agreement the equivalent of a chattel? The law is settled otherwise, if the defendant's part of the contract is wholly executory at the time the action is commenced. This has been held in cases where a note, a mortgage, or other agreement to pay money was given by the purchaser to the insolvent. *Hardingham v. Nichols*, 3 Atk. 304; *Baldwin v. Sagar*, 70 Ill. 503, 507; *Kitteridge v. Chapman*, 36 Iowa, 348, 351; *Dixon v. Hill*, 5 Mich. 404, 409; *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Arnholt v. Hartwig*, 73 Mo. 745; *Young v. Kellar*, 94 Mo. 581, 7 S. W. 293, 4 Am. St. Rep. 405; *Haughwort v. Murphy*, 21 N. J. Eq. 118; *Freeman v. Deming*, 3 Sandf. Ch. (N. Y.) 327. If, therefore, the defendant's contract in the case at bar was wholly executory at the time this bill was filed, the complainant must prevail. The defendant contends that its agreement is no longer completely executory on its part, but that it will incur loss beyond the loss of its bargain, and that, by the rescission proposed, it will be left in a position worse than that which it occupied before the contract was made. It seeks to liken the agreement in question to a policy of insurance. Although no loss has happened, yet the premium on an insurance policy paid in fraud of creditors cannot be recovered from a bona fide insurer after the expiration of part of the term of the policy. The contract does not remain wholly executory on the part of the insurer; the insured has been protected during the time which has elapsed.

But the agreement in the case at bar is, in many respects, the converse of a policy of life insurance. The defendant's liability to pay the annuity is conditioned upon Dunning's remaining alive beyond July 1, 1916. The price of the conditional annuity promised by the defend-

ant in 1901 was fixed in view of this contingency. In 1907, when the bill was brought, Dunning's chance of living beyond July 1, 1916, had appreciably increased. During the six years he had received nothing, either in money or in protection. On the contrary, if the contract is now rescinded, the defendant will have profited materially from the lapse of time. It has received interest and has given nothing. In order to obtain in 1907 an annuity like that here in question Dunning must have paid a considerably larger premium than that charged him in 1901. This larger premium may be taken to be the present value of the agreement here in controversy. Hence the cancellation proposed by the trustee's bill relieves the defendant from a contract having a greater value than the amount which the defendant is required to refund. The defendant is therefore placed, not in a worse, but in a better position than it occupied before the contract was made. This may be stated in another manner. The defendant's promise to pay money is conditioned upon two things, payment of the premium by the bankrupt, and the bankrupt's survival. Survival is not value, indeed, but it is a condition in the defendant's favor, the existence of which materially diminished the money payment required. Since the payment by the bankrupt, nothing has been done to carry out the contract, except that the survival has been partly accomplished. This is no part of the defendant's execution of the contract; it furnishes the defendant no basis for resistance to the trustee's demand for repayment; it rather supplies an additional reason why the demand should be granted.

The fact, if it be inferable from the face of the record, that the defendant is a mutual company, whose assets belong to its annuitants and policy holders, in no way alters the case. By the cancellation of the Dunning contract, the financial condition of the other annuitants and policy holders will be demonstrably improved.

It follows that the demurrer must be overruled.

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In re ALTON MFG. CO.

(District Court, D. Rhode Island. January 7, 1908.)

No. 733.

1. REPLEVIN—STATE LAW—JURISDICTION—NATURE OF PROCEEDING.

Under the Rhode Island law, an action of replevin is so far a proceeding in rem that, unless the res has actually been taken possession of by the officer, the court is without jurisdiction to determine the question of title.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Replevin, § 118.

Jurisdiction as affected by state laws, see note to *Barling v. Bank of British North America*, 1 C. C. A. 513.]

2. BANKRUPTCY—RECEIVERS—APPOINTMENT—TIME.

Where an order appointing a receiver in bankruptcy directed that he was appointed receiver of all goods, chattels, property, and effects of the bankrupt corporation, his appointment on his subsequent qualification dated from the entry of the decree.

3. SAME—RECEIVERS—RIGHT TO POSSESSION.

Where a seller of property to a bankrupt sought to recover the property in replevin, but the writ was not served until after an order of the

bankruptcy court had been entered appointing a receiver prior to adjudication, a subsequent levy was void as an infringement on the jurisdiction of the bankruptcy court; the seller not being entitled to ignore the receiver's right of possession, as the sale, even though voidable, vested title in the bankrupt, and title was still in the bankrupt at date of the appointment of a receiver.

In Bankruptcy. Receiver's petition for return of goods replevied by writ from the state court.

Edwards & Angell, for petitioners.

John W. Sweeney, for receiver.

O. H. Brogdan, for bankrupt.

BROWN, District Judge. An involuntary petition in bankruptcy against the Alton Manufacturing Company was filed November 18, 1907. On November 19th, at 9:30 a. m., upon petition, a receiver was appointed, and the amount of his bond was fixed at \$25,000. The receiver's bond was filed about 1:30 p. m. Between the entry of the decree appointing a receiver and the filing of his bond, a writ of replevin from the state court was served, and a state officer took possession of goods—10 induction motors—which had been purchased by the Alton Manufacturing Company of the persons who were plaintiffs in replevin. The goods were seized while in the basement of the Alton Company's mill, and in the possession of said company or of its assignees. The act of bankruptcy charged in the creditors' petition was the making of a general assignment for the benefit of creditors.

The Supreme Court of Rhode Island has held that an action of replevin in that state is so far a proceeding in rem that, unless the res has actually been taken possession of by the officer, there is nothing before the state court, and the court is without jurisdiction to decide the question of title. *Warren v. Leiter*, 24 R. I. 36, 39, 52 Atl. 76.

If jurisdiction was acquired by the state court, it was not earlier than the time of seizure, about 11 o'clock a. m. We need not consider, therefore, whether the writ was sued out before the filing of the petition in bankruptcy, nor pass upon the petitioner's contention that the bankruptcy court acquired jurisdiction of the goods by the mere filing of an involuntary petition. See *In re Weinger, Bergman & Co.* (D. C.) 126 Fed. 875. It is enough to inquire whether the bankruptcy court had possession at any time before the seizure in replevin. It is true that the receiver had not filed his bond, nor taken actual possession, but the terms of the decree appointing him were positive—"It is ordered and decreed that Henry R. Segar of said Westerly be and he is hereby appointed receiver of the goods, chattels, property and effects of the Alton Manufacturing Company"—and, though he was required to give bond, his appointment dated from the entry of the decree, and preceded the seizure in replevin. The entry of this decree, in my opinion, conferred upon the bankruptcy court such jurisdiction of the goods of the bankrupt that a subsequent seizure under a writ of replevin from the State Court was unauthorized, and an interference with the possession of the bankruptcy court. *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183. It is true that in

that case there had been an adjudication of bankruptcy, and the entrance to the bankrupt's store had been locked by order of the referee before the seizure.

In the present case there had been no adjudication of bankruptcy, and no act of the receiver amounting to an actual taking of possession. For the preservation of the estate, however, a decree appointing a receiver had been entered; and, considering the nature of this decree, it seems to be unnecessary that it should have been followed by an actual seizure by the receiver in order to confer prior jurisdiction on the bankruptcy court.

In *Farmers' Loan Co. v. Lake St. Rd. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667, the question of priority was considered; and it was said:

"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court; but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature, where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of special importance in its application to federal and state courts."

See, also, *Arnold*, Petitioner, 15 R. I. 15, 23 Atl. 31.

By the entry of the decree appointing a receiver, the bankruptcy court acquired jurisdiction of the bankrupt's property whether its title was absolute or voidable at the date of the entry of the decree. Even if a sale of property to the bankrupt was procured by fraud, it is not void, but voidable only at the election of the party defrauded; and until this election the title is in the purchaser. *Whitford, Slocum & Co. v. Chace*, 7 R. I. 322. A vendor who chooses to assert a right to avoid a sale which had not been avoided before the appointment of a receiver cannot be permitted to ignore the receiver's right of possession or the jurisdiction over the goods acquired by the bankruptcy court before the vendor's election to rescind. This jurisdiction attached irrespective of the assignment made by the Alton Company for the benefit of creditors, for the rule is the same whether the goods are held by the bankrupt or for him. In *Bryan v. Bernheimer*, 181 U. S. 192, 193, 21 Sup. Ct. 557, 45 L. Ed. 814, it was said that an assignee under a general assignment for creditors is an agent of the bankrupt for the distribution of the proceeds of his property. See, also, *Whitney v. Wenman*, 198 U. S. 539, 552, 25 Sup. Ct. 778, 49 L. Ed. 1157.

An order may be entered directing the return of the goods taken in replevin to the petitioner as receiver of this court.

## In re DIAMOND.

(District Court, N. D. Alabama, N. D. January 9, 1908.)

No. 1,290.

## 1. PROPERTY—POSSESSION.

Possession of personal property is prima facie evidence of ownership.

## 2. HUSBAND AND WIFE—PROPERTY OF WIFE—OWNERSHIP OF HUSBAND.

Where a wife's ownership of certain personal property was only collaterally in question in a proceeding for the allowance of exemptions to her bankrupt husband out of other property against the creditors' claim that the husband was not entitled to exemptions because he had concealed the property alleged to belong to the wife by not including the same in his schedule, the common-law rule that the property, though purchased with the earnings of the wife and children, belonged to the husband, was inapplicable.

## 3. BANKRUPTCY—EXEMPTIONS OF BANKRUPT—SELECTION OF PROPERTY.

Under the Alabama law entitling a debtor to select from the body of his property such as he desires to claim exempt, it was no answer to a bankrupt's claim for exemptions out of property other than household goods, etc., alleged to belong to his wife, that such goods were in fact his property and that he had failed to schedule them, since, if such were the fact, the property so omitted might be subjected to the claims of the creditors in a direct proceeding for that purpose.

## 4. SAME—CONCEALMENT OF PROPERTY.

Where household goods claimed to have been purchased with the earnings of a bankrupt's wife and children were claimed both by her and the bankrupt to be her property, the bankrupt's failure to schedule the same did not constitute a concealment thereof, precluding an allowance of exemptions to him from other property, though such goods may have belonged to him as a matter of law.

In Bankruptcy. Petition for review of order of referee allowing exemptions.

E. W. Godbey, for petitioners.

Wert & Lynne, for bankrupt.

HUNDLEY, District Judge. This is an appeal from the decision of the referee in bankruptcy, allowing the bankrupt certain property set aside by the trustee as exempt. The contention is here made that the bankrupt is not entitled to have this property set aside as exempt, because there was certain property, to wit, certain household goods, which were not included in the schedule of his property. The bankrupt denied ownership of this property, and it is claimed by the wife of the bankrupt to be her property. It is further contended that the property is not the property of the wife, but of the bankrupt, and hence the bankrupt has concealed this property from his creditors. The proof that the title is in the wife is, in substance, that she purchased this property with the proceeds of her own labor and that of her children, some of whom were sui juris, and that part of it was given to her by her husband; some of this property having been acquired by her some six or eight years ago, while she was in Chicago, Ill. A lengthy and exhaustive argument is presented to sustain the contention that the earnings of the wife and children belong under the common law to the father, and, inasmuch as these household goods were purchased with these earnings, they are in law the property of the bank-

rupt, and that, because the bankrupt failed to include them in his schedule, therefore he is guilty of concealing property subject to the claim of his creditors. While it may be true that, when the title to property purchased in another state is attacked, it may be incumbent upon the person seeking to sustain his title to show, not only how he obtained his title, but the law of the state in which he resided at the time the property was purchased, and in the absence of such a showing it will be presumed that the common law prevailed in the state at the time the property was purchased.

The mistake which the counsel for the petitioner makes in the case at bar is that this presumption of the common law prevailing in the state of Illinois is not applicable to the issue here presented. It may possibly be that, in a proceeding to subject the household goods claimed by Mrs. Diamond to the satisfaction of her husband's debts, it might become necessary, to sustain her title thereto, for her to show that at the time she purchased the goods in Illinois with the earnings of herself and children, and at the time the husband gave her the goods in that state, such transaction vested in her the legal title under the statutes of Illinois, and, on her failure to prove what the statutes of that state were at the time of the obtaining of her title, that the common-law rule would prevail against her. It must be remembered, however, that the title of Mrs. Diamond to this property is not directly in issue in the case at bar; but the sole question in issue is whether or not the bankrupt has concealed his own property from his creditors. The proof shows without conflict that Mrs. Diamond is in possession of the property. Possession of personal property is *prima facie* evidence of ownership. The proof shows, further, that she and her children purchased the property, with the exception of that which was given her by her husband. In this proceeding her title is only brought in question indirectly, and the doctrine of the common-law rule cannot be applied in this case. Again, every citizen of Alabama has the right to select from out the body of his property such property as he desires to be claimed as exempt. This the bankrupt has done, and he has not claimed that property which his wife claims to be her own. If in fact or in law the wife does not own the household property referred to, but in fact or in law it is the property of the bankrupt, then that property belongs to the bankrupt, and may be subjected to the debts of his creditors by proper direct proceedings for this purpose.

But this court is not justified in holding, on the evidence presented, that the bankrupt has concealed any property from his creditors; for he states, in apparent good faith, that the property averred to have been concealed is in fact the property of his wife, and is not his. He may, perhaps, as matter of law, be mistaken as to the title of the wife, and yet in absolute good faith may so consider the property to belong to the wife, free from all liabilities for his debts, as is provided under the Constitution and laws of Alabama, in which state they were both residing at the time of the commencement of this proceeding. This would be far from establishing the fact that he was concealing the property from his creditors. There is no evidence that he concealed, or attempted to conceal, anything. He simply did not include in his schedule property in the possession of his wife, and which both he and

his wife swear is her property. For aught this evidence shows, this property was never even claimed by the bankrupt. The common law may or may not prevail in the state of Illinois, and the statutes of Illinois may in fact be such as not to confer any title whatever upon the wife of the bankrupt; but this is a question only to be tested in a direct proceeding attacking the title of the wife, and is not involved in a proceeding to show a concealment, under the purview of the bankrupt law, on the part of the bankrupt.

I am of the opinion that under the evidence presented, and for the reasons above stated, the petitioners have failed to establish the fact that the bankrupt has concealed any property from his creditors which can be subjected to the payment of his debts. The reasoning upon which the referee arrives at his conclusion is erroneous; but, for the reasons stated herein, the action of the referee in allowing the property chosen by the bankrupt to be set aside as exempt is affirmed.

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SIMPSON-CRAWFORD CO. et al. v. BOROUGH OF ATLANTIC HIGHLANDS.

(Circuit Court, D. New Jersey. January 2, 1908.)

1. COMMERCE—INTERSTATE COMMERCE.

Complainants operated a store in New York City, from which they sold goods for delivery to customers in Atlantic Highlands, N. J. These goods in original packages were to be sent by boat or express to Atlantic Highlands, where complainants' employes put them into complainants' wagons and delivered them at the residences of the customers. *Held*, that the entire transaction, from the purchase of the goods to the delivery to the purchasers, constituted interstate commerce.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 31.]

2. SAME—INTERFERENCE BY STATE—POLICE POWERS.

Where goods are brought from another state into New Jersey under contract of sale, and delivered there in their original packages to the purchasers, the transit may not be interfered with by the state or any of its municipalities, except for proper police purposes.

3. SAME—ORDINANCES—REVENUE—LICENSE FEES.

Gen. St. N. J. p. 2236, § 532, grants to the common council of any borough power to enact ordinances to license and regulate cartmen, carriages, and vehicles used for the transportation of goods and chattels, and to fix rates of compensation to be paid for such licenses, for purposes of revenue. The borough of Atlantic Highlands passed an ordinance imposing an arbitrary annual license tax of \$10 on every two-horse truck or vehicle engaged in the transportation of merchandise, and a tax of \$7.50 on every one-horse vehicle similarly engaged. *Held*, that such ordinance was not an exercise of police power, but a revenue measure, and was inapplicable to interstate commerce, though it operated equally on both interstate and domestic commerce; interstate commerce not being subject to taxation by the states.

In Equity. On final hearing on pleadings and stipulation as to facts.

McDermott & Enright, for complainants.

John M. Sweeney and John E. Foster, for defendant.

LANNING, District Judge. The borough of Atlantic Highlands, in the state of New Jersey, has an ordinance entitled "An ordinance to li-

cense and regulate certain kinds of business within the corporate limits of the borough of Atlantic Highlands." Its sections pertinent to the present issue are the following:

"Section 1. That it shall be unlawful for any person to engage in or conduct, within the corporate limits of the said borough, any of the kinds of business hereinafter specified unless he, she or they shall have first obtained a license therefor from the mayor and borough clerk who are hereby authorized and empowered to issue such license in the name of the said borough and for the purposes and businesses as hereinafter specified.

"Sec. 2. That the businesses for which such license shall be issued and obtained and the fees to be paid therefor shall be as hereinafter specified and shall be paid to the borough clerk."

"Sec. 5. For each and every two-horse truck, wagon or vehicle used within the corporate limits of said borough for the transportation of baggage, goods and merchandise a yearly license fee of ten dollars shall be paid.

"Sec. 6. For each and every one-horse truck, wagon or vehicle used for the same purpose a yearly license fee of seven dollars and fifty cents shall be paid."

The eighteenth and nineteenth sections provide that no license shall be issued for a term exceeding one year, and that any person violating any of its provisions shall, on conviction, be required to pay a penalty of \$10, and in default of payment thereof be committed to the borough or county jail for a period of 30 days.

The Simpson-Crawford Company is a retail dealer in dry goods and other merchandise, and has its storehouse and principal place of business in New York City. In the summer months many of its customers reside in the borough of Atlantic Highlands. These customers either personally deliver their orders for goods and merchandise to the company at its storehouse or send their orders to the storehouse by mail. The goods and merchandise ordered are put in separate packages for the respective customers, and sent by boat or express from New York City to Atlantic Highlands, where employes of the Simpson-Crawford Company put them in wagons belonging to that company and take them to and deliver them at the residences of the customers in Atlantic Highlands. The Simpson-Crawford Company insists that its business with its customers in Atlantic Highlands is interstate commerce, and that, as against it, the borough ordinance is void. As the borough authorities threaten to fine and imprison the employes of the said company, it now seeks an injunction to restrain the enforcement of the ordinance as against it and its employes.

The counsel for the defendant insists that the business of the Simpson-Crawford Company in the borough of Atlantic Highlands is that of truckman, and not interstate commerce. I think it clear, however, that during the entire period of transportation from the city of New York until delivery to the purchasers in the borough of Atlantic Highlands the Simpson-Crawford Company is carrying on interstate commerce. *The Daniel Ball*, 10 Wall. 557, 565, 19 L. Ed. 999; 8 Fed. St. Ann. p. 423; *Case of the State Freight Tax*, 15 Wall. 232, 275, 21 L. Ed. 146; *Rhodes v. Iowa*, 170 U. S. 412, 426, 18 Sup. Ct. 664, 42 L. Ed. 1088.

In the next place it is urged by the counsel for the defendant that, even if the ordinance does incidentally interfere with interstate commerce, it is justifiable interference in the exercise of the police power of the state, duly delegated to the borough; and *Ames v. Kirby*, 71 N. J.



Law, 442, 59 Atl. 558, and other cases are cited in support of the defense. After a careful consideration of the authorities, however, I think they do not go to the extent of supporting legislation by a state, or by a municipality to which legislative powers have been delegated by the state, of the kind embodied in the ordinance now under review. Like *Sternweis v. Stilsing*, 52 N. J. Law, 517, 20 Atl. 65, the present case relates to the business of bringing goods, under a contract of sale, from another state into New Jersey, and delivering them in their original packages to the purchasers in New Jersey. Their transit may not be interfered with by the state, or any of its municipalities, except for proper police purposes. In the present case the ordinance is sought to be sustained under the authority of a statute of New Jersey, approved May 16, 1894 (Gen. St. N. J. p. 2236, § 532), which grants to the common council of any borough the power to enact ordinances to license and regulate cartmen, and carriages and vehicles used for the transportation of goods and chattels, to fix the rates of compensation to be paid for such licenses, to prescribe the penalties for the violation of such ordinances, and to impose such rates of compensation for purposes of revenue. There is nothing in the ordinance indicating, on the part of the common council of the borough of Atlantic Highlands, a purpose to exercise a mere police power for the protection of the inhabitants of the borough. The fee imposed is an arbitrary sum, and its payment is exacted as a condition precedent to the right to transact business in the borough. It is evidently a revenue ordinance. As applied to the *Simpson-Crawford Company*, it is a tax on interstate commerce. It is true that the license fee is imposed on all vehicles used in the borough for the transportation of goods. But, as was said in *Robbins v. Shelby Taxing District*, 120 U. S. 489, 497, 7 Sup. Ct. 592, 30 L. Ed. 694:

"Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state."

The same rule was applied in the recent case of *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. Ed. 295. In that case *Rearick* was convicted of violating an ordinance of the borough of Sunbury, in Pennsylvania, which made it unlawful to solicit orders for, sell, or deliver at retail, either on the streets or by traveling from house to house, foreign or domestic goods, not of the parties' own manufacture or production, without a license for which a large fee was required. An Ohio company employed *Rearick* as its agent to solicit in Sunbury retail orders to the company for groceries. The company filled the orders in Ohio by putting the articles ordered in distinct packages and forwarding them to the agent in Sunbury, marked for the respective customers. The company's accounts were with the agent only, and not with the customers. The agent received the packages from the railroad company, delivered them to the customers, collected the price for them, and remitted the proceeds to the company. The court held that the business was interstate commerce, and that, as against the agent, the ordinance was an unauthorized interference with interstate commerce.

In my judgment the injunction prayed for should be allowed.

## In re STRAUB.

(District Court, N. D. West Virginia. January 9, 1908.)

## 1. NOVATION—NATURE AND REQUISITES.

A bankrupt, having purchased certain land and executed a deed of trust thereon to secure a debt, conveyed the land to his father, who did not assume the debt, and later devised the land to his two children, consisting of the bankrupt and his sister. *Held*, that such transaction did not constitute a novation of the debt secured by the deed of trust, which can occur only when there is a substitution of a valid new obligation for an old one, necessitating the extinction of the old debt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, Novation, § 1.]

## 2. LIMITATION OF ACTIONS—BAR OF DEBT AS AFFECTING SECURITY.

Where a trust deed constituted a conveyance of title as security for a debt, the statutory bar of limitation in so far as the personal liability of the debtor was concerned was ineffective to destroy the lien against the property conveyed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 652.]

## 3. BANKRUPTCY—LIENS—PAYMENT—CONTRIBUTION.

A bankrupt, having purchased certain real estate, executed a deed of trust thereon to secure a debt, and later conveyed the land to his father for a cash consideration subject to the deed of trust; the land subsequently being devised by the father to the bankrupt and his sister jointly. *Held*, that the holder of the debt secured by the deed of trust was entitled to payment in full of the proceeds of the sale of the bankrupt's half interest in the property, reserving to the bankrupt's creditors the right to subrogation to the bankrupt's right to contribution from his sister, subject, however, to the state of indebtedness existing between the bankrupt and his sister.

## 4. SAME—CONTRIBUTION—DETERMINATION—PROCEEDINGS.

Where property subject to a deed of trust was devised to a bankrupt and his sister, and the holder of the debt secured obtained payment in full from the proceeds of the sale of the bankrupt's interest in property, the claim of the bankrupt's creditors to subrogation to his right to compel contribution from his sister could only be considered and determined in ancillary proceedings instituted for that purpose.

In Bankruptcy.

W. P. Samples, for creditors.

Hugh Warder and G. W. Ford, for Kate Barnes, ex'x.

DAYTON, District Judge. On the 23d day of February, 1888, Charles H. Straub purchased lot No. 107, in the town of Grafton, and on the 25th day of May following executed a deed of trust thereon to secure George W. Barnes a note for \$1,400, payable four years thereafter. On June 29, 1891, Straub conveyed, with covenants of general warranty, this property to his father, John P. Straub, for \$3,250 in hand paid. By the will of John P. Straub, dated March 3, 1895, this property was by him devised jointly to his two children, the said Charles H. Straub and Mary F. Straub, now Simmons. On August 26, 1897, George W. Barnes died testate, and Kate Barnes qualified as his executrix. On May 25, 1898, Charles H. Straub executed to said Kate Barnes his note for \$500, payable one day after date, in lieu of and for the unpaid balance of said original \$1,400 debt. Charles H. Straub has been declared bankrupt, and in the settlement of his estate

before the referee in bankruptcy Kate Barnes filed said \$500 note, claiming it to be a specific and prior lien upon the half interest of said bankrupt in said lot 107 devised to him by his father, secured by said original deed of trust. This contention was denied by the trustee in bankruptcy, who insists that John P. Straub assumed, by his purchase from his son, the payment of the original deed of trust debt; that a novation of the debt was consummated by the execution of the \$500 note to Kate Barnes, and the trust lien was thereby extinguished. The referee overruled this contention, but held that only one half of this trust debt could be collected from the proceeds of the sale of the half interest owned by the bankrupt, and that she would be required to resort to the other half interest in the hands of Mrs. Simmons for the remaining half of her debt. From this ruling of the referee both the trustee and Kate Barnes have excepted, and petitioned for revision.

I think the referee was clearly right in holding that there was no novation of the original debt and no extinguishment of the trust lien upon lot No. 107 to secure its payment. The debt was originally the debt of the bankrupt, and whether or not his father, when he took over the property, assumed to pay it, is not material here. It is very clear he gave no new obligation to either Barnes or to his executrix therefor nor did he secure any release of the lien. This lien was of record, and therefore he took the property from his son with full notice of this lien, but without personal assumption thereof. There could be no novation of the debt such as to destroy this lien without concurrent action on the part of the holder, Barnes, or his personal representative. The taking of a new note for the debt, or for an unpaid portion thereof, could work no such novation. A novation is the substitution of a new obligation for an old one, which is thereby extinguished, and its requisites are a valid prior obligation to be displaced, the consent of all parties to the substitution, the extinction of the old obligation, and the creation of a valid new one. The substitution may be in the debt or contract, in the debtor or in the creditor. 4 Current Law, 838; *In re Fuller & Bennett* (D. C.) 152 Fed. 538. Here the same party executed the two notes to the same creditor (the executrix standing for the testator), the one for the original debt the other for its unpaid balance and novation could not arise.

I think, however, the referee did err to the prejudice of the executrix in holding that she could only collect one half of this debt out of the proceeds of the sale of the bankrupt's half interest in this property. It is to be remembered that this deed of trust constituted a conveyance of the legal title to this property and every part of it; that John P. Straub by his deed only took the equity of redemption, and by his will could only devise the equity of redemption back to his son and daughter; and that the creditors of either of these could only subject this equity of redemption to payment of their debts. The trust, being thus a conveyance of title held in security, the statutory bar of limitation might bar the personal liability of the maker of the note, but could have no such effect to destroy the lien upon the property. In such case the holder of the lien cannot be required to surrender to unsecured creditors any single part of the property so held in trust by him until the whole of his debt is paid, unless he consent

thereto. This is the very letter of his trust conveyance recorded, and of which the world must take notice. The extent to which the referee could go was to direct the payment in full to Kate Barnes of this trust debt out of the proceeds of the sale of the bankrupt's half interest, reserving to the creditors the right to be subrogated to the bankrupt's right, and his only, to demand from his sister contribution. And this right of the bankrupt to so demand contribution must be conditional upon the state of indebtedness that may or may not exist between him and his said sister, and can only be considered and determined upon ancillary proceedings instituted for that purpose.

The order of the referee will be reversed, and the case remanded to him, with directions to enter decree in accordance with this opinion.

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THE BENCLIFF.

(District Court, E. D. Pennsylvania. January 9, 1908.)

No. 11.

1. ADMIRALTY—ORDER DIVIDING COSTS—PROCTOR'S FEE.

Where the libellant is the prevailing party in a suit in admiralty, but the costs are divided, the fee of \$20 to libellant's proctor should also be divided.

2. SAME—PREMIUM ON SURETY COMPANY BOND.

The premium paid by a libellant to a surety company for entering a stipulation for costs required by a rule of court is taxable as costs where reasonable in amount.

In Admiralty. On exceptions to taxation of costs.

For former opinion, see 155 Fed. 242.

Convers & Kirlin and Henry R. Edmunds, for libellant.  
Henry Flanders, for respondent.

J. B. McPHERSON, District Judge. The question raised by the respondent's exception has been already decided in his favor by The L. F. Munson (D. C.) 127 Fed. 767. In accordance with that case, the fee of \$20 due in the present suit to the libellant's proctor should have been included in the bill of costs before, and not after, the division. To add the fee after the division charges the respondent with the whole of this particular item, although the decree of the court requires him to pay one-half only. The Bencliff (C. C.) 155 Fed. 242.

The libellant's exception to the disallowance of the charge of \$15, which was paid to a surety company for entering the stipulation for costs required by the rule of court, must also be sustained. The clerk was right in following the practice heretofore prevailing in this district and refusing to allow the charge, but Judge Holland and I are both of opinion that the time has come when a change in this respect would be desirable. That the reasonable cost of obtaining such a bond may be properly allowed as a disbursement made necessary by a rule of court seems well settled. *Neff v. Pennoyer*, Fed. Cas. No. 10,084; *Dennis v. Eddy*, Fed. Cas. No. 3,793; *Simp-*

son v. 110 Sticks (D. C.) 7 Fed. 243. And good reasons for sanctioning the practice are given by Judge Hanford in *The South Portland*, 95 Fed. 295, and by Mr. Justice Mitchell, now Chief Justice of the Supreme Court of Pennsylvania, in *Clark's Estate*, 195 Pa. 527, 46 Atl. 127, 48 L. R. A. 587. In the latter case the constitutionality of a Pennsylvania statute permitting the fee to be charged as part of a trustee's expenses was the question under consideration, and the decision is therefore not now directly in point; but the advantages of a bond given by a corporation surety over a bond executed by an individual are so clearly set forth in the opinion that the language of the court may be quoted with profit:

"The individual surety as formerly known was usually a relative or friend who had confidence in the principal, and voluntarily assumed the obligation of answering for the latter's faithful performance of duty. I need not speak of the individual who became surety for pay, for the very name of 'professional bail goer' is a reproach to every branch of the administration of justice which he was allowed to contaminate with his presence. But the voluntary surety, however honest and well qualified at the time of his approval by the court, is liable to the contingencies of business, the changes of value in property, and the inexorable chance of death which brings his estate into the administration of the law under wholly changed circumstances. Of the happening of any of these contingencies the only person in position to keep close watch is the principal, and his interest is adverse to making known any doubt as to the sufficiency of his friend, or to assuming the burden of finding a new surety. These are some of the disadvantages even of an honest surety, and, if we add, to them the risk of a dishonest one who may dispose of his property on his own scent of danger or on a friendly hint from his principal, we may have a fair idea of the dangers of which our reports present many illustrations. On the other hand, the surety company, included in the provisions of the act of 1895 must have a capital, the amount, nature of investment, and management of which, are known and within constant sight of the court and the parties interested. It is obliged to make reports of its condition to the courts and to the commonwealth, and is at all times subject to the visitatorial power of the latter, and finally it has the sharp incentive of prevention of loss by looking closely after the administration of his trust by its principal for whom it has become responsible, not from friendly personal confidence, but as a strict business venture. It was said in this case by the learned president of the orphans' court, whose experience entitles his opinion to great weight, that: 'Corporation suretyship is another product of modern thought and ingenuity, and may be said to possess many advantages over individual bail or security. \* \* \* Our daily experience has proved that corporate security and the oversight and management by expert officers of the trust and security companies are highly advantageous not only to the fiduciary, but to all the parties interested, whether creditors, legatees or distributees.' But, even if this be not so, it is plain that, while the duties and liabilities of the surety, whether corporation or individual, are the same, and in those respects they stand upon the same plane, yet the qualities and advantages of the security afforded are materially different. It is on this difference that the discrimination in the act of 1895 is founded, and it is a fair and constitutional basis for the legislative discretion."

In the federal courts, in addition to the ruling in *The South Portland*, supra, the Court of Appeals of the Ninth Circuit has made a similar decision in *Jacobsen v. Lewis, et al., Co.*, 112 Fed. 80, 50 C. C. A. 121, and Judge Lacombe has announced the same conclusion in *Edison v. American Mutoscope Co. (C. C.)* 117 Fed. 192. The opposite view is taken by the Court of Appeals of the Sixth Circuit in *Lee Injector Co. v. Pennberthy Co.*, 109 Fed. 964, 48 C. C. A. 760, but the only reason given for disallowing the charge is that

"there is no authority for taxing such an item," and this language may refer to the absence of specific authority on the subject, since apparently the court did not consider the general authority of a judicial tribunal to make proper and lawful rules in the conduct of its business, and to charge the necessary and reasonable costs of complying therewith against the losing party as an obligatory disbursement in the cause. It need hardly be added that the amount of the allowance is always under the court's control for the purpose of preventing an excessive charge.

The clerk is directed to retax the costs in accordance with this opinion.

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WHOLEY v. BRITISH & FOREIGN S. S. CO.

(District Court, E. D. New York. January 13, 1908.)

1. SHIPPING—INJURY TO STEVEDORE—DUTY OF OWNER—SAFE PLACE TO WORK.

The owner of a vessel must furnish a stevedore employed thereon a safe place to work in so far as the construction of the vessel and its various parts is concerned, and also render such inspection that no hidden defect which should have been known to the officers of the vessel can exist and continue without warning.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, § 350.]

2. SAME—ASSUMED RISK.

Libelant, a stevedore, was injured by falling through a hatchway on a vessel caused by an alleged defective hatch cover. It was charged that the cover was improperly constructed, in that it was too short, and a longshoreman who replaced it the night before testified that he noticed the defect, and had introduced wedges at each end so as to equalize the bearing surface, and prevent its displacement. The cover was in place at the time of the accident, but, when libelant stepped on the end thereof, his weight caused the cover to revolve, and he fell with the cover into the hold below. *Held*, that the defect, if it existed, was open and apparent, and that libelant assumed the risk thereof.

Alvin C. Cass, for libelant.

Wing, Putnam & Burlingham, for respondent.

CHATFIELD, District Judge. The libelant, a stevedore, was injured by falling through a hatchway upon the vessel *St. Fillans* upon the 22d day of June, 1905. The longshoremen with whom Wholey was working had loaded some iron in the hold under the hatchway in question upon the preceding day, and at the close of work Wholey's fellow longshoremen had replaced the covers to the hatch. Upon the morning in question Wholey's duties had kept him occupied some distance away from the hatch, and, the gang being called to the upper deck, Wholey stepped upon the cover nearest to where he had been working, in order to go to the place to which he had been called. The hatch and the hatch covers were constructed in the ordinary manner. The hatch covers had been replaced the night before in their proper order, and the cover upon which Wholey stepped was the one that belonged in the particular corner in which it was at the time. This hatch cover of plank was some two feet wide by eight feet long, and rested upon a shoulder inside the coaming, with a bearing surface of about an inch and a half at the end resting upon the coaming. The

further end of this particular hatch cover rested upon a T-shaped fore and after, extending the length of the hatch, and the amount of bearing surface was there also some inch and a half. The corner of the hatch cover was rounded off to fit the rounded corner of the coaming, but the shoulder upon which the end of the hatch cover rested was not carried around this curve. It also appears from the testimony that an additional movable fore and after had been placed in position under the middle of the hatch covers upon the starboard side of the hatch by the longshoremen on the night previous, and was in place at the time of the accident. The evidence shows that, when Wholey stepped upon the end of this particular hatch cover at a point near the corner of the hatch, his weight caused the hatch cover to revolve upon the movable fore and after, and he fell with the hatch cover through the opening to the hold below. His injuries were serious. He lost considerable time after the accident, and is apparently incapacitated permanently from the work which he previously performed.

It is charged that the hatch cover in question was improperly constructed, or in an unsafe condition, in that it was too short. One of the longshoremen who had replaced the hatch covers the night before testified that he noticed this particular hatch cover to be short, and had chocked it, or introduced wedges at each end, so as to equalize the bearing surface, and prevent its displacement. The owner of a vessel must furnish a stevedore employed upon his vessel a safe place to work, in so far as the construction of the vessel and its various parts is concerned, and the inspection and care of these parts is bound to have been such that no hidden defect (which was or should have been known to the officers of the vessel) is allowed to exist and to continue without warning to the stevedores. This, of course, does not include a latent defect that a reasonable inspection by the shipowner or his agents would not show. *The Wm. F. Babcock* (D. C.) 31 Fed. 418; *The Saranac* (D. C.) 132 Fed. 936; *The Red Jacket* (D. C.) 110 Fed. 224; *The International Mercantile Marine Co. v. Fleming*, 151 Fed. 203, 80 C. C. A. 479. In the case at bar, if the defect existed, it was open and apparent, and the stevedore who claims to have chocked the hatch cover not only noticed the alleged defect, but took precautions to provide against it.

There are but two explanations of the accident: Either the stevedore who chocked this particular hatch cover wedged it in such a position that it did not have sufficient purchase at the lower end, or, if he inserted the blocks properly, and rendered the hatch cover immovable, its condition was thereafter changed through the actions of the stevedores themselves prior to the time of the accident—and on neither theory can the vessel be held liable. *McDonnell v. Oceanic Steam Nav. Co.*, 143 Fed. 480, 74 C. C. A. 500. The situation is not such as existed in the case of *The Earl of Dunmore* (D. C.) 120 Fed. 858, where the court said:

"Although the libellant was in the employ of the stevedore, yet the ship owed the stevedore and his men the duty of giving proper warning that the hatch would fall, unless dismantled in the particular manner now pointed out."

Hatch covers constructed in this manner are intended not only to cover the hatches, but to be used as platforms for work upon the deck in which the hatch is located; and, if the defect were one not apparent to the stevedores, when reasonably careful, but of which the ship's officers should have had knowledge, and should have given warning, the responsibility of the vessel would follow. In the case at bar the defect was not hidden, had apparently been noticed in so far as it existed by the stevedores themselves before the accident, and was of such a character that any casual inspection or observation by the foreman of the stevedores would have revealed the unsuitability of this hatch cover as a place upon which to work.

The libel must be dismissed.

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GALLAGHER et al. v. DE LANCEY STABLES CO.

(District Court, E. D. Pennsylvania. January 9, 1908.)

No. 2,834.

**BANKRUPTCY—CORPORATIONS SUBJECT TO LAW—TRADING—MERCANTILE PURSUITS.**

A corporation organized to conduct a general livery and boarding stable business, and engaged in buying, keeping, and hiring its horses and vehicles for profit and keeping, feeding, and caring for the horses and vehicles of others for hire, not being engaged in buying and selling horses and vehicles or feed as a business, is not a trading corporation or one engaged chiefly in mercantile pursuits within Bankr. Act July 1, 1898, c. 541, § 4, cl. "b," 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], providing that such corporations may become bankrupt.

[Ed. Note.—What persons are subject to bankruptcy law, see note to *Mattoon Nat. Bank v. First Nat. Bank*, 42 C. C. A. 4.]

Trial by the Court Without a Jury.

Michael J. Ryan, Howard M. Long, and A. J. Wilkinson, for plaintiffs.

John J. McDevitt, Jr., and Francis Chapman, for defendant.

J. B. McPHERSON, District Judge. The petition in this case avers that the De Lancey Stables Company is a corporation "principally engaged in the livery stable business, buying and selling horses and feed"; this averment being evidently intended to bring the corporation within the provisions of section 4, cl. "b," Bankr. Act July 1, 1898, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], concerning trading companies or companies engaged in mercantile pursuits. The answer took issue with the petition upon this point, and a trial was afterwards had by agreement before the court without a jury. From the evidence thus heard I find the facts to be as follows:

The De Lancey Stables Company is a Pennsylvania corporation, formed, as stated in its charter, for the purpose of conducting a general livery and boarding stable business. In pursuance of this purpose, it bought, kept, and hired for profit its own horses and vehicles, hiring them either by the hour or for a defined service; and also kept, fed, and cared for the horses and vehicles of other persons, receiving pay for so doing. It sometimes bought and sold horses in the course



of its livery business, and upon one occasion it may perhaps have sold a horse to a person who desired to buy. This sale, however, is denied, and (if the fact were material) I should accept the denial as true. Upon another occasion it conveyed a horse to a creditor in part payment of his bill, but it was no part of the company's business, either authorized or actual, to buy and sell. It bought such feed as was necessary, but there is no evidence that it ever sold any feed directly, or in any other way than by supplying the needs of the horses that were taken upon board.

These being the facts, I think it so clear that the corporation was principally engaged neither in trading nor in mercantile pursuits that discussion is unnecessary. It is well settled that a trader or a merchant is a person who is engaged in the business of buying and selling, one who buys in order to sell; and I think it must be conceded that the foregoing facts do not bring the bankrupt within either class—if, indeed, the two classes should be distinguished. Moreover, even if the bankrupt did occasionally trade in horses and vehicles, this was certainly not its principal business. It kept horses for hire, and took them to board, and it was engaged in nothing else.

There are one or two isolated decisions which favor the position of the petitioning creditors, but the overwhelming weight of authority is against them. The industry of the junior counsel for the bankrupt has collected numerous cases bearing upon the questions involved, and, for the advantage of future reference, I cite them from his brief, as follows: *Groves v. Kilgore*, 72 Me. 489; *Re Odell*, 9 Ben. 209, Fed. Cas. No. 10,426; *Martin v. Nightingale*, 3 Bingham (E. C. L.) 421; *Wright v. Bird*, 1 Price (Eng. Exch.) 20; *Stewart v. Ball*, 2 Bingham New Rep. (E. C. L.) 78; *Re Morton Boarding Stables* (D. C.) 108 Fed. 791; *Re Quimby Co.* (D. C.) 121 Fed. 141; *Re New York Banking Co.* (D. C.) 127 Fed. 471; *Phila. & Lewes Transportation Co.* (D. C.) 111 Fed. 403; *Zuggalla v. International Mercantile Agency*, 142 Fed. 929, 74 C. C. A. 97; *Re Chesapeake Oyster & Fish Co.* (D. C.) 112 Fed. 960; *Re San Gabriel Sanitarium Co.* (D. C.) 95 Fed. 271; *Re Surety & Guaranty Co.*, 121 Fed. 75, 56 C. C. A. 654; *Re United States Hotel Co.*, 134 Fed. 229, 67 C. C. A. 153, 68 L. R. A. 588; *Re Smith*, 2 Lowell, 69, Fed. Cas. No. 12,981; *Re Kimball* (C. C.) 7 Fed. 469; *Re White Star Laundry Co.* (D. C.) 117 Fed. 570; *Re Troy Laundry Co.* (D. C.) 132 Fed. 266; *In re Snyder & Johnson Co.* (D. C.) 133 Fed. 806; *Re Keystone Coal Co.* (D. C.) 109 Fed. 872; *Re Pacific Coast Warehouse Co.* (D. C.) 123 Fed. 749; *Re New York Ice Co.*, 147 Fed. 214, 77 C. C. A. 440; *First Nat. Bank v. Wyoming Valley Ice Co.* (D. C.) 136 Fed. 466; *Philpot v. O'Brien*, 126 Fed. 167, 61 C. C. A. 111, s. c., 196 U. S. 643, 25 Sup. Ct. 785, 49 L. Ed. 632.

The clerk is directed to enter a judgment in favor of the defendant upon the issue joined by the petition and answer concerning the principal business of the bankrupt, and thereupon to dismiss the petition for want of jurisdiction.

## CURTIN v. BENSON et al.

(Circuit Court, N. D. California. December 11, 1907.)

No. 13,827.

**WOODS AND FORESTS—NATIONAL PARKS—VALIDITY OF REGULATIONS.**

Rules 9 and 10 of the rules and regulations established by the Department of the Interior for the government of the Yosemite National Park, which provide that owners of patented lands within the park limits shall have the boundaries thereof so marked and defined as that they may be readily distinguished from the park lands, and prohibiting the driving of stock over the park lands without written permission from the superintendent, are valid; and the superintendent may lawfully refuse to permit stock to be driven over the park lands, or over established toll roads therein, to or from the lands of a private owner, or to permit such owner to graze stock on his land, until he shall have complied with such rules by marking his boundaries.

In Equity. This was a suit brought by the plaintiff to obtain a decree enjoining the defendants from doing certain of the acts set forth in the findings of the court.

J. B. Curtin and Marshall B. Woodworth, for complainant.

Robert T. Devlin, U. S. Atty., and George Clark, Asst. U. S. Atty., for defendants.

DE HAVEN, District Judge. Upon consideration of the evidence and the agreed statement of facts, filed herein June 13, 1906, I find the following facts:

(1) That the plaintiff, J. B. Curtin, owns within the limits of the Yosemite National Park the following described lands: N.  $\frac{1}{2}$  of section 16, and S. E.  $\frac{1}{4}$  of section 18, in township 2 S., range 20 E. That in addition thereto he leases from other parties the following described lands within the said Yosemite National Park: W.  $\frac{1}{2}$  of the S. W.  $\frac{1}{4}$  and S. E.  $\frac{1}{4}$  of S. W.  $\frac{1}{4}$  of section 14, N. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  of section 23, and all of section 17, in township 2 S., range 20 E., and the S. W.  $\frac{1}{4}$  of section 13, township 2 S., range 19 E.

(2) That leading to said lands so owned and leased in the said Yosemite National Park by the plaintiff herein are toll roads over which the public may pass upon payment of the fees exacted by the corporation controlling said roads; said roads having been established many years prior to the creation of said park.

(3) That the defendant Maj. H. C. Benson is the duly appointed, qualified, and acting superintendent of said Yosemite National Park, and was at the time of the commencement of the action herein such superintendent, and has continuously acted in that capacity from that date until the present time.

(4) That the Department of the Interior has established certain rules and regulations for the government of the said Yosemite National Park, which said rules and regulations the defendant herein, as such superintendent of the said Yosemite National Park, is obliged to enforce, and for the purpose of enforcing said rules and regulations he has a body of troops under his command.

(5) That among other rules and regulations promulgated and established by the Secretary of the Interior are the following: "(9) Owners of patented lands within the park limits are entitled to the full use and enjoyment thereof. Such lands, however, shall have the metes and bounds thereof so marked and defined as that they may be readily distinguished from the park lands. Stock may be taken over the park lands to patented lands with the written permission and under the supervision of the superintendent. (10) The herding or grazing of loose stock or cattle of any kind on the government lands in the park, as well as the driving of such stock or cattle over the same, is strictly forbidden, except in such cases where authority therefor is granted by the superintendent."

(6) That the plaintiff, J. B. Curtin, claims the right to drive his cattle to his said lands owned and leased by him as aforesaid in the Yosemite National Park without complying with the provisions of sections 9 and 10 of the rules and regulations as set forth above, claiming said rules and regulations to be invalid, and claiming that to deprive him of the right so to drive his cattle to and from, and graze his cattle upon his land would work irreparable injury to him.

(7) That the plaintiff herein did on one occasion place cattle upon his said lands in said Yosemite National Park, and that the said defendant H. C. Benson, as such superintendent, did immediately remove said cattle from said lands and refuse to allow the same to be grazed thereon until said plaintiff complied with said rules and regulations. That prior to the commencement of this action the defendant H. C. Benson, as such superintendent of said Yosemite National Park, did refuse to allow and by force did prevent said plaintiff from driving any of his said cattle or horses in, upon, or over said toll roads to his said lands in said park, and did prevent said plaintiff from using any of his said lands in said park until the metes and bounds thereof were properly pointed out. That the defendant H. C. Benson, as such superintendent, has enforced, and will continue to enforce as such superintendent of the Yosemite National Park, the rules and regulations hereinbefore set out, until the same are declared invalid by competent authority, or his orders in reference to enforcement thereof are changed.

As a conclusion of law from the foregoing facts, and the facts admitted by the pleadings, I find that the rules and regulations made by the Secretary of the Interior, numbered 9 and 10, for the government and superintendence of the Yosemite National Park, and set out in the foregoing finding numbered 5, are valid.

2. That plaintiff is not entitled to the relief prayed for in the bill of complaint, or any relief.

3. That defendants are entitled to a judgment dismissing the bill of complaint, and for their costs.

Let such decree be entered.

## WHITNEY v. DEWEY.

(Circuit Court of Appeals, Ninth Circuit. December 2, 1907.)

No. 1,416.

## 1. PARTNERSHIP—CONTRACT CREATING—CONSTRUCTION.

Complainant, having initiated water rights in a stream believed to be valuable, entered into a written contract with another who, as a promoter, undertook to obtain capital to construct a dam and develop a water power. Each was to devote his best efforts to securing funds, and each was to own one-half interest in the property, with a proviso that in case the second party did not make satisfactory progress within a year he should retire from the enterprise, and assign all of his rights and interest to complainant. *Held*, that the contract was one of partnership, and any property acquired by either, in furtherance of the joint enterprise so long as it continued, was held in trust for the joint benefit of both.

## 2. SAME—RELATIONS OF PARTNERS—DUTY OF GOOD FAITH.

The first and highest duty which partners owe to each other is perfect good faith; each is under obligation to do what he can to promote the success of the partnership, and in every purchase or bargain each is under a duty to use the property of the concern for the benefit of all.

## 3. SAME—REAL ESTATE ACQUIRED BY PARTNER—TRUST.

Equity will apply its broad principles to secure all partners their rights in real estate which equitably belongs to the firm by regarding the legal title if in one partner as held on an implied trust for partnership purposes.

## 4. SAME—RIGHTS OF PURCHASER FROM PARTNER.

One who, knowing that real estate is the property of a partnership, pays for and takes title to it from one partner alone, without the knowledge or consent of the other, takes the title that he gets at his peril and on the responsibility of the person with whom he deals.

## 5. SPECIFIC PERFORMANCE OF PARTNERSHIP CONTRACT—PURCHASER WITH NOTICE.

Complainant and another formed a partnership, the purpose of which was to form a corporation to develop a water power, the right to which complainant owned. The contract provided that each should own a half interest in the property, but that, if the second party should not succeed in obtaining capital within a year, complainant might at his option dissolve the partnership, and should receive from his partner an assignment of all his rights and interest in the property. It being thought necessary to acquire certain land for a dam site, the partner obtained a warranty deed therefor from the owner to himself, agreeing to pay for the same when the corporation was organized. He afterward, without complainant's knowledge, acquired a half interest in the grantor's equitable title. Some time after the expiration of the year, nothing further having been done, complainant dissolved the partnership, and demanded a transfer of his partner's interest, but the latter claimed that so far as the dam site was concerned he took the deed which had not been recorded in trust, and that it never became operative because the project was not carried through. In such belief complainant bought the land from the grantor in such deed, taking a quitclaim, which he recorded, and entered into possession. Subsequently his partner sold and conveyed a half interest in the property to another, who sold to defendant, both of whom had knowledge of the partnership and of complainant's claim and possession. *Held*, that the original deed conveyed the full legal title for the benefit of the partnership, and that on the dissolution complainant became entitled under the partnership contract to a conveyance to himself, and that he could enforce such right by suit for specific performance against defendant who took subject thereto.

**6. SAME—NATURE OF SUIT.**

Such a suit was not one for a forfeiture of rights on the termination of the partnership agreement, but to enforce a specific performance of its terms.

**7. FORFEITURES—DEFINED.**

"Forfeiture" usually signifies loss of property by way of compensation for injury to the person to whom the property is forfeited, as well as punishment.

Appeal from the Circuit Court of the United States for the Central Division of the District of Idaho.

Gavin McNab and Richards & Haga, for appellant.

W. E. Borah, for appellee.

Before GILBERT, Circuit Judge, and DE HAVEN and HUNT, District Judges.

HUNT, District Judge. W. Grant Whitney, a citizen of Oregon, appellant, brought this suit against E. H. Dewey, a citizen of Idaho, appellee, praying for a decree requiring Dewey to assign, quitclaim, and set over to appellant all his (defendant's) right, title, and interest in and to certain real estate in the counties of Boise and Canyon, Idaho, as provided in an agreement dated September 7, 1899, between complainant and one Willard White, and for such other relief as is proper. Among the defenses set up by Dewey is the statute of limitations; that an action was begun and tried in a state court of Idaho, wherein Whitney, appellant here, was the plaintiff, and Dewey, appellee here, was the defendant, and that a judgment of the Supreme Court of the state of Idaho in the said suit has become final, and that Whitney is now estopped, by reason of said suit and judgment, from litigating any of the questions involved in this suit; that on January 25, 1900, one Beery and wife were the sole owners and seised in fee of the property involved, and that they conveyed the property by warranty deed to White, and at the time of the conveyance, no one else had any interest in the undivided half interest in said property now claimed by Dewey; that the conveyance of warranty to White was made with the full knowledge of Whitney, and that thereafter White conveyed to Cobban and Casey, who retained possession until sale to Dewey; and that Dewey, for a valuable consideration, became the owner of an undivided half interest in the property; and that, when the conveyances to Cobban and Casey and Dewey were made, none of said parties had knowledge of any claim or equity of Whitney or any one else; and that there never was any combination and confederacy, as charged in the bill. There was a trial and decree dismissing complainant's bill. Complainant appeals.

The essential facts are as follows: Complainant, prior to September 7, 1899, had located a water right on the Payette river in Idaho, whereby he appropriated a quantity of water for power and irrigation purposes, and had commenced proceedings to secure title to a right of way for a reservoir site in connection with his water appropriation. Complainant then met one Willard White, whom he heard was representing capital and could be of service to him. The two looked over the ground. In order to utilize a reservoir site, it was necessary to ac-

quire certain land on which was situated a good dam site, the general purpose in view being the utilization of water for generating power. With a view to raising funds wherewith to carry out their plans, complainant and Willard White, upon September 7, 1899, entered into the following contract:

"This agreement witnesseth: Whereas, W. G. Whitney and Willard White having acquired a dam, a log storage and power site on the Payette river, at a point called the Black Rock Canyon about six miles above the town of Emmett in Canyon county, Idaho; and

"Whereas, it is proposed to secure sufficient funds with which to erect a dam at said site, about 30 feet in height, with a view of creating a large water power to be used in sawing lumber, elevating water upon both sides of the Payette river for the purpose of irrigation, and for generating electric power to be utilized for railway and such other purposes as may be found feasible.

"Now, therefore, in consideration of the premises, each of the parties hereto agrees to give his best efforts to the immediate accomplishment of the above-mentioned project, and does agree that the parties hereto are to own an equal interest in such undertaking, share and share alike.

"It is further agreed that in the event the said White shall fail to raise sufficient funds to construct said dam or fail to make such progress as shall be satisfactory to said Whitney within one year from the date hereof, the said White agrees to assign all his right, title, and interest in the same to said Whitney.

"Witness our hands and seals this 7th day of September, 1899.

"W. Grant Whitney,  
"Willard White."

After making this agreement, the parties, believing that it was necessary to secure title to the land involved in this suit, concluded to acquire the same from the owner, I. R. Beery, of Minneapolis, Minn. White, by agreement, was to obtain a contract from Beery for the purchase of the land. About December 26, 1899, White went to Minneapolis, and obtained a contract for purchase from Beery. This contract was between Beery and White. By its terms, in consideration of the covenants named in the contract to be performed by White, Beery agreed to sell, and White agreed to buy, the property now involved in this litigation. White agreed to pay to Beery \$6,000—\$1,000 in cash was to be paid on or before February 1, 1900; and \$5,000 in first mortgage bonds in a corporation to be formed for the purpose of developing a power plant at the site of the reservoir and dam, the bonds to be issued upon the property described, and improvements to be placed thereon. The contract also provided that in the event of a failure to comply with the terms thereof by White, Beery was to be relieved from all obligation to convey the property, and White should forfeit all right thereto at the option of Beery. It also provided that, upon payment in the time and manner specified, Beery was to execute to White and his assigns a sufficient deed conveying to White the title to the property. No money was paid to Beery under the terms of the contract. White then went to New York and other places to try and secure money to carry out the plans of himself and Whitney, and on his way back to Idaho, about January 25, 1900, again saw Beery, and obtained from him a warranty deed to the property. No money was paid to Beery for this deed. When White returned to Idaho, he told Whitney that he had talked with Beery about forming the company,

and that Beery had suggested to him that he make him the deed, and that White should take it to be used when the conditions of the contract of December 26, 1899, were complied with. White also told Whitney that he took the deed to avoid any delays and as a matter of trust, and that, when the company would be formed and the conditions of the contract complied with, "the deed should be turned to the company, but should be used for no other purpose." Beery never was paid any money, but did not declare forfeiture, as he was authorized to do under the provisions of the contract. White failed to raise the money to carry out the scheme of a corporation, and when September 7, 1900, came about, practically nothing had been effected by White toward obtaining money to build the dam. Whitney, however, did not notify White at that time that progress was not satisfactory to him, and, as White said he could succeed if allowed to go ahead, matters were permitted to run along for about seven months thereafter, or until April 1, 1901. During all this time Whitney advanced considerable money, though it had been agreed that White was to pay his own expenses. No company had been organized prior to April 1, 1900. No money had been obtained, and Whitney says he could not see that White had any prospects or definite plans ahead. Thereupon, about April 1, 1901, Whitney told White that what had been done was not satisfactory, that he could see no future to it, and that negotiations between himself and White, under the contract of September 7, 1899, must be at an end, and asked White to assign to him any interest he had under the contract. White told Whitney that he could not assign to him the deed which Beery had made to him because the property did not belong to him, but had been taken from Beery as a trust to enable matters of closing up the proposed company to be expedited, but that he (White) had no right to transfer it; that the deed was subject only to the conditions of the contract, and that, as there had been no money paid for the deed, if the contract could not be carried out, the deed would be of no validity, and that he could not transfer it for that reason. From April 1, 1901, Whitney and White never have had any personal dealings with each other, although there was some negotiation through counsel for a payment by Whitney to White, by way of compromise for any possible claim or interest White might have. After Whitney and White dissolved their relationship, Whitney, still believing that the warranty deed of January 25, 1900, was invalid, negotiated directly with Beery for the purchase of the land involved, and on May 13, 1901, Beery, by quitclaim deed, conveyed the land to Whitney in consideration of \$1,000 cash paid to him by Whitney. This quitclaim deed was recorded in the proper offices in Idaho about May 21, 1901. Whitney made some improvements upon the property very soon after receiving the deed. Thereafter, about August 7, 1901, White, in consideration of \$1,800, gave a quitclaim deed to the firm of Cobban & Casey for an undivided half interest in the land herein involved. Prior to that date, about May 22d, Whitney met R. M. Cobban, of the firm of Cobban & Casey, and told him that he and White had dissolved, told him of the contract of September 7, 1899, between himself and White, and that White no longer had an interest in the

property, but that complainant and one Davis had control. Thereafter, on September 27, 1902, Cobban & Casey, in consideration of about \$2,000, quitclaimed to the appellee Dewey whatever interest they had in the land in question, by reason of their deed from White. Before they quitclaimed they explained to Dewey that Whitney had a quitclaim deed from Beery, and appellee had actual knowledge also that Whitney claimed to be the owner of the whole property. The case becomes somewhat complicated by a contract dated April 25, 1900, between Beery of Minneapolis and White. In this contract, it was recited that whereas Beery was the equitable owner of the property, and Willard White held the legal title by virtue of a deed which had been executed by Beery and wife under an agreement theretofore entered into between Beery and White, and whereas it was desired by the parties to enter into a new and different agreement in relation to the property, therefore it was agreed that White had, upon the day of this last referred to deed (April 25, 1900), become the owner absolute of the equitable, as well as of the legal, title to a half interest, undivided, in the property, for the consideration of \$750, \$150 of which was paid the day of the date of the deed, \$100 was to be paid May 15, 1900, and \$500, was to be paid by January 1, 1901. Beery also bound himself to convey to White the remaining half interest upon payment of \$1,750 on or before January 1, 1901. This contract between Beery and White also recited that it was the aim and intention of the parties to utilize the premises for the construction of a dam to raise water for irrigation, and for the development of water and electrical power; and that, therefore, in the event that the parties to the agreement should thereafter agree to promote such enterprise for the construction of the dam and the development of power, White, as a partner with Beery in the promotion of the enterprise, was to be given a credit of \$2,500 at the time of the institution of the partnership, for time and money already expended in the promotion of such object, and in defending the title, and that if the partnership was formed and the promotion was proceeded with the option was to be withdrawn and annulled, and the parties were to proceed as partners in the promotion of the objects named. It will be observed that this contract was made during the first year of the existence of the contract between Whitney and White, dated September 7, 1899. It was made secretly, never was recorded, and Whitney testified that he never knew of its existence before the trial of the suit in the state court hereinafter referred to.

On July 22, 1903, Whitney commenced an action against Dewey in the state courts of Idaho, praying for a decree quieting his title to the property herein involved, and for an injunction against Dewey from asserting any claim to the premises. Dewey denied Whitney's right and title, and set up title in himself to an undivided half interest in the premises, claiming through the warranty deed of January 25, 1900, to White, and the deed from White to Cobban & Casey. On appeal the Supreme Court of the state discussed the contract of September 7, 1899, hereinbefore set out in full, referred to the agreement of December 26, 1899, between Beery and White, to the deed made



by Beery and wife to White on January 25, 1900, and to the agreement between Beery and White of April 25, 1900. It was decided that the warranty deed to White was delivered, and that Beery, as a grantor, could not, by his warranty deed absolute on its face, convey such a title to his grantee, White, as would enable White to pass a good and perfect title, and at the same time attach such parol conditions to the deed upon its delivery as to preclude White from conveying and transferring an equally good title to any other person. It was held that, under the deed of January 25, 1900, the entire legal title passed from Beery to White, and that evidence offered for the purpose of showing a failure to vest title in White under the warranty deed was improperly admitted. It was also held that by the contract of April 25, 1900, Beery parted with his equity to a one-half interest. The court, however, distinctly held that the action before it was not one by Whitney to compel White, or his grantee with notice, to assign any interest acquired under the partnership agreement, and distinctly declined to express any opinion whether or not such an agreement as had been entered into on September 7, 1899, between White and Whitney, could be made the basis upon which a court of equity would declare "a forfeiture." It was also the opinion of the court that Dewey was the owner of an undivided half interest in the property. *Whitney v. Dewey*, 10 Idaho, 633, 80 Pac. 1117, 69 L. R. A. 572, decided February 23, 1905. The present suit was instituted in the federal court August 7, 1905.

We look upon the agreement of September 7th as one of partnership. It was a contract where the parties contemplated, by joint effort, the promoting of a project for building a dam so as to create and use and sell water power for electrical and other purposes. Each agreed to give his best efforts to secure means immediately. Corporate organization was undoubtedly in the minds of Whitney and White, for, in dealing with Beery, they were to pay him in part by first mortgage bonds to be issued by a corporation to be formed to build a dam. But, whether in one form or another, and no matter how much or how little was accomplished, each of the parties became an owner in all property that was contributed and acquired in connection with the execution of the purposes of the association. The rights that had been initiated by Whitney individually prior to September 7, 1899, became the joint property of Whitney and White, share and share alike. White contributed no property to the partnership, but was anxious to join with Whitney, as he believed the rights which Whitney had contributed were valuable and could be made much more so. White was really a promoter, agreeing to contribute his energy and time with an exclusive right for a year to secure a half interest in the whole enterprise. But the parties provided for possible failure, and agreed that in case White should not be able to secure necessary funds to accomplish the undertaking within a year from September 7, 1899, or in the event of unsatisfactory progress on White's part within a year, White was to assign to Whitney all his right, title, and interest in and to the dam site, lands, rights, contracts, and privileges connected with the whole project that had been acquired by the partnership or either partner for the partnership. The plain purpose was this:

White was to get the necessary money and make the scheme an actually possible one; and to do so he had a year's time. If he could succeed, it would mean a great deal to him; but if he should fail, then he was to withdraw absolutely and assign every right he had to Whitney.

There are some principles which are thoroughly well established that bear upon the case, and will furnish grounds of equity and law upon which our decision must be placed. The first and highest duty which partners owe to each other is perfect good faith. Each is under obligation to do what he can to promote the success of their partnership. In every purchase or bargain each is under a duty to use the property of the concern for the benefit of all. In the requirement of good faith between partners, naturally, deceit, concealment, and false representations are forbidden. Parsons on Partnership, 225, says:

"If he (one partner) makes any private bargain with third parties for his own benefit, which either inflicts a loss upon the partnership, or turns to himself advantages which belong to all in common, he will be held to make compensation for this, or to restore these advantages to the partnership in some way. Thus, if the partnership have a valuable leasehold property, and, when it is about to expire, a partner privately gets a renewal of it to himself, he cannot take advantage of this to impose hard terms on his partners, but will be held to have obtained it for them as well as for himself."

Judge Story writes as follows:

"In cases, therefore, where real estate is purchased for partnership purposes and on partnership account, it is wholly immaterial, in the view of a court of equity, in whose name or names the purchase is made and the conveyance is taken, whether in the name of a stranger alone or a stranger jointly with one partner. In all these cases, let the legal title be vested in whom it may, it is in equity deemed partnership property not subject to survivorship, and the partners are deemed the *cestuis que trust* thereof. A court of law may, nay must, in general, view it only according to the state of the legal title. And if the legal title is vested in one partner or in a stranger, a bona fide purchaser of real estate from him, having no notice, either express or constructive, of its being partnership property, will be entitled to hold it free from any claim of the partnership. But if he has such notice, then in equity he is clearly bound by the trust; and he takes it *cum onere* exactly like every other purchaser of a trust estate."

Equity will apply its broad principles to real estate so as to secure to all parties their rights by regarding the legal estate as held in trust for the purposes of the partnership. This doctrine extends to carrying into effect implied, as well as express, trusts; and as is frequently the case in partnership relations where property is purchased in the name of one of the partners and the conveyance in form vests the legal title in one, equity will hold that he takes clothed with a trust for the partners in their partnership capacity, so as to secure the beneficial interest to them until the purposes of the partnership are accomplished. The consequence is that partnership property so held cannot be conveyed away by the partner alone who holds the legal title, without violating the trust. A conveyance made by the one partner would be invalid against the other, unless made to one who purchased in good faith, without notice, actual or constructive, of the trust. One who, knowing that a piece of real estate is the property of a partnership, pays

for a title to it from one partner alone, without the knowledge or consent of the other, takes the title that he gets at his peril, and on the responsibility of the person with whom he deals. These principles are clearly laid down in the following books: *Dyer v. Clark et al.*, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; *Hoxie v. Carr et al.*, Fed. Cas. No. 6,802; *Phillips et al. v. Crammond et al.*, Fed. Cas. No. 11,092; *Perry on Trusts*, § 127. When, therefore, White, one of the partners, took the warranty deed from Beery to himself on January 25, 1900, a trust resulted to the partnership. The deed was delivered by Beery, and though both White and Beery believed there was a lack of delivery by Beery, and though they believed that it was subject to the accomplishment of their plans, as defined by the contract between White and Beery, dated December 26, 1899, nevertheless, under the rules of law, the deed was delivered unconditionally, and transferred Beery's entire legal title in the property to White, impressed in equity, however, with a trust for the partners and the partnership.

The decision of the learned Supreme Court of the state, in the action to quiet title, heretofore referred to, was that, tested by rules of law, White became vested with such a title from Beery as would enable him to pass a perfect title, and that no evidence of parol conditions was admissible for the purpose of showing a failure to vest title in White. With the judgment of the court upon the question there decided we are in accord; and we proceed upon the premise that Beery alienated his entire legal interest in the property by the deed to White. But, even so, the case before us is a very different one from that decided by the state court. There the action was to quiet title, but the rights, if any there are, in Whitney to compel White, or his grantees with notice, to assign under the contract of September 7th, were expressly not determined. It is substantially the question referred to, but left undecided by the Supreme Court, that has become the foundation of this suit. We have then before us the question whether equity will decree a specific performance under the contract of September 7th. Let us here say that the evidence does not show that this is really a suit to enforce a forfeiture, as respondent contends. Nor is it to enforce the provisions of an unfair and unconscionable agreement. The consideration for the contract between White and Whitney was an exclusive privilege to White for 19 months of acquiring a valuable property interest, if he could successfully exercise his energy and secure necessary money to build the dam. Assuming, for the present, that White acted in good faith, yet equity will not refuse to Whitney the enforcement of the contract as made. If White had obtained the necessary money, and Whitney had refused to perform his part, White could have compelled him to do so. Forfeiture usually signifies loss of property by way of compensation for injury to the person to whom the property is forfeited, as well as punishment. Nothing of that kind is involved herein, inasmuch as the remedy that Whitney seeks is one by which White, who violated his primary duty to convey, when circumstances arose requiring conveyance, may be compelled to do the very act which his duty and Whitney's primary right require from him. The case thus far, then, is this: On January 25, 1900, Beery had parted

with his whole title, and White held unrecorded warranty title to the lots for himself and his partner. Whitney, so far as the record enables us to pass upon his conduct, always dealt with White openly and fairly. He advanced his own means for the benefit of the project, and although at the end of the year White had not secured funds to make their plans successful, and Whitney could have dissolved the relationship, still, after assurances by White that he would be able to accomplish something if permitted to go on, he allowed the relationship to continue until about April 1, 1901. No intentional departure from the way they had been going on before was indicated, and it is evident that the provisions of the original articles were to be applicable to their association during its continuance. Parsons on Partnership, 239. White was still under an obligation to raise the necessary money to build the dam, and Whitney was under an obligation to use his best endeavors to promote the plan. Whitney still retained the right to dissolve the relationship if at any time White's progress was not satisfactory, or if he failed to get the necessary money, while White was still under obligation to assign all his rights to Whitney if such conditions of unsatisfactory progress or failure arose, and Whitney should elect to act upon them or either of them. About April 1, 1901, Whitney dissolved the partnership. The acts of dissolution consisted of an explicit verbal notice by Whitney to White that the progress was not satisfactory, and that their relationship must end. It was not a dissolution on terms, but a distinctly expressed announcement by one partner to another of dissolution of a partnership which was then at will; and from the moment of the announcement by the one partner, the partnership was terminated. In passing upon this point, we are not unmindful of the language of the learned judge who wrote the opinion of the Supreme Court of Idaho, denying a motion for a rehearing, to the effect that there was not sufficient proof of dissolution. We judge that at the trial in the state court the evidence of what was said by Whitney at the interview of dissolution was far less satisfactory than upon the trial had before the United States Circuit Court. Upon the testimony in the record before us, the proof of dissolution is ample; and we hold that from and after April 1, 1901, the partnership relation ceased.

White's duty to convey under the contract then arose; but he failed to perform without excuse. In May, Whitney, erroneously but honestly believing that the warranty deed from Beery to White had conveyed no valid title to the partners or either of them, in good faith purchased Beery's interest in the whole property (which was, at most, but an equity in the nature of a vendor's lien), and thereafter promptly had his quitclaim deed put upon record. The taking of the quitclaim, which, in its terms, conveyed the lots involved, was really unnecessary on Whitney's part, because, as we have said, Beery had already alienated his title by the warranty deed to White. The quitclaim operated to extinguish any possible lien that Beery might have had against the property for any unpaid price, and it also put the record title to the whole property in Whitney. It became notice to all that Whitney was a grantee of all the right, title, and interest

that Beery had in the property. *Moelle v. Sherwood*, 148 U. S. 21, 13 Sup. Ct. 426, 37 L. Ed. 350. This circumstance of itself ought to have warned Cobban and Casey that they could not buy from White, who held the unrecorded warranty deed, and claim protection as bona fide purchasers for a valuable consideration without notice. Sections 3000-3001, Rev. St. Idaho 1887. But when to the record notice there was added the positive actual knowledge of the previous relationship between Whitney and White, of its dissolution, and of Whitney's claim of exclusive ownership, all of which was told to Cobban by Whitney, they became purchasers from White with knowledge, and are to be held as having taken the undivided half interest conveyed as subject to the unextinguished trust in White, and to his positive duty to assign all his interest to Whitney. *Oliver et al. v. Piatt*, 3 How. 333, 11 L. Ed. 622. These observations apply with equal force to Dewey, the appellee, who, when he took a deed from Cobban & Casey, also had constructive and actual knowledge that Whitney claimed title to the whole tract. Appellee's actual knowledge was received in several ways. Before he bought he was told that Whitney claimed an interest, and he knew that Whitney and White had been associated in financial matters connected with the property. He was also the general manager and vice president of the Idaho Northern Railway Company, which was seeking a right of way over the lands affected by this litigation. Long before appellee took his deed from Cobban & Casey, he also knew of a condemnation suit instituted by the railway company against Beery et al. for such a right of way, and of the intervention of Whitney filed therein, claiming ownership of the whole tract. Appellee's position, therefore, is no better than that of Cobban & Casey; neither can stand on firmer ground than White himself could occupy.

We have thus far considered the case without regard to the secret contract made April 25, 1900, by Beery and White. We regard White's conduct in obtaining that conveyance, and in not advising his partner of it, as a willful fraud against Whitney. It was done in direct violation of every rule of good faith, and of the written obligations of their partnership articles. White's purpose evidently was to get Whitney out, and, in trying to do so, he concealed the truth and deceived his partner. But it does not appear that appellee or Cobban & Casey knew of the willful fraud or participated in it; hence they should not and cannot be charged therewith. Their attitudes are as heretofore explained—purchasers with knowledge of the quit-claim deed from Beery to Whitney and of the business association of White and Whitney, and of Whitney's claim of exclusive ownership. These several pieces of information are sufficient, as we have shown, without regard to the willful fraud of White, to defeat appellee's claim of right in the property. Consequently, White's willful fraud and the secret deed are not material to the decision of the case. It may be unfortunate for Cobban & Casey and Dewey that as White's grantees and successors they will suffer some pecuniary loss as a result of their purchase, but they are none the less fortunate in being free from implication in those parts of his conduct which showed intent to defraud his partner.

We cannot see that Whitney has ever waived any rights. His leniency in not dissolving the partnership after the first year of the contract with White was for White's benefit, in that it gave him further time in which he might raise necessary funds; but there is no evidence at all of intention to release White from his obligation to convey, if he failed to raise the necessary means, and no presumption in favor of such a waiver is to be indulged in.

Laches are charged. But Whitney has been active and persistent since May, 1902, when he intervened in the condemnation suit referred to, in seeking judicial determination of his claims. How, then, can it be said that he has slept on his rights? He relied upon the statements of his partner, White, that no title was conveyed by the deed of January 25th, and knew nothing of the secret contract of April 25th between Beery and White until the action to quiet title was tried in the state courts.

One other point remains for consideration. It appears that in 1900 White, acting for the partnership, employed one Banister to make a report concerning the property. Banister was not paid, and thereafter obtained judgment against White, and attached the property of the partnership. When White sold to Cobban & Casey, Cobban paid to one Neil for Banister the sum of \$561.75—the amount of the judgment held by Banister. This sum was therefore paid for services rendered for the benefit of the firm, and we think it but equitable that it should be paid back to this appellee, who purchased from Cobban & Casey for more than they had paid. No other sum need be tendered or paid back to appellee by appellant, for the reason that appellant is only insisting upon the performance of his contract with White, under the terms of which appellant is entitled to a conveyance without paying any sum. Moreover, the evidence shows that all that complainant was obliged to do—and more, in fact, in that he advanced money for expenses, for which White alone was liable—was done by him. Appellee can occupy no better position than the most favored one which can be assumed for White, namely, that of a purchaser in trust for the person beneficially interested. *Jackson v. Lynn*, 94 Iowa, 151, 62 N. W. 704, 58 Am. St. Rep. 386; *Pomeroy's Equity Jurisprudence*, § 422.

Finally, looking at the whole case, we think that the rule must prevail whereby appellee is liable in equity to the same extent and in the same manner as his vendors, Cobban & Casey, and Cobban's and Casey's vendor, White; that, having acquired with full notice of the trust, he became himself a trustee for Whitney with respect to the property, and is bound to assign as the original trustee, White, himself, would be.

The decree of the Circuit Court will be reversed, and the cause remanded, with directions to enter a decree that, upon payment to appellee by appellant of the sum of \$561.75, with interest thereon from August 1, 1901, at the legal rate allowed by the law of the state of Idaho, amount paid in satisfaction of the Banister judgment, appellee assign to appellant by quitclaim deed all his right, title, claim, and

interest in and to the property involved herein, as described in complainant's bill, and as described in the quitclaim deed from Cobban & Casey, dated September 27, 1902, to appellee, E. H. Dewey.

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UNITED STATES v. HERMANN BOKER & CO.

(Circuit Court of Appeals, Second Circuit. November 15, 1907.)

No. 85 (3,923).

CUSTOMS DUTIES—CLASSIFICATION—"SHEET STEEL IN STRIPS."

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 137, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1639], for "sheet steel in strips," does not include long, narrow, thin, cold-rolled steel strips, because they are not sheet steel, nor stripped from sheet steel, nor commercially known as sheet steel in strips.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6482.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decision below, see 154 Fed. 174, reversing a decision of the Board of United States General Appraisers (G. A. 5,929; T. D. 26,063), which had affirmed the assessment of duty by the collector of customs at the port of New York.

J. Osgood Nichols, Asst. U. S. Atty. (Henry L. Stimson, U. S. Atty., on the brief), for the United States.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Charles P. Searle, for other importers.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. The merchandise involved in this case consists of cold-rolled steel varying from one-half an inch to six inches in width, not over  $\frac{25}{1000}$  of an inch in thickness, from 50 to 250 feet in length, and put up in the form of coils for importation. The question has been raised successively under the tariff acts of 1890, 1894, and 1897 whether this article falls within the classification of "steel in all forms and shapes not specially provided for," or within the classification "sheet steel in strips." It arose first in the United States Circuit Court for the First Circuit. In *re Wetherell*, 60 Fed. 268. The legislation involved was the second proviso of Act Oct. 1, 1890, c. 1244, § 1, Schedule C, par. 148 (26 Stat. 577):

"That flat steel wire, or sheet steel in strips, whether drawn through dies or rolls, untempered or tempered, of whatsoever width,  $\frac{25}{1000}$ ths of an inch thick or thinner (ready for use or otherwise) shall pay a duty of fifty per centum ad valorem."

Colt, J., held that the merchandise was variously described in commerce; that there was no article known under the special designation of "sheet steel in strips"; that sheet steel was a well-known article, being hot-rolled steel not less than 8 inches in width or more than about 12 feet in length; but that strips cut from such sheet steel

did not seem to have been imported, nor to have had any settled commercial designation, nor to have been much dealt in. In view of the addition of the word "sheet" before steel, he thought that the question was one of doubt, which should be resolved in favor of the importer, and the merchandise classified for the lower duty as "not specially provided for."

On appeal to the Circuit Court of Appeals (65 Fed. 987, 13 C. C. A. 264), the court, while agreeing generally with the reasoning of Judge Colt, held that as steel stripped from sheets had not been an article of importation, while the article in question had been largely imported, and that as the words "sheet steel in strips" immediately followed the provision for flat steel wire, thought to be an analogous article, and were followed by the words "whether drawn through dies or rolls," which could not apply to sheet steel, so far as dies is concerned, Congress must have intended to cover by these words strips of steel of this thickness, however produced, and reversed the judgment.

The question then arose in this circuit in the case of *Boker v United States* (C. C.) 116 Fed. 1015, in which Lacombe, J., followed the *Wetherell* Case, holding that the articles were "steel, sheet steel and in strips." Upon appeal to the Circuit Court of Appeals (124 Fed. 59, 59 C. C. A. 425), that court found that the articles were not sheet steel, because they were not hot-rolled, nor of the length of 12 feet or less; pointed out that in Act Aug. 27, 1894, c. 349, § 1, Schedule C, par. 124 (28 Stat. 517), the words "whether drawn through dies or rolls," found in the act of 1890 and largely relied upon in the *Wetherell* Case, had been omitted, and that the importer had proved that strips from commercial sheet steel were an important article in the trade and commerce of the country, and were known among dealers as "sheet steel in strips." Accordingly the court declined to follow the *Wetherell* Case, and reversed the judgment of the Circuit Court.

The present case arises under Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1639], which provides in paragraph 137 for "sheet steel in strips, <sup>25</sup>/<sub>1000</sub> of an inch thick or thinner," which words do not immediately follow, as in the act of 1894, the provision for flat wire, a circumstance to which weight was given in the *Wetherell* Case. Counsel for the United States insists strenuously upon the application of the rule that, when words in a statute have received a judicial interpretation and the same words are re-enacted, the Legislature must be presumed to have used them in accordance with that interpretation. *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207, 35 L. Ed. 1080; *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609.

Assuming that this principle is applicable, a conclusion exactly opposite to the government's would follow, because the *Wetherell* Case was not decided by the United States Circuit Court of Appeals until November 13, 1894, over two months after the act of 1894 was passed, so that during the deliberations of Congress the judicial construction of the words was that of Judge Colt in the Circuit Court, to



the effect that they did not cover the merchandise in question. The omission of the words "whether drawn through dies or rolls," and of any limitation of the thickness of the strips, is quite consistent with the intention of Congress to accept that construction. The reversal of the judgment after the passage of the act of 1894 could not change the construction of the words in that act, nor, we think, of those words when re-enacted in the act of 1897.

The record includes the testimony in the Wetherell Case, in the Boker Case, and much new testimony, both on the part of the United States and of the importer. The judge of the Circuit Court found that the nomenclature in the steel trade was very loose, and, following our previous decision in the Boker Case (124 Fed. 59, 59 C. C. A. 425), held that the words "sheet steel in strips" exactly covered strips cut from sheet steel, and that the articles to which the government proposed to apply the words, not being sheet steel, nor stripped from sheet steel, nor denominated in the trade "sheet steel in strips," should be classified as "steel in all forms and shapes not specially provided for."

We agree with his conclusion, and the judgment is affirmed.

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#### UNITED STATES v. ALBERT LORSCH & CO.

(Circuit Court of Appeals, Second Circuit. November 8, 1907.)

No. 59 (3,774).

#### 1. CUSTOMS DUTIES—CLASSIFICATION—AGATE BEARINGS—"MANUFACTURES OF AGATE"—"PRECIOUS STONES."

Pieces of agate, which have been cut, polished, and grooved to fit them for specific use as scale bearings, are more specifically enumerated under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 115, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636], as "manufactures of agate \* \* \* not specially provided for," than under Schedule N, par. 435, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], as "precious stones advanced in condition or value \* \* \* and not set."

#### 2. SAME—SPECIFIC EXCEPTION FROM GENERAL PROVISION—"NOT SPECIALLY PROVIDED FOR."

Where Congress, having provided in general terms for a group of articles, which includes many different species, as "precious stones," selects by name one of those species and prescribes that manufacturers of that particular species shall be dutiable at a different rate, as "manufacturers of agate, not specially provided for," it has so clearly indicated its intention to withdraw the article from the general group as soon as it becomes a completed manufacture that the absence of the limiting clause, "not specially provided for," from the group provision, is not particularly significant.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decision below, see 152 Fed. 591, affirming a decision of the Board of United States General Appraisers (G. A. 5,875; T. D. 25,965), which had followed the decision by the Circuit Court for the Southern District of New York in U. S. v. American Express Co., 147 Fed. 894, and was rendered before the contrary decision by the

Circuit Court for the Southern District of Ohio in *Smith v. Computing Scale Company*, 147 Fed. 890.

J. Osgood Nichols, Asst. U. S. Atty. (Henry L. Stomson, U. S. Atty., on the brief), for the United States.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The collector classified the articles under Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 115, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636], which reads:

"115. Manufacturers of agate, alabaster, chalcedony, chrysolite, coral, cornellion, garnet, jasper, jet, malachite, marble, onyx, rock crystal, or spar, including clock cases with or without movements, not specially provided for in this act, fifty per centum ad valorem."

The importers contend that they should have been classified under paragraph 435 of the jewelry schedule (Schedule N, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676]), which reads:

"435. Diamonds and other precious stones advanced in condition or value from their natural state by cleaving, splitting, cutting, or other process, and not set, ten per centum ad valorem; imitations of diamonds or other precious stones, composed of glass or paste, not exceeding an inch in dimensions, not engraved, painted, or otherwise ornamented or decorated, and not mounted or set, twenty per centum ad valorem."

The Board of General Appraisers found that the articles are:

"Pieces of agate, all similar in form but differing slightly in dimensions, the largest not exceeding one inch in length, one-half inch in depth and one-fourth of one inch in width which have been cut, polished and grooved, thus fitting them for specific use as bearings for scales of superior quality."

No one disputes the accuracy of this finding. The evidence shows that nothing further is required to fit them for that specific use. They are ready to be fitted into the grooves prepared for their reception in the completed scales. As one of the witnesses expresses it:

"Nothing [has to be done to it] except to place it right in a notch in the beam ends of the scale and then rest the levers right on it. \* \* \* In the scale in which this bearing is set, the opening is left there and it is pushed in; the receptacle in which they are put being made so carefully that there is no trouble whatever in placing the article inside."

They are known in the trade as "agate bearings," and are manifestly manufactures of agate. It is conceded that agate is a precious stone. The Board held that:

"The provision of paragraph 435 for precious stones cut but not set (but susceptible of being set) is without terms of limitation, and would seem to be more specific than the provision of paragraph 115 for manufactures of agate not specially provided for."

We do not concur in this conclusion. The group of articles known as "diamonds and other precious stones" includes many different species. When Congress selects by name one of those species, and provides that manufactures of that particular stone shall be dutiable at a different rate, it so clearly indicates its intention to withdraw

the article from the general group, as soon as it has become a completed manufacture, that the absence of the words "not specially provided for" in the paragraph covering the group is not particularly significant. Indeed, importers' counsel concedes that agate paper weights, blotters, paper cutters, seals, and the like would be properly classified under paragraph 115. These agate bearings, which have become completed manufactures, salable as such in trade, are plainly susceptible of a similar classification. A former decision of this court, however (*U. S. v. Benedict & Warner*, 145 Fed. 914, 76 C. C. A. 446), induced the judge who heard the cause below to reach a different conclusion. In that case the merchandise consisted of—

"semispherical rock crystal polished, the flat surfaces of which have been engraved intaglio in designs of animal heads. The intaglio cuttings are painted in living colors. After being mounted they are used in the nature of ornaments, such as scarf pins, brooches, etc."

It was held that they were within paragraph 435, and not covered by paragraph 115. A brief memorandum of opinion was filed, stating that the evidence showed:

"That, while the natural rock crystal itself is not particularly expensive, these completed intaglios unset cost as high as \$13 to \$15 each, and that this cost is due to the fact that the ornamentation is done with an engraving tool in an expensive manner. They are used for jewelry purposes only."

Diamonds and other precious stones are mainly used for jewelry or ornamental purposes, being advanced in condition from their natural state by cleaving, splitting, cutting, or other process. It is shown that there are various well-recognized "cuts" or shapes, such as rose cut, diamond cut, cabochon, intaglio, cameo, and others, all adapted to advance the stone in condition and value. In the *Benedict & Warner* Case it appeared that the rock crystal had been cut intaglio, and could be mounted as such in scarf pin or brooch; and the question to which the attention of the court was directed was whether the addition of painting in the grooves thus cut, which added to the beauty of the design, but did not change its adaptability to use, made it a "manufacture of rock crystal," rather than "rock crystal advanced by cleaving, splitting, or cutting." In other words, the question presented in that case was whether the "other process" referred to in paragraph 435 must, on the principle of "*noscitur a sociis*," be confined to processes similar to "cleaving, splitting, or cutting," and therefore not inclusive of painting.

Whatever be the language used in the *Benedict* Case, and the court as then constituted erred at least in filing a memorandum so brief as not to set forth fully the point decided, we are clearly of the opinion that these agate bearings have become a manufacture separate and distinct from the "precious stones advanced" of paragraph 435.

The decision of the Circuit Court is reversed.

## UNITED STATES v. GEORGE NASH &amp; CO.

(Circuit Court of Appeals, Second Circuit. November 7, 1907.)

No. 58 (4,244).

## 1. CUSTOMS DUTIES—CLASSIFICATION—WIRE SCREW RODS.

Tariff Act July 24, 1897, c. 11, § 1, Schedule C, par. 141, 30 Stat. 162 [U. S. Comp. St. 1901, p. 1640], provides, for "iron \* \* \* rods \* \* \* cold drawn \* \* \* in addition to the ordinary process of hot rolling," a duty "in addition to the rates \* \* \* on \* \* \* rods \* \* \* which are hot rolled." *Held*, as to wire screw rods which have been cold drawn after being hot rolled, that they are subject to this additional duty, regardless of the fact that such articles are specially enumerated in another paragraph as "wire screw rods" and that cold drawing is a necessary part of the process of making such rods.

## 2. SAME—GENERAL PROVISION—UNEQUAL OPERATION.

Where a general tariff provision prescribes an additional duty capable of application to all of several articles enumerated in another provision, it should be applied to all, even though it may operate unequally.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York (152 Fed. 573), reversing a decision of the Board of General Appraisers (G. A. 6,338; T. D. 27,-288), which modified the decision of the collector of the port of New York.

J. Osgood Nichols, Asst. U. S. Atty. (Henry L. Stimson, U. S. Atty., on the brief), for the United States.

Kammerlohr & Duffy (Joseph G. Kammerlohr, of counsel), for importers.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The merchandise in question is iron screw rods. Both sides agree that it is dutiable at four-tenths of a cent per pound under the following paragraph of Tariff Act July 24, 1897, c. 11, § 1, Schedule C, 30 Stat. 161 [U. S. Comp. St. 1901, p. 1638]:

"136. Wire rods: Rivet, screw, fence, and other iron or steel wire rods, whether round, oval, flat, or square, or in any other shape, and nail rods, in coils or otherwise, valued at four cents or less per pound four-tenths of one cent per pound."

The only question is whether the merchandise is subject to the additional duty imposed by the following clause of paragraph 141 of said act (30 Stat. 162 [U. S. Comp. St. 1901, p. 1640]):

"On all iron or steel bars or rods of whatever shape or section which are cold rolled, cold drawn, cold hammered, or polished in any way in addition to the ordinary process of hot rolling or hammering, there shall be paid one-fourth of one cent per pound in addition to the rates provided in this act on bars or rods of whatever section or shape which are hot rolled."

The testimony shows that these screw rods are first hot rolled and then cold drawn. They, therefore, fall within the express provisions

of paragraph 141. They are "iron rods" of some "shape or section," which have been "cold drawn \* \* \* in addition to the ordinary process of hot rolling." They are subject to the duty imposed by this section, unless for some reason it is inapplicable.

This argument is made why paragraph 141 should not apply: Its purpose is to impose additional duties on account of additional processes. There is no "additional" process in cold drawing a screw rod. The testimony shows that a hot rolled rod does not become a screw rod until it is cold drawn. Cold drawing is necessary to fit the rod for the screw making machine. Imposing a duty upon screw rods *eo nomine* imposes a duty upon cold drawn rods. No further process calls for the additional duty provided in paragraph 141, and, therefore, it is inapplicable. There would be much force in this contention if screw rods were subjected to a duty *eo nomine* in a section by themselves, or with other rods which were necessarily cold drawn. It could well be urged that they were required to pay a presumably increased duty for the very reason that they were cold drawn, as well as hot rolled, and that Congress could not have intended to impose a further duty on that account. In such a case the two sections of the act might be said to be contradictory, and the rule that specific designations control general, though appropriate, descriptions applicable. But paragraph 136 embraces rivet, fence, other iron or steel wire rods of every shape, and nail rods as well as screw rods. There is no testimony that cold drawing is a necessary part of the process of making these rods. In fact, the reason why screw rods are cold drawn—for use in the screw making machine—does not apply to them. They seem clearly subject to the additional duty imposed by paragraph 141 when for any reason they are cold drawn. And, if paragraph 141 applies to some of the articles described in paragraph 136, it must apply to all, even though it may operate unequally. There is no indication that the framers of the act intended to single out screw rods for an exclusive duty.

It is also urged that paragraph 141 is inapplicable, because it refers to additional independent processes, while the cold drawing which screw rods receive is merely an incident of their preparation. But the statute is broad and comprehensive. Its terms embrace rods which have been cold drawn for any reason.

It is further urged that the arrangement of the different clauses in paragraph 141 follows that of the metal schedule preceding the "wire" subdivision, and that it should be construed as applying to that schedule alone. There would be force in this claim, if the language of paragraph 141 were limited in any way to the metal schedule. But the clause of that section now under consideration contains no limitation or qualification. It embraces "all" iron or steel rods, "of whatever shape or section." Manifestly the wire rods described in paragraph 136 come within its terms.

It follows, therefore, that the merchandise in question is subject to the duty of one-fourth of one cent per pound under paragraph 141, in addition to the duty of four-tenths of one cent under paragraph 136, of the tariff act.

The decision of the Circuit Court is reversed.

## In re LOUISVILLE NAT. BANKING CO.

(Circuit Court of Appeals, Sixth Circuit. January 16, 1908.)

No. 1,715.

## 1. BANKRUPTCY—DISCHARGE—OBJECTIONS—STATUTE—CONSTRUCTION—"PROPERTY."

Bankr. Act July 1, 1898, c. 541, § 14, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1026], provides that the court shall discharge the applicant unless he has obtained property on credit from any person on a materially false statement made in writing to such person for the purpose of obtaining such property on credit. *Held*, that the word "property," as there used, meant "anything of value," "anything that might be owned or possessed," "anything having a debt paying or a debt securing power," including money, so that an objection that the bankrupt obtained a loan of money by making a materially false statement in writing constituted a valid objection to his discharge.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

## 2. SAME—DISCHARGE—VACATION—JURISDICTION.

Where the attorney for an objecting creditor was unavoidably absent when the hearing of an application for a bankrupt's discharge was had, and another attorney, who had been requested to appear and oppose the discharge on a valid ground, failed to do so, the court, after granting a discharge, had jurisdiction to consider and determine the creditor's motion to set it aside.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 869.]

## 3. SAME—DENIAL—WRIT OF REVIEW.

Denial of a creditor's application to set aside a bankrupt's discharge on the ground that, if the facts claimed by the creditor were established, they would not warrant the court in refusing a discharge, was reviewable by the Circuit Court of Appeals on a petition for review.

## On Petition for Review.

Wm. M. Smith, for petitioner.

Before LURTON and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

RICHARDS, Circuit Judge. On January 9, 1907, William L. Pfaffinger filed his petition and on the same day was adjudged a bankrupt. On April 5, 1907, he filed a petition for a discharge, and notice was given that the application would be heard on April 27, 1907; but the hearing was postponed until May 4, 1907. On that day the attorney for the Louisville National Banking Company, one of the creditors of the bankrupt, was unavoidably absent. He had made arrangements with another attorney to represent him at the hearing and make formal objection to the discharge of the bankrupt on the ground that this creditor had a large claim for borrowed money, and that the bankrupt, in order to obtain the money represented by the credit, had made a materially false statement in writing to such bank and had obtained the money on the faith of such statement. The creditor not being represented at the hearing, and no objection being made, the discharge was granted on May 4, 1907. Afterwards, and as soon as it became known to the attorney of the

creditor that the attorney he had engaged to represent his client had failed to appear, and that no objection had been made, and the discharge had been granted, a motion was made to set aside the discharge for the reasons indicated. The matter was fully presented to the court below, and it refused to set aside the order of May 4, 1907, granting a discharge, on the ground that, even if the facts claimed by the creditor were established, they would not warrant the court in refusing a discharge, and therefore would not warrant the court in setting aside the order.

Section 14 of the bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3427]), as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1026], provides, among other things, that the court shall discharge the applicant unless he has "(3) obtained property on credit from any person upon a materially false statement made in writing to such person for the purpose of obtaining such property on credit." The court below, in the opinion referred to, states that the matter was referred to the referee for the purpose of ascertaining whether the claim of the creditor that the bankrupt had made a materially false statement as to his financial condition, for the purpose of obtaining credit in the shape of money, and had thus obtained money, was sustained by the proof, and that the referee had reported that such statement had been made in writing and falsely showed the bankrupt's indebtedness at that time, namely, March 24, 1903, to be \$10,200, and his assets as at least \$49,674. Conceding the facts claimed to be thus established, the court below took the view that the statute did not apply, because it applied only to a materially false statement in writing made for the purpose of obtaining property on credit, and that money is not property. In support of this view, Collyer on Bank. (6th Ed.) pp. 196, 197, is cited, and also a rule in *U. S. v. Isham*, 17 Wall. 496, 21 L. Ed. 728, in which Mr. Justice Hunt, speaking for the court, says (page 504, 17 Wall. [21 L. Ed. 728]):

"The words of the statute are to be taken in the sense in which they will be understood by that public in which they are to take effect. Science and skill are not required in their interpretation, except where scientific or technical terms are used."

We approve of the rule laid down by Mr. Justice Hunt, but we do not think it sustains the construction claimed in this case. The position taken by Collyer on Bankruptcy is in our opinion without support. If we were to apply the rule laid down by Mr. Justice Hunt, and take the common, ordinary meaning of the word "property," we think we would reach the usual definition given to the word; that is, "anything of value," "anything that may be owned or possessed," "anything which has debt-paying or debt-securing power." One of the common crimes is obtaining property under false pretenses. It has never been restricted to the obtaining of property other than money, but to the obtaining of property including money. No good reason can be advanced for limiting the term "property" in this statute to property excluding money. Money is property in its most available and efficient form. According to the construction of the lower court, the bankrupt could, without subjecting himself to a

penalty, obtain money by making a materially false statement in writing; but he could not, without subjecting himself to the penalty, obtain property exclusive of money by making such false statement; still with the money which he could thus obtain without penalty he could readily purchase the property which the law prohibited him from thus obtaining. In our opinion the case of *Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, settles the question. There the point was made "that a transfer of any of his [the bankrupt's] property" was limited in meaning to a transfer of any of his property excluding money, and the court held that the phrase included "anything of value, anything which has a debt-paying or debt-securing power; and money is property."

The authority of the court below to consider and determine the motion to set aside the discharge is upheld by the decision in *Re Dupee*, 2 Low. 18, Fed. Cas. No. 4,183. See, also, *Hamlin v. Toledo, St. L. & K. C. R. R. Co.*, 78 Fed. 664, 24 C. C. A. 271, 36 L. R. A. 826. The question which comes before the court in the present case is one of administration; the proper construction of the amendment of February 5, 1903, authorizing a refusal of the discharge in certain cases. The question was properly presented by a petition for review, and case No. 1,715 will therefore be dismissed.

The judgment is reversed, and the case remanded, with directions to set aside the discharge and for further proceedings not inconsistent with this opinion.

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UNITED STATES v. MULLER, MACLEAN & CO.

(Circuit Court of Appeals, Second Circuit. November 8, 1907.)

No. 56 (4,417).

1. CUSTOMS DUTIES—CLERICAL ERROR—MISTAKE AS TO ABBREVIATION.

An importer in giving the invoice value of his merchandise stated it in dollars, instead of rupees, having mistaken the rupee abbreviation for the dollar mark. *Held*, that this constituted a clerical mistake.

2. SAME—APPRAISEMENT—FAILURE TO APPRAISE TRUE VALUE.

Merchandise having been erroneously invoiced at an excessive value, the appraiser merely accepted that value as being sufficiently high, without making any effort to ascertain the true value, as required by Customs Administrative Act June 10, 1890, c. 407, § 10, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1922]. *Held*, that the appraisement was therefore invalid.

3. SAME—INVOICE VALUE—ASSESSMENT ON LESS AMOUNT.

The provision in Customs Administrative Act June 10, 1890, c. 407, § 7, 26 Stat. 134 [U. S. Comp. St. 1901, p. 1892], that duty shall not be assessed on less than the invoice value, does not require that the collector should take as the dutiable value an excessive sum erroneously given in a pro forma invoice, when he has before him a consular invoice giving the correct value. He conforms to the statute if he assesses on the basis of the value in the latter invoice.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court, affirming a decision of the Board of General Appraisers, which reversed a decision of the collector of the port of New York in assess-



ing duty upon certain imported merchandise upon an amount stated as its value in the pro forma invoice, instead of the amount stated in the consular invoice, which latter amount, as the appraiser testifies, was the correct market value. The consular invoice, which had been delayed for some reason, was before the collector when he acted.

J. Osgood Nichols, Asst. U. S. Atty.

Kammerlohr & Duffy (John G. Duffy, of counsel), for importers.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. The decision of Judge Hazel will be found in 152 Fed. 575; and we fully concur in its conclusions. The appellant's brief states that Judge Hazel was in error in his assumption as to the government's concessions, and adds:

"The government does not concede that the alleged overvaluation of the mica was a clerical mistake. On the contrary it was a deliberate valuation by an importer," etc.

What the government does or does not concede in this particular is unimportant. The undisputed evidence shows conclusively just what the mistake was. The representative of the importer in preparing pro forma invoice had before him some insurance documents which stated the value as "rupees 636.10 (equals \$204)." He mistook the rupee mark for a dollar mark, and, deducting for consular fees, set down the value as \$632. If this is not a "clerical mistake," we are at a loss to define the term. The appraiser appears to have accepted the value thus stated as being high enough to cover. He made no effort whatever to "ascertain, estimate, and appraise the actual market value and wholesale price at the time of exportation in the principal markets of the country whence the merchandise was imported." Customs Administrative Act June 10, 1890, c. 407, § 10, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1922]. The case is therefore within the decision of this court in *U. S. v. Beer*, 150 Fed. 566, 80 C. C. A. 368.

Reference is made to the last clause of section 7 of customs administrative act of 1890, which reads:

"The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value."

That provision does not require the collector to accept a mistaken value given in a pro forma invoice, when he has before him the correct value given in a consular invoice. He conforms to the statute by not assessing upon an amount less than the consular invoice, if that give the correct value.

The decision is affirmed.

## UNITED STATES v. D. S. HESSE &amp; BRO.

(Circuit Court of Appeals, Second Circuit. November 8, 1907.)

No. 78 (4,210).

## CUSTOMS DUTIES — CLASSIFICATION — ARTICLES "IN IMITATION OF LACE" — BRAID SETS.

Collars and cuffs composed of braids sewn together and ornamented with cords and threads *held* dutiable as "wearing apparel \* \* \* in imitation of lace," under Tariff Act July 24, 1897, c. 11, § 1, Schedule J, par. 339, 30 Stat. 181 [U. S. Comp. St. 1901, p. 1662]. It is not necessary that articles coming within this provision should be imitation lace as known to the trade.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court reversing a decision of the Board of General Appraisers (G. A. 6,283; T. D. 27,086), which sustained the action of the collector of the port of New York in classifying certain articles for duty under the act of 1897. The opinion below is found in (C. C.) 154 Fed. 171.

D. Frank Lloyd, Asst. U. S. Atty.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. The articles in question are collars and cuffs designed for feminine wearing apparel, each set consisting of a collar and one pair of cuffs completed and ready to be attached to the garment on which they are to be worn. They are composed of cotton braids sewn together by hand, and ornamented with cotton cords and cotton threads.

The relevant paragraphs are:

"322. All manufacturers of cotton not specially provided for in this act forty five per centum ad valorem."

"339. Laces, lace window curtains, tidies, pillow shams, bed sets, insertings, flouncings and other lace articles; handkerchiefs, napkins, wearing apparel, and other articles, made wholly or in part of lace, or in imitation of lace; nets or nettings, veils and veillings, etamines, vitrages, neck ruffings, ruchings, tuckings, flutings, and quillings; embroideries and all trimmings, including braids, edgings, insertings, flouncings, galloons, gorings and bands; wearing apparel, handkerchiefs, and other articles or fabrics embroidered in any manner by hand or machinery, whether with a letter, monogram or otherwise; tamboured or appliquéed articles, fabrics or wearing apparel; hem-stitched or tucked flouncings or skirtings, and articles made wholly or in part of ruffings, tuckings, or ruchings." etc.

Act July 24, 1897, c. 11, § 1, Schedules I, J, pars. 322, 339, 30 Stat. 179, 181 [U. S. Comp. St. 1901, pp. 1661, 1662].

It will be observed that paragraph 339 contains a detailed enumeration of a considerable number of specific articles. Paragraph 322 is a general catch-all clause. Moreover, the use of the phrase "other articles made wholly or in part of lace or in imitation of lace" implies that Congress understood that there were articles made in imitation of lace, which did not contain any lace in their make-up. There is noth-

ing to show that the phrase "articles made in imitation of lace" has any trade meaning or is other than a mere descriptive phrase.

From the record and an inspection of the exhibits submitted, we have reached the conclusion that the importations in controversy are not "lace" nor "imitation lace," as those words are used in trade, nor are they made "wholly of lace," nor made "in part of lace," but that they are "articles made in imitation of lace," and as such covered by paragraph 339.

The decision is reversed.

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UNITED STATES v. SEYD.

(Circuit Court of Appeals, Second Circuit. November 8, 1907.)

No. 57 (4,211).

**CUSTOMS DUTIES—CLASSIFICATION—HANDMADE SURFACE-COATED PAPER.**

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule M, par. 401, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1672], for handmade paper, is not restricted to paper ejusdem generis with the writing, letter, and other papers enumerated in that paragraph; and handmade surface-coated paper is more specifically provided for thereunder than under the provision in paragraph 398, 30 Stat. 188 [U. S. Comp. St. 1901, p. 1671], for surface-coated paper "not specially provided for."

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decision below, see 152 Fed. 657, reversing a decision of the Board of United States General Appraisers, which had affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by William Seyd.

J. Osgood Nichols, Asst. U. S. Atty. (Henry L. Stimson, U. S. Atty., on the brief).

Comstock & Washburn (J. Stuart Tompkins, of counsel), for importer.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

**PER CURIAM.** The paper imported is concededly handmade paper. It is also surface-coated paper, and the single question is whether it shall be classified for duty under paragraph 398 or paragraph 401 of the Tariff Act of July 24, 1897 (30 Stat. 188, 189, c. 11, § 1, Schedule M [U. S. Comp. St. 1901, pp. 1671, 1672]). Paragraph 398 covers "surface-coated papers not specially provided for in this act." Paragraph 401 covers "handmade paper," both plain and "ruled, bordered, embossed, printed or decorated in any manner," but without the qualification "not specially provided for in this act." Under familiar principles of construction (*U. S. v. Reiss & Brady*, 136 Fed. 741, 69 C. C. A. 393) it should be classified under paragraph 401, being a surface-coated paper which is specially provided for as "handmade." The court below followed a former ruling of the Circuit Court (*Miller v. U. S.* [C. C.] 128 Fed. 469) that the handmade papers referred to in paragraph 401 must be ejusdem generis with the

writing, letter, bond, note, drawing, and similar papers enumerated therein. This court, however, in *Benneche v. U. S. (C. C. A.)* 153 Fed. 861, disapproved of that construction, holding that the phrase "handmade" in paragraph 401 was not to be thus restricted. That decision controls this case.

Decision reversed.

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CHAPIN v. FRIEDBERGER-AARON MFG. CO.

(Circuit Court of Appeals, Third Circuit. December 23, 1907.)

No. 16.

APPEAL—DISMISSAL—PATENTS—APPEAL FROM DECREE AWARDED INJUNCTION  
—EXPIRATION OF PATENT PENDING APPEAL—MOOT QUESTION.

On the expiration of a patent while an appeal from a decree awarding a perpetual injunction against its infringement, but not ordering an accounting, is under advisement by the appellate court, the case becomes one not involving any subsistent right, and the appeal will be dismissed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3122; vol. 38, Patents, § 603.]

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

On motion to dismiss appeal.

For opinion below, see 151 Fed. 264.

Joseph C. Fraley, for appellant.

Frank S. Busser, for appellee.

Before DALLAS and BUFFINGTON, Circuit Judges, and CROSS, District Judge.

DALLAS, Circuit Judge. This was a suit on a design patent. The court below awarded a perpetual injunction, but, the complainant having waived any right it might have had to an account, no accounting was ordered. The decree was made on April 13, 1907. This appeal was taken during the month following, was argued on October 8, 1907, and was still under advisement when, on October 26, 1907, the patent expired. Thus the injunction became inoperative, and nothing was left for a judgment of this court to act upon. The one substantial question in the case has been eradicated, and we ought not to consider a mere abstraction, not resting upon any existing fact or subsistent right. The case has declined to the level of those which, in *Hatch v. Reardon*, 204 U. S. 160, 27 Sup. Ct. 188, 51 L. Ed. 415, were characterized as "imaginary," and with such cases courts will not concern themselves. *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. 132, 40 L. Ed. 293; *Gamewell Fire-Alarm Telegraph Co. v. Municipal Signal Co.*, 61 Fed. 208, 9 C. C. A. 450; *Lockwood v. Wickes*, 75 Fed. 118, 21 C. C. A. 257; *American Middlings Purifier Co. v. Vail*, 15 Blatchf. 315, Fed. Cas. No. 308. Neither party was at fault in not calling our attention at the argument to the fact that the patent was about to expire. It had not been observed by either party, and we think that the court, of its own motion, if it had subsequently become aware of

the actual expiration of the patent, might properly have refused to further entertain the appeal.

The clerk's costs, we are advised, have already been secured, and, as we have come to the conclusion that neither party should be awarded costs in this court (*Garnwell Co. v. Municipal Co.*, supra), our order will be that the appeal be dismissed, without costs.

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GIZZI v. PITTSBURG & L. E. R. CO.

(Circuit Court of Appeals, Third Circuit. December 20, 1907. Rehearing Denied January 6, 1908.)

No. 61.

WRIT OF ERROR—MATTERS REVIEWABLE—RULING ON MOTION FOR NEW TRIAL.

In the federal courts the ruling of a trial court on a motion for new trial is not reviewable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3860-3865.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

On motion for rehearing.

Wm. M. Stewart, Jr., for plaintiff in error.

Before DALLAS and GRAY, Circuit Judges, and CROSS, District Judge.

DALLAS, Circuit Judge. When this case was reached upon the call of the docket for the present term, the court, of its own motion, dismissed the writ of error, upon the ground that the specifications went only to the refusal of the court below to grant a new trial. Almost immediately after this had been done, the learned counsel for the plaintiff in error presented a petition for a reargument, which, in substance, asks us to reconsider the question whether a refusal to grant a new trial is reviewable in this court. We have several times held that it is not, and we adhere to that ruling. *Myers v. Kessler*, 142 Fed. 730, 74 C. C. A. 62.

A reargument is denied.

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UNITED STATES v. ROBINSON et al.

(Circuit Court of Appeals, Fourth Circuit. January 2, 1908.)

No. 744.

BAIL—WILLFUL DEFAULT—RECOGNIZANCE.

Rev. St. § 1020 [U. S. Comp. St. 1901, p. 719], provides that when any recognizance in a criminal case taken for, in, or returnable to any federal court, is forfeited by a breach of its conditions, the court in its discretion may remit the whole or any part of the penalty, whenever it appears that there has been no willful default of the party, etc. *Held* that, where, on breach of an appearance bond, the court found that the party had made willful default, and final judgment was rendered at the succeeding term,

the court had no power to remit any portion of the judgment against one of the sureties on his apprehending the principal and delivering him into custody at the term at which final judgment was entered, no answer having been filed to the scire facias issued and served at the previous term.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 5, Bail, §§ 328-334.]

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville.

A. L. Coble, Asst. U. S. Atty., and A. E. Holton, U. S. Atty.

Before PRITCHARD, Circuit Judge, and BRAWLEY and PURNELL, District Judges.

PRITCHARD, Circuit Judge. This is a writ of error by which it is sought to review a judgment of the District Court vacating a judgment upon a scire facias made final at the May term, 1903, of the United States District Court for the Western District of North Carolina. The facts in this case are as follows:

Alonzo Robinson was held by a United States commissioner for his appearance at the November term, 1902, of the United States District Court at Asheville, to answer a charge of criminal violation of the internal revenue laws of the United States, and gave bond in the sum of \$300 for his appearance, with James A. Breedlove and J. W. Robinson as sureties thereon; that at the November term, 1902, of the District Court at Asheville, the said Alonzo Robinson made willful default, was called and failed, and judgment nisi entered at said term, at which term the scire facias was duly issued and served upon the defendants; that shortly after November term, James A. Breedlove, one of the sureties on the bail bond, apprehended his principal, Alonzo Robinson, and duly delivered him to the custody of the United States marshal, and at the May term, 1903, of the District Court at Asheville, the case was disposed of in the due course of the business of the court; that the said James A. Breedlove was advised at the time and so understood that the apprehension and surrender of his principal was an exoneration of his liability upon said bail bond, and he thereupon filed no answer to the scire facias, which had been issued at the November term, 1903, and served. Upon his failure to answer at the May term, 1903, a judgment final was rendered upon the nisi judgment entered as above stated at the November term, 1902.

The first assignment of error raises the question as to whether the court below had the power to remit a recognizance where there was a willful default.

Section 1020 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 719] provides:

"When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no wilful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

Among other things, the foregoing section provides that the court may, in its discretion, remit the whole or a part of the penalty, when-

ever it appears that there has "been no willful default of the party," etc. While in a case like the one at bar a surety may suffer a hardship owing to the provisions of this statute, nevertheless, its terms are plain and unmistakable. It clearly defines the circumstances under which the court may exercise its discretion and remit the whole or a part of the penalty, to wit, when there has been no willful default; and inasmuch as the court in this case found as a fact that the default was willful, it necessarily follows that it was not within the discretion of the court to vacate or modify the judgment in question.

We do not deem it necessary to consider the second assignment of error inasmuch as the determination of the first assignment necessarily disposes of the questions sought to be reviewed herein.

For the reasons hereinbefore stated, the judgment of the court below is reversed, and the case remanded to that court with instructions to proceed in accordance with the views herein expressed.

Reversed.

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LE BROcq v. CHILDS et al.

(Circuit Court, E. D. New York. January 11, 1908.)

PATENTS—ACTION FOR INFRINGEMENT—PLEADING—COMPLAINT—SUFFICIENCY.

A complaint in an action to recover damages for the fraudulent procuring of a patent by defendants in the name of one of them for an invention alleged to have been made by plaintiff *held* to state a cause of action on demurrer.

At Law. On demurrer to complaint.

H. B. Philbrook, for plaintiff.

Niles & Johnson, for defendants.

CHATFIELD, District Judge. The plaintiff, having made an arrangement with the defendants to secure a patent upon his invention for a certain appliance upon terms included in the contract, has brought suit, charging the defendants with having fraudulently and knowingly obtained a patent for the same invention in the name of one of the defendants, to the damage of the plaintiff. The complaint shows that upon the first application and upon an amended application to the Patent Office the defendants were unable to secure a patent upon the plaintiff's invention, although the entire claims were not rejected upon the amended application. The defendants subsequently obtained a patent for what the plaintiff alleges is the same invention, with certain changes in the specifications and in the claims as stated, which the plaintiff alleges were immaterial.

The defendants demur, and claim that the plaintiff in his complaint sets forth an allegation that he pointed out to the defendants certain changes in his invention, and that, therefore, upon the face of the complaint, it is apparent that the plaintiff did not comply with his contract. It seems to the court that the demurrers of the defendants admit the allegations of the plaintiff that the changes were immaterial, and that it is a necessary inference from the entire language of the complaint

that the inventions, so far as the patentability of the idea or the scope of the invention are concerned, are alleged to have been alike. The plaintiff could have framed his complaint for a specific performance, or for damages for breach of contract; but he has chosen to allege fraud, and may even therein be limited to the terms of the contract as the measure of damage. But a cause of action seems to have been sufficiently set forth, and the demurrers will be overruled, with leave to answer within 20 days, upon the entry of an order herein.

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LORAIN STEEL CO. v. WHITE MFG. CO.

(Circuit Court, S. D. New York. December 30, 1907.)

PATENTS—INVENTION—RAILWAY SWITCH STRUCTURE.

The Moxham patent, No. 536,734, for a railway switch structure, claim 1, is void for lack of invention, in view of the prior art. Claim 6, conceding it patentable novelty, in view of its narrow range, must be limited to the precise structure described. As so limited, *held* not infringed.

In Equity. On final hearing.

Claims 1 and 6 are as follows:

"1. A railway switch structure, which consists of a metallic structure provided with a pocket in which a plate, which is grooved so as to form the flangeway and point, is removably secured; the rails of the remainder of said switch being secured to said metallic structure."

"6. A railway switch piece, consisting of a body portion having a pocket adapted to receive a plate, a plate in said pocket having track surfaces and depending holding down members, projecting downward from the plate into the space beneath, said space below the plate being filled with a material adapted to support the plate and bond the holding down members substantially as described."

Thomas W. Bakewell and Charles MacVeagh (George H. Parmelee and Clarence P. Byrnes, of counsel), for complainant.

Henry D. Donnelly, for defendant.

HAZEL, District Judge. In this action to restrain the infringement of claims 1 and 6 of patent No. 536,734, dated April 2, 1895, granted to A. J. Moxham, for improvement in railway switch structures, I have examined the record and discovered no reason to disagree with the Circuit Court of Appeals for the Sixth Circuit in *Johnson Company v. Toledo Traction Company*, 119 Fed. 885, 56 C. C. A. 415. The said court, having before it for consideration the scope of claims 1, 2, 3, 4, and 5 of the patent in suit, held that there was no such indicated change in the manner of using or applying the railway switch structure as to warrant holding that by its use there was produced a new result. In view of the thoroughly comprehensive reasons assigned by the court in the *Johnson Company Case*, it is neither necessary nor useful to reiterate the scope of claim 1. This case is not thought to be stronger, and, even if the asserted new evidence indicating the inadequacy of the prior structures had been presented in the former case, in my judgment, a different decision would not have resulted.



My impression, from an examination of the prior art, is that the specific claim 6, read in connection with the specification, cannot be given breadth to include defendant's device without ignoring such antecedent art and elements as were commonly known. Assuming that claim 6 is patentably novel, in view of its narrow range, it must be limited to the precise structure described. As thus limited the defendant would not infringe. The casting of the defendant has not the short projections of claim 1 to correspond in shape to the abutting rails, nor has it the holding down members of the sixth claim, nor the specific bonding material of the complainant's patent.

The bill is dismissed, with costs.

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KELSEY HEATING CO. v. JAMES SPEAR STOVE & HEATING CO.

(Circuit Court, E. D. Pennsylvania. December 19, 1907.)

No. 32.

PATENTS—INFRINGEMENT—INJUNCTION—CONTEMPT.

Where an essential element of complainant's patent on a hot-air furnace consisted in placing the rods tying the bottom plate and crown sheet through the vertical air flues which surrounded and formed the sides of the combustion chamber, an injunction restraining infringement was not violated by a furnace in which the tie rods were placed entirely outside of and removed from the flues.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 373.]

In Equity. On rule to show cause why defendants should not be adjudged guilty of contempt in disregarding an injunction restraining infringement of a patent.

For opinion sustaining the patent and finding infringement, see 155 Fed. 976 reversed on appeal 158 Fed. 622.

Howard P. Denison, for complainants.

Charles Howson, for defendants.

ARCHBALD, District Judge.\* The proceedings for contempt, based upon the alleged disregard of the injunction heretofore issued in this case, must be dismissed. It is made an essential element of the complainants' hot-air furnace, by the patent in suit, that the rods which tie the bottom plate and crown sheet together shall extend through the vertical air flues, which surround and form the sides of the combustion chamber; the advantages claimed for this arrangement, according to the specifications, being that the rods are thereby protected from soot and rust, and that the obstruction to cleaning the combustion chamber, which they would otherwise offer, is thereby obviated. But in the furnace which is now being put out by the defendants, of which complaint is here made, the tie rods used are located, not within, but entirely outside of and removed from, the flues, thus avoiding the construction specified in the patent. No doubt in structural function they are the same. But that is not sufficient. The invention

\*Specially assigned.

at the best is a narrow one, and, in view of the prior art, the particular location given to the tie rods is material, if its novelty is to be sustained. To refer to nothing else, furnaces, in exact conformity with the structure in suit, saving only that the tie rods were outside of, where they are now inside, the flues, were manufactured under the earlier patent to the same inventor, and were in public use for over two years prior to the application for the patent in controversy. And if it be now held that a tie rod located on the outside of the flues, and so not extending through them, is the equivalent of one located within them, as called for by the claim, the decision which has been made sustaining the patent is seriously called in question. But, without dwelling upon that, the terms of the claim are clear and expressly call for tie rods extending through the flues to which the complainants are thus confined, and, the construction which has been now adopted by the defendants being different in this respect, there is no violation of the injunction.

The proceedings for contempt are dismissed, at the cost of the complainants.



# AUTOMATIC WEIGHING MACH. CO. v. PNEUMATIC SCALE CORPORATION, Limited.

(Circuit Court, D. Maine. January 1, 1908.)

No. 582, Equity.

## 1. PATENTS—SUIT FOR INFRINGEMENT—DECISION IN INTERFERENCE PROCEEDING.

On an appeal to the Court of Appeals of the District of Columbia from the decision of the Commissioner of Patents, in an interference proceeding between two applicants each claiming the same invention, the question at issue is merely one of priority as between two inventors; but in a subsequent suit for infringement of the successful patent in which its validity is attacked, the issue is broader, and involves the question whether the patentee was an original inventor as against the public at large, wherefore the decision in the interference proceeding is not of controlling force in such suit.

## 2. SAME—ANTICIPATION—PRIOR DISCLOSURE OF INVENTION BY ANOTHER.

Although one who was the first to conceive an invention may lose his right to a patent therefor as against a subsequent independent inventor of the same device by failing to use reasonable diligence in following up his conception, yet where he made known his invention to another and exhibited drawings, such disclosure, if of sufficient fullness to enable one skilled in the art to construct the device, completed the invention within the meaning of the patent law with the full effect as an anticipation.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 66.]

## 3. SAME—AUTOMATIC WEIGHING MACHINE.

The Thomas patent No. 768,004 for an automatic weighing machine is void for anticipation.

In Equity. On final hearing.

Phillips, Van Everen & Fish, and Elmer P. Howe, for complainant.  
Fish, Richardson, Herrick & Neave, for respondent.

PUTNAM, Circuit Judge. This is a bill in equity alleging infringement of the first seven claims of a patent relating to an automatic weighing machine, No. 766,004, issued on July 26, 1904, to Edward G. Thomas on an application filed on December 17, 1896. The respondent claims under a patent which, so far as this case is concerned, is agreed to be identical, No. 633,675, issued to the assignee of George W. Watson on September 26, 1899, on an application filed on March 11, 1898. It will be noticed that the application for the patent to Watson was filed after the application for the patent to Thomas, but that the patent to Watson was granted first. This is said to have been through an oversight on the part of the Patent Office; but we do not perceive that we are concerned in determining precisely how this happened, or that the record enables us so to do, or that it would be of any substantial importance in this case, or to any party except the United States, to determine whether or not the patent to Watson was thus issued. After the patent to Watson issued, the case went to the Court of Appeals of the District of Columbia, under section 4911 of the Revised Statutes as amended by the act to establish the Court of Appeals for the District of Columbia, approved on February 9, 1893, c. 74, 27 Stat. 436 [U. S. Comp. St. 1901, p. 3391]. That court decided in favor of Thomas. 23 App. D. C. 65. We have no particular occasion to refer to that decision, except to the facts stated at page 67, which indicate that the questions involved are not practically free from doubt. In the Patent Office, the Examiner of Interferences adjudged priority to Thomas. He was reversed by the Board of Examiners, who were again reversed by the Commissioner of Patents, whose decision in favor of Thomas was affirmed by the Court of Appeals.

No one claims that the decision of the Court of Appeals is conclusive on the issue here; but it is maintained by the complainant that it is very persuasive. We should so regard it, and probably should follow it, if the issues were the same as those before us, although the proofs were not obtained on examination and cross-examination as in the case here. In *Prindle v. Brown*, 155 Fed. 531, the Court of Appeals for this circuit pointed out the peculiarities of the proceedings on interferences, even on appeal; so that, so far as the decision of the Court of Appeals is concerned, we rest on what we have said, with what is also said by the opinion in *Prindle v. Brown*, with the single addition which will be found to be of importance, that the Court of Appeals of the District of Columbia decided only as between two different persons claiming patents for the same invention, while here we are compelled to decide as between a party holding a patent and the general public. In the former case, each party to the issue was supposed to have been an inventor, and the question was one only of priority; while with us the question is whether Thomas was an original inventor under the statutes as against the public at large.

The invention in this case lies almost entirely in the conception because it is apparent that, when the conception had been fully explained, any person of ordinary skill in the art could put it into practical form.

The invention lies in the following propositions: It relates to a class of automatic weighing machines in which a succession of packages are fed automatically from a hopper containing the material, and simultaneously weighed and carried away. Prior to the invention in question, there was but a single hopper, and the packages were brought in succession to the platform of a scale beneath that hopper; and as each package came into position on the scale, the gate closing the mouth of the hopper was opened, and when a sufficient weight had been delivered to the package to tip the scale, the gate was closed automatically, and the package was carried away and another one put in its place. The patents are substantially identical, and each of them explains the improvement on the single hopper device in about the same way. Each points out the advantage of a double hopper machine, which is the subject-matter of the patent, and which we need not enlarge on. What was to be accomplished was speed and accuracy, of course avoiding waste. With a single hopper, if the material was fed rapidly, it led to waste before the gate could be closed; and, if in order to avoid waste, it was fed slowly, the operation would not be sufficiently speedy. Hence the idea, which forms the substance of the invention, of adding a second hopper, so that the package was partly filled quickly from the first hopper, without any special care as to accuracy, and then more accurately from the second hopper with a finer stream until the exact weight was reached, each hopper working simultaneously, but with a different package. Of course, the first hopper filled the larger part of the package, so that the second hopper, having less material to deal with, could receive more accurate handling, but in the same length of time required for the operation of the first hopper.

Watson completed his conception in January, 1896. As to this conception, the complainant admits as follows, coupling it with its own notion of the sole issue in the case:

"It will not be denied in the present controversy that Watson had conceived the invention, as found by the Commissioner and the Court of Appeals, by January, 1896, which is prior to the date of conception by Thomas. The sole issue, therefore, on this defense of prior invention, would seem to be whether Watson had sustained the burden of proof upon him to show the 'reasonable diligence' required by the statute."

This is followed by a statement from the complainant that it was not contended in the proceedings in the Court of Appeals of the District of Columbia, and would not be contended here, "that Watson was not in possession of a complete conception of the invention as early as January 10, 1896." It is also shown by both Watson and one Doble, for whom he was working, that in January, 1896, Watson explained the conception to Doble, and showed him drawings of the details of the mechanism covering each step in the series required to make an operative machine; and, referring to this, Doble testified as follows:

"Q. When Mr. Watson explained this drawing to you, did you understand the mechanism shown in it? A. I did fully."

This drawing was preserved and produced before us, and no question is made as to the date of its origin nor as to its sufficiency in

representing, so that any person skilled in the art might fully understand, not only the underlying conception, but the ordinary method of putting it into operation. We are not therefore met with any of the difficulties in regard to the amount of proof required discussed in *Brooks v. Sacks*, 81 Fed. 403, 26 C. C. A. 456, cited and explained by the Circuit Court of Appeals for this circuit in *Westinghouse Co. v. Stanley Co.*, 133 Fed. 167, 174, 177, 179, 68 C. C. A. 523. The facts are put beyond controversy; the only question is as to their effect.

As stated in the opinion of the Court of Appeals of the District of Columbia, Watson made no further effort with reference to the invention in question until January, 1897, when he made some working drawings, and nothing further thereafter until he filed his application for a patent. The view expressed by Mr. Justice Story in *Reed v. Cutter*, 1 Story, 590, 600, Fed. Cas. No. 11,645, based on certain expressions of the statute, that one who has the earliest conception, provided he uses reasonable diligence in adapting and perfecting the same, may secure his patent, although the second inventor has in fact first perfected the same conception, seems to have been generally accepted, although we are not aware of any express provision of the present statute or any decision of the Supreme Court fully authenticating it. The rule, however, is given in *Walker on Patents* (4th Ed.) 126. He lays it down only as an equitable rule, and refers neither to any language of the statute nor any authoritative decision of the Supreme Court. However that may be, we are inclined to the opinion that Watson did not bring himself within any rule of that character. Therefore, *Watson v. Thomas*, 23 App. D. C. 65, already referred to, was no doubt correctly decided on the theory which we have stated, that the case is strictly one between two, each of whom originally, so far as the other was concerned, conceived the invention. Here, however, as we have said, we have a very different question. Can Thomas' patent be sustained as against the public in view of the fact that, as the record stands, his conception does not go back of his application for his patent, while Watson, a long time previously, not only had a complete conception, but developed it to Doble in the way we have explained?

Of course, the law is thoroughly settled that a mere conception, not in some way demonstrated or communicated, does not amount to an invention under the statutes of the United States. This is so thoroughly understood that we need hardly cite authorities for it. Mr. Walker seems to make some distinction between drawings and an oral description, based rather on circumstances than on any essential difference. At page 64 he says that, "in cases where the invention may be exhibited in a drawing or model, it will date from the completion of such a model or such a drawing as is sufficiently plain to enable those skilled in the art to understand the invention." In *Loom Company v. Higgins*, 105 U. S. 580, 594, 26 L. Ed. 1177, the court states the broad rule as follows on the precise question of priority:

"An invention relating to machinery may be exhibited either in a drawing or in a model, so as to lay the foundation of a claim to priority, if it be sufficiently plain to enable those skilled in the art to understand it."

This is a positive and broad statement, but in that case it was applied in favor of the patentee, so that we cannot assert positively that it goes beyond the rule favorable to patentees, as stated in *Reed v. Cutter* and by Mr. Walker, as we have already said. In *Eames v. Andrews*, 122 U. S. 40, 66, 7 Sup. Ct. 1073, 30 L. Ed. 1064, the court reiterates and affirms its own expressions with reference to foreign publications which are sufficient under the statute to anticipate. However strict that rule may be, and it is none too strict, what Watson explained and showed to Doble fully meets all its requirements. If, therefore, what he thus showed and explained had been published in some foreign scientific journal, it would have answered as a complete anticipation. Why should it not so answer when disclosed in the United States in the way which it was disclosed?

Three times the Circuit Court of Appeals for this circuit approached the precise question we have here, without being required to exactly meet it under the same or analogous circumstances. In *Decoco Co. v. Gilchrist Co.*, 125 Fed. 293, 296, 60 C. C. A. 207, it discussed in a general way, with some illustrations, conceptions which were never fully practically developed or applied; but what is said there does not come close enough to the case at bar to be of use. In *Westinghouse Co. v. Stanley Co.*, 133 Fed. 167, 170, 180, 68 C. C. A. 523, the invention was strikingly like that in question here in one respect. It lay in the fundamental conception, which being explained, the mechanical application of it was within the reach of any person of reasonable skill in the art. There it was ruled for that particular conception that, when the originator thereof had stated it, though only in general terms, he had made his conception clear, even though the mechanical details had not been expressed or thought out. It was there further pointed out that all which was learned from the inventor at what was fixed to be the crucial date was only "the general features of the invention"; yet it was held that, as against alleged priorities, the patent which was obtained for the invention thus communicated went back to the time of the communication. In that case, however, the ruling was applied in favor of the patentee, so that it may perhaps be said that it was supported by what Mr. Walker says on that topic as we have already observed; although neither in *Westinghouse Co. v. Stanley Co.* nor in the expressions of the Supreme Court which we have quoted, was there any limitation of that character stated or even hinted at. Next was the opinion of this court in *Eastern Paper Bag Co. v. Continental Paper Bag Co.* (C. C.) 142 Fed. 479. This opinion was accepted on appeal by the Circuit Court of Appeals, according to the report found in 150 Fed. 741, 80 C. C. A. 407. Therefore, we are justified in referring to it here as having sufficient authority for us. There invention appeared not only in the conception, but it also was, or might have been, involved in the practical application thereof. This is suggested at page 493 of 142 Fed.; so that a mere statement of only the conception would not have been sufficient. For this reason, and also by reason of the favorable rule

in behalf of patentees, we held the invention to date from the time it was practically worked out, as shown at pages 511, 512, and 516 of 142 Fed.

It follows that it can hardly be said that there are sufficient authorities, either in the decisions of the courts or in the text-writers, to guide us clearly under the circumstances now before us. We must consequently follow our own impressions with reference thereto. It seems to us that Watson completed this invention and expounded it in January, 1896, and that in this he went so far that the only thing needed to entitle him to a patent at that time was to employ some solicitor to put his application into the form required by the rules governing proceedings in the Patent Office. We cannot, therefore, resist the conclusion that Watson was a true inventor within the law; so that, in behalf of one who occupies the position of the public at large, and who is entitled to all the defenses to which one who is merely alleged to be an infringer is entitled, as is the condition of the respondent in this proceeding, Thomas cannot be held to have been "the original and first inventor," within section 4892 of the Revised Statutes [U. S. Comp. St. 1901, p. 3384].

While what we have said states clearly to ourselves the case as we apprehend it, we think some further references to particular cases may be necessary in order that no inferences may be drawn from this opinion beyond what we intend. The opinion of Mr. Justice Story in *Reed v. Cutter*, 1 Story, 590, Fed. Cas. No. 11,645, which is the basis of nearly all the discussions with reference to two independent inventors who are simultaneously working out the same conception, and the basis of all discussions of what is now the second paragraph of section 4920 of the Revised Statutes [U. S. Comp. St. 1901, p. 3394], leaves aside the precise proposition we have before us; and, therefore, it is that we have said that there is nothing in the statute relative to patents for inventions which throws any light on this case as we have developed the facts, except indirectly or by implication. In *Reed v. Cutter* this particular topic is discussed, beginning with page 596 of 1 Story (Fed. Cas. No. 11,645). At page 599 of 1 Story (Fed. Cas. No. 11,645), Mr. Justice Story lays down the proposition which is thoroughly established in law, that an invention resting on a mere theory, or a mere intellectual notion, or uncertain experiments, is not an invention under the patent laws. As was shown by the Circuit Court of Appeals for this circuit in *Prindle v. Brown*, 155 Fed. 531, 534, what is thus improperly called an invention is not at all an invention as known to the law. Mr. Justice Story, in the same connection, states impliedly what is in effect the reverse of this proposition when he refers to something "actually reduced to practice and embodied in some distinct machinery, apparatus, manufacture, or composition of matter." He does not touch directly on a condition substantially the same as that existing here. The reason of this is that section 4920 of the Revised Statutes relates to two persons competing for a patent for the same conception; though none of the decisions, so far as we understand, have undertaken to define authoritatively what is meant by the words "surreptitiously or unjustly" found therein. Of course, the word "surreptitiously" has no relation to a case where each party to an interference has really and truly pro-

ceeded independently and honestly; although the word "unjustly" may be strained to cover even a case like that. So *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657, relied on by the complainant, was a special proceeding under the statute to determine a question of priority between interfering inventors, and the opinion said, at page 124 of 153 U. S., at page 773 of 14 Sup. Ct. (38 L. Ed. 657), that the case was "something more than a mere appeal," and was "an application to the court to set aside the action of one of the executive departments of the government." Therefore, for the reasons we have already stated, neither *Morgan v. Daniels*, nor the expressions of the opinion therein relied on by the complainant, assist us here. *Christie v. Seybold*, 55 Fed. 69, 5 C. C. A. 33, decided by the Circuit Court of Appeals for the Sixth Circuit, also much relied on by the complainant, is of the same class with *Morgan v. Daniels*, and passes by us in the same way. *Prindle v. Brown*, 155 Fed. 531, decided by the Circuit Court of Appeals for this circuit, and also relied on by the complainant, is careful to lay aside in general language a case like that before us, as though it anticipated that such a case might arise. The language of the opinion at page 534 of 155 Fed. is as follows:

"It is not necessary in order to complete an invention that there be a machine constructed, or even a model. The invention may be disclosed by the application sufficiently to entitle the patentee to priority as of the date of the application, or it may have been disclosed by a machine or model, or in some other concrete manner, a long time before the application was filed, so that the patent whenever applied for would go back to that disclosure."

The words "or in some other concrete manner" are broad enough to include a case like this at bar; and in *Prindle v. Brown* it was not necessary to determine the precise question now before us. We may add right here that the authorities, in their present condition, do not sustain the extreme view found in *Robinson on Patents*, vol. 1, § 126, which might in effect render invalid a patent for a machine, otherwise lawfully issued, because not based on one actually constructed and practically operated. A careful examination of *Agawam Company v. Jordan*, 7 Wall. 583, 606, 19 L. Ed. 177, and *Whiteley v. Swayne*, 7 Wall. 685, 687, 19 L. Ed. 199, shows that these decisions do not sustain the proposition for which they are cited in this connection.

Therefore, as we have already said, we find nothing in all the decisions brought to our attention which permits us to hold that what was disclosed by *Watson to Doble* in January, 1896, was not a complete invention under the patent law, with the same effect in the way of anticipation as though it had received publication on that date in a foreign scientific journal, or which requires us to leave a possibility, and even a probability, that any one assuming to have been a later inventor might not, in these days of great mechanical activity and of unlimited facility of communication, have become informed of what *Watson* had done, in some manner which neither the court nor the parties to the litigation have discovered, and thus have availed himself of what was already known at least to some person in the art, instead of having conceived anything new by his own mental operations. In order not only to guard the community from the evils of surreptitious information thus obtained, but also from the possibility of collusion, as well as



to give true effect to the statute which required Thomas to make oath in his application for his patent that he was both "the original" and "first" inventor, this supplemental explanation of the authorities, and of our conclusions, seems to be desirable.

Let there be a decree dismissing the bill, with costs for the respondent, under rule 21.

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FOX et al. v. KNICKERBOCKER ENGRAVING CO.

(Circuit Court, S. D. New York. January 10, 1908.)

No. 8,773.

1. PATENTS—DAMAGES FOR INFRINGEMENT—ESTABLISHED LICENSE FEES.

Where the owners of a patent granted an exclusive license thereunder, authorizing the licensee to grant licenses to others on such terms as it saw fit, reserving as a royalty a certain per cent. of the profits realized by the licensee, in a joint suit by the owners and licensee for infringement which interfered with sales by the licensee and the granting of licenses, the license fee established, charged, and received by the licensee may properly be taken as a basis for the computation of damages and profits recoverable from the infringer.

[Ed. Note.—Accounting by infringer for profits, see note to *Brickill v. City of New York*, 50 C. C. A. 8.]

2. SAME.

Where two different uniform license fees under a patent prevailed at different periods of time, the fee having been reduced on a certain date, an infringer whose infringement commenced during the first period and extended into the second may properly be charged with damages at the higher rate until he ceased to infringe; but where he subsequently again commenced infringement, his liability should be measured by the rate then prevailing.

3. SAME.

Evidence held sufficient to show uniform established license fees under a patent during the time of its infringement by defendant.

4. SAME—INCREASE OF DAMAGES BY COURT.

Where a defendant knowingly infringed a patent and continued such infringement after suit brought, taking business away from licensees by cutting prices, the case is a proper one for the court in the exercise of its discretion, under Rev. St. § 4921 [U. S. Comp. St. 1901, p. 3395], to award the complainant treble damages.

In Equity. On the master's report and exceptions thereto, the complainants move to confirm the report, overrule the exceptions, and treble the amount awarded under section 4921 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3395], while defendant moves for the allowance of its exceptions, and prays no decree for a money judgment be made or any master's fee or costs be allowed.

See 140 Fed. 714.

Phillip C. Peck, for complainants.

Albert H. Walker, for defendant.

RAY, District Judge. December 15, 1905, an interlocutory decree herein was entered in favor of complainants against the defendant, adjudging that defendant had infringed U. S. letters patent to Thomas S. Fox, May 28, 1901, No. 675,272, for improvements in half tone

negatives, by making and using half tone negatives, and also by using in the manufacture of same the methods and processes described in certain claims of such patent, and that complainants recover of defendant the gains, profits, savings, and advantages which it had derived, received, or made by reason of such infringements. It was referred to a special master; John A. Shields, Esq., to ascertain and state among other things the gains, profits, savings, and advantages made and derived by defendant through such infringements. On the coming in of the report defendant filed his exceptions thereto, nine in number, and which allege errors as follows: (1) In the finding, in substance, that complainants had established a uniform license fee which they had maintained in the city of New York, etc., and that same was at the rate of \$15 per week. (2) In the finding, in substance, that the Waterproof Film & Equipment Company receives a license fee of \$3 per week from the North American Engraving Company, but that said company obligates itself to pay, under the license, a balance of \$850, which goes to Mr. Fox, the patentee. (3) In the holding of the master as to license fees as a measure of damages in that it is inconsistent with the rule stated in *Rude v. Westcott*, 130 U. S. 165, 9 Sup. Ct. 468, 32 L. Ed. 888, that, "In order that a royalty may be accepted as a measure of damages against an infringer who is a stranger to the license establishing it, it must be paid by such a number of persons as to indicate a general acquiescence in its reasonableness by those who have occasion to use the invention, and it must be uniform at the place where the licenses are issued." (4) In the finding, in substance and effect, that the patented process was used by defendant in making all the half tone plates for certain parties within a certain time. (5) In the finding, in substance, that defendants infringing work or acts were from November 27, 1903, to August 22, 1904, and from December 1, 1904, to February 6, 1905. (6) In the finding that "the defendant destroyed all file proofs of their use of the infringing process prior to the commencement of this accounting." (7) In the holding that complainants, having made out a prima facie case of damages, are entitled to the presumption that, "where the defendant has an opportunity to vary complainants' prima facie proofs and does not, the defendant cannot do so," for the reason complainants made no prima facie case. (8) In the holding that "actual damages may be calculated where complainants furnish some reasonable basis or data on which to calculate the same," for the reason that the evidence does not furnish any reasonable basis or data on which to calculate damages. (9) In the holding that "complainants are entitled to recover from the defendant, as their damages, the sum of \$705, being for a period of infringement comprising forty-seven weeks, at a prevailing rate of royalty or license fee of \$15 per week." Defendant says there is no proof of such prevailing rate of royalty or license fee and there is no proof of infringement for that time. These exceptions require and demand a careful scrutiny of the evidence which has been given. The defendant does not quarrel with the rules of law stated but says there is no evidence permitting or justifying their application in this case.

Under the agreement between the owners of the patent, Thomas S. Fox and William H. Mackey and the North American Engraving

Company, dated August 5, 1902, and in force until March 9, 1904, which made the said engraving company exclusive licensee with power to grant licenses, said engraving company was to pay to said owners, "for the use of said patent and as royalty therefor, twelve and one-half per centum of the gross selling price of all goods turned out by the party of the second part to its private customers, and, in addition thereto, one-half of all the profits arising to it from the transfer or other disposition by it to other persons, firms, or corporations of patent rights or territorial rights under said patent." Therefore, during the time from August 5, 1902, to March 9, 1904, the loss or damage to complainants Fox and Mackey by reason of infringement depriving the licensee of sales of licenses was one-half of the license fee charged by said engraving company, as there was no provision requiring it to establish or maintain any particular license fee. The license fee it would charge was optional with it. In addition, the loss or damage to Fox and Mackey during such time was  $12\frac{1}{2}$  per centum of any deprivation by reason of such infringement of private customers to the engraving company. March 9, 1904, said North American Engraving Company assigned the said agreement to the complainant Waterproof Film & Equipment Company, and on the same day Fox and Mackey granted a sole and exclusive license to said last-named company to use, vend, and sell under the patent, and to grant licenses thereunder, no license fee which it was to demand being specified. Such agreement contained a provision that the last-named company should obtain from the North American Engraving Company a release of all claims and demands and rights arising under the agreement between Fox and Mackey and said engraving company. This was done, evidently, by taking an assignment of the said agreement, as a short cut, and the legal result was that the Waterproof Film & Equipment Company became sole licensee under Fox and Mackey, with power to grant licenses without restriction. Without quoting all the agreements as to consideration for such license it is sufficient to say that in legal effect they were that the Waterproof Film & Equipment Company would pay each and every year to Fox and Mackey \$780, in any event, in regular weekly payments, and such further sum as would make the total sum paid each year, equal to  $16\frac{2}{3}$  per centum of the gross receipts of the Waterproof Company, or 25 per centum of the net profits. The \$780 was to go to Mr. Fox. The provision referred to reads as follows:

"In each and every year during the continuance of this agreement the party of the second part shall pay to the said Thomas S. Fox, the sum of seven hundred and eighty dollars (\$780) in regular weekly payments of fifteen dollars (\$15) each; and on the first secular days of March, June, September and December of each and every year and on each of said days the party of the second part shall pay to the party of the first part such an amount as may be necessary to make the total payment for the three months next preceding, including the sums paid to the said Thomas S. Fox, equal to sixteen and two thirds per centum of the gross receipts or to twenty-five per centum of the net profits as provided in the third clause hereof."

Infringements by others which lessened these receipts or profits damaged the complainants. As there is proof that the defendants' infringements did injure the business of the North American Engraving Company and interfere with its sales, and profits and grant-

ing of licenses, and, also, did injure the business of the Waterproof Film & Equipment Company and interfered with its sales, and profits, and granting of licenses, I think the master was correct and justified in resorting to the license fees established, charged, and received as a basis for estimating damages.

The evidence as to license fees came from James H. Miller, now or at one time treasurer of the North American Engraving Company and who has been with it since 1899. He says that the North American Engraving Company first granted licenses in December, 1902, and that the royalty was \$15 per week to engraving houses in New York City and \$12 per week to the newspapers in New York City, and that these sums were paid, and that between December, 1902, and February 6, 1905, that company granted over a dozen licenses—10 at least—all under this Fox patent, 8 to photo-engravers and 2 to newspapers; mostly signed contracts; not for the life of the patents; for different periods, some renewed, some not; all for short periods however. Also, that after the Waterproof Film & Equipment Company took the assignment and made its agreement March 9, 1904, the license fee was reduced to \$3 per week. The witness states that in 1905 the license fee was reduced to \$3 per week for the reason "it was determined that that price was too great for success, and there were other reasons which don't pertain to this at all which led us to put it at a much lower rate later on." That is at a rate less than \$15 per week. Then on an answer being insisted on giving all the reasons, he said in answer to the question:

"Q. And afterwards, why did you come down to three? A. We thought that was the price, since we having had two years' experience to know the general way it was regarded in the trade, that \$15 was too much, and that three perhaps was a better rate, and that was made by the Waterproof Film & Equipment Company, and not the North American Engraving Company."

The Waterproof Film & Equipment Company granted about a half dozen licenses including one to the North American Engraving Company at \$3 per week for license fee. On being closely questioned, the witness said "Yes" to the following question:

"So, when you get down to the bottom of the matter, all you know about that is that the North American Company has paid to the Waterproof Film & Equipment Company during the last two years \$3 a week for license fee under Fox patent?"

Prior to that he had said in answer to questions as follows:

"Q. How much money has the North American Engraving Company paid to the Waterproof Film & Equipment Company for license fees under the Fox patent since the beginning of 1905? A. That is practically one year, isn't it? Q. A little more. A. I think it has paid over \$1,000; I am not sure. Q. What was the North American Company authorized to do with the Fox patent for this thousand dollars, more or less? A. To use the process in its half tone negatives. Q. Was it not also authorized to license other people under the Fox patent? A. The North American? Q. Yes. A. Oh, no; no right at all. Q. How much per week did the North American pay to the Waterproof Film & Equipment Company during the year 1905 for license fees under the Fox patent? A. License fees only? Q. Yes. A. Paid for license fees \$3 a week. Q. For what did it pay the other \$850, as \$3 a week would be only about \$150? A. The North American Engraving Company has a contract

with Mr. Fox himself. The balance goes to him. Q. Then am I right in understanding you that during the year 1905 the Waterproof Film & Equipment Company was the institution that had the sole right to grant licenses under the Fox patent? A. Yes. Q. And during the year 1905 the Waterproof Film & Equipment Company granted a license to the North American Engraving Company for \$3 a week under the Fox patent; is that right? A. Yes, sir."

No further explanation was given as to the consideration for the payment of this \$1,000 by the North American Engraving Company to the Waterproof Film & Equipment Company. I am inclined to think there was some arrangement by which the engraving company assumed the payment to Fox of the \$780 mentioned in the agreement between Fox and Mackey and the Waterproof Company, but we are in utter darkness on the subject.

The evidence does not to my mind establish that the Waterproof Company ever charged or received more than \$3 per week as a license fee, or that the North American Engraving Company paid more than that sum as a license fee. The witness says the license fee paid by that company was \$3 per week. Taking into account that the agreement between Fox and Mackey and the Waterproof Film & Equipment Company called for \$780 per annum in any event, and the other percentages named, we may surmise that this or some sum was assumed by the engraving company as a consideration for its license, but neither party gave any evidence tending to show that the engraving company paid \$850 or any sum to Fox as a license fee or as a consideration for the use of the patented processes. It was incumbent on complainant to give evidence legitimately tending to show this before defendant was called upon to controvert it. The witness repeatedly stated at all times that the license fee charged and received by the Waterproof Company was \$3 per week. He said this was the sum paid by the engraving company to that company as a license fee, and nothing was said as to the consideration for the payment to Fox. But the evidence is conclusive that the license fee after March 9, 1904, was only \$3 per week. As the master took the license fees as his basis for estimating and calculating the damages we are confined to that in fixing damages. On the evidence the periods of infringement were found to be, I think correctly, from November 27, 1903, to August 22, 1904, and from December 1, 1904, to February 6, 1905, or 47 weeks. The regular and established license fee from November 27, 1903, to March 9, 1904, at which time the agreement was assigned to the Waterproof Film & Equipment Company and it established a license fee of \$3 per week, a period of 14 weeks, was \$15 per week. From March 9, 1904, to August 22, 1904, a period of 23½ weeks, the regular and established license fee was \$3 per week, and from December 1, 1904, to February 6, 1905, a period of 9½ weeks, it was the same—\$3 per week. Some of these damages accrued to the North American Engraving Company, but by the assignment of March 9, 1904, they were duly assigned to William H. Mackey and Thomas S. Fox. The damages on the basis adopted by the master are, therefore, \$591, not \$705, and the master's report must be modified accordingly.

I know of no law that prevents a change in the amount charged as a license fee at a given time. To make it "uniform" it is not necessary that it be uniform for all time, or that each and every person taking a license shall pay that exact sum under all circumstances and conditions. If it is uniform for a considerable period of time, and accepted and paid by those who take licenses during that time it answers the rules of law even if, during that period for some peculiar reason or special circumstances, a lesser fee is accepted from a few persons. This is especially true where, as here, the license fee charged was uniform at \$15 per week, except to newspapers—only two of them—while the North American Engraving Company controlled the patent, and was uniform at \$3 per week after its control passed to the Waterproof Film & Equipment Company. In this case, as the infringer belonged to the engraver class, and the fee charged by the North American Company to that class was uniformly \$15 per week, and as defendant took business away from that company by its infringements and thus actually damaged the complainants, that fee governs as to all the time the engraving company controlled the granting of licenses. The defendant cannot claim the benefit of the subsequent reduction, except as to the infringements committed after the reduction was actually made. I take it that if A. converts property to B., of the same kind, on two different occasions, and is sued for the conversions, and it appears that the value of the property converted was \$50 per ton at the time of the first conversion, and only \$10 per ton at the time of the second conversion, that the basis for estimating damages would be \$50 per ton as to the first and only \$10 per ton as to the last. This is common sense and justice to say the least. I see no reason why the rule does not apply in a patent case where two different uniform license fees for the same rights have prevailed for two different periods of time, respectively, and infringements have taken place during each of said periods. See *Rude v. Westcott*, 130 U. S. 165, 9 Sup. Ct. 468, 32 L. Ed. 888. This is peculiarly true when a different party controlled the patent and the granting of licenses and the fixing of the fee during each period. We are getting at damages for infringements at different periods of time and under different circumstances, and the established and uniform license fee is used as a basis for estimating the damages. Hence the uniform license fee prevailing at the time of each infringement controls the damage, and this is the rule when applicable at all as the basis. "It is a general rule in patent cases that established license fees are the best measure of damages that can be used." *Clark v. Wooster*, 119 U. S. 322-326, 7 Sup. Ct. 217, 219, 30 L. Ed. 392.

In *Rude v. Westcott*, 130 U. S. 152, at page 165, 9 Sup. Ct. 463, at page 468, 32 L. Ed. 888, the court said:

"It is undoubtedly true that where there has been such a number of sales by a patentee of licenses to make, use, and sell his patents, as to establish a regular price for a license, that price may be taken as a measure of damages against infringers. That rule was established in *Seymour v. McCormick*, 16 How. 480, 14 L. Ed. 1024, and affirmed in *Corporation of New York v. Ransom*, 23 How. 487, 16 L. Ed. 515; *Packet Co. v. Sickles*, 19 Wall. 611, 617, 22 L. Ed. 203; *Birdsall v. Coolidge*, 93 U. S. 64, 23 L. Ed. 802; and *Root v. Railway Co.*, 105 U. S. 189, 197, 26 L. Ed. 975. Sales of licenses, made at

periods years apart, will not establish any rule on the subject and determine the value of the patent. Like sales of ordinary goods, they must be common—that is, of frequent occurrence—to establish such a market price for the article that it may be assumed to express, with reference to all similar articles, their salable value at the place designated. In order that a royalty may be accepted as a measure of damages against an infringer, who is a stranger to the license establishing it, it must be paid or secured before the infringement complained of; it must be paid by such a number of persons as to indicate a general acquiescence in its reasonableness by those who have occasion to use the invention; and it must be uniform at the places where the licenses are issued."

In this case the granting of licenses was sufficiently frequent, and the price charged therefor was sufficiently uniform. There was sufficient reason for making the rate to engravers \$15 and the rate to newspapers only \$12 per week. The rate to the class of licensees to which this infringer belonged was absolutely uniform for each period of time. The number of persons who took licenses was sufficient to indicate acquiescence in the reasonableness of the royalty fixed and charged. True, the evidence is that time and the experience of others convinced the Waterproof Company it would do better and make more money should it reduce the royalty, which it did, but this fails to disprove that such a number of persons engaged in the business and took licenses at the figure given as to indicate a general acquiescence in the reasonableness of the royalty charged.

Whether the evidence shows that the patented process was used by defendant in making "all" the half tone plates for certain parties within a certain time, I regard as immaterial. The evidence shows it was used in making substantially all. The evidence was express that the defendant destroyed all file proofs of their use of the infringing process prior to the commencement of the accounting, but this was not done for purposes of concealment, or to destroy evidence. It was customary and done in the usual course of its business. I think that the complainants made more than a prima facie case of damages. They have shown that defendant used the patented method and processes without a license at times when regular and uniform royalties were fixed and licenses were being granted, and took business away from complainants' licensees who were to pay complainants a percentage of the profits of the business. Clearly this damaged complainants. As defendant did not take a license when it ought to have done so and ought to have paid complainants, or their assignors, \$309 therefor, it seems to me we have a reasonable basis. "Actual damages must be calculated, not imagined; and an arithmetical calculation cannot be made without certain data on which to make it." *New York v. Ransom*, 23 How. 487-488, 16 L. Ed. 515, approved *Rude v. Westcott*, 130 U. S. 167, 9 Sup. Ct. 469, 32 L. Ed. 888.

The complainants ask to have the damages trebled under section 4921, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3395]. That section provides that, in such a case as this, "the court shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass upon the case." See *Tilghman v. Proctor*, 125 U. S. 148, 149, 8 Sup. Ct. 894, 901, 31 L. Ed. 664. Whether damages

shall be increased or not depends largely on the conduct of the defendant and the circumstances of the infringement. Was it willful or defendant, persisted in after knowledge and notice? Has the conduct of the defendant been unreasonable and unjustifiable in his light? The court cannot seize upon the fact that the damages which the complainants have been able to prove are small as an excuse for increasing them. As just seen damages must be proved. In this case defendant admitted its infringement. The president of the company says they ceased to infringe after the injunction was served. I do not find any preliminary injunction. If there was none, and my attention is not called to any, then defendant continued to infringe after suit brought. The master so finds. It has not suppressed, concealed, or destroyed evidence. Its books were produced in court when called for. I find no evidence that the defendant kept its books in the form they did to conceal or suppress evidence. The reason for not keeping more comprehensive books—books showing the business more in detail—is fully given. Mr. Eggers, the president of the company, says that during a portion of the time they had no clerical force—kept no cash-book when they had no bookkeeper. I do not see that this is improbable; on the contrary it is quite probable. As to the file proofs and their destruction Mr. Eggers said:

"Q. Did you keep any file proofs of these etchings? A. We kept them a month and then threw them away." And: "Q. And the file proofs of such work have been destroyed? A. We never keep file proofs of any work; that is, past a month or two until the account is paid and checked up. I believe that is the general custom in the trade, with everybody."

The defendant did not appear when proofs were taken. After the interlocutory decree and when a sworn account was called for defendant practically denied infringement, and claimed to show, and did give evidence tending to show, that the patented process had been used for years before the patent was applied for. However, that is no defense now on the question of damages. It would seem that defendant knew or had reason to believe it was infringing as the records show it was called upon to indemnify at least one party with whom it was dealing, and from whom it secured business by a reduction of price, thus knowingly taking business from a licensee of complainants. The account rendered before the master was hardly a frank and full statement. On the whole I think a proper case has been made for increasing the damages, and they will be trebled accordingly. *Topliff v. Topliff*, 145 U. S. 174, 12 Sup. Ct. 825, 36 L. Ed. 658; *National F. B. & P. Co. v. Robertson's Estate* (C. C.) 125 Fed. 524.

The defendant will also pay the master's fees and all the costs and expenses connected therewith usually allowed in such cases. The master's report will be modified as suggested, and, as modified, confirmed, as I do not find anything in the evidence to suggest that had the defendant taken a license, when it first infringed, at \$15 per week, it would have been for such a time as to cover that infringing period when the rate of \$3 per week was the established and uniform fee—commencing December 1, 1904, and ending February 6, 1905—the evidence being that licenses were invariably taken for short periods of time. It seems to me clear that for such time the defendant can



only be held at \$3 per week, as his second period of infringement commenced long after the \$3 rate had been established. As the other infringement was continuous and ran into the \$3 period, I think defendant should be held to the \$15 rate so long as his first infringement continued.

There will be a final decree accordingly.

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TUBELT CO. v. FRIEDMAN et al.

(Circuit Court, D. New York. January 8, 1908.)

No. 32.

1. PATENTS—INVENTION—SUBSTITUTION OF EQUIVALENTS IN OLD STRUCTURE.

Patentable invention is lacking in a structure all of the elements of which are found in the prior art, and where all the alleged inventor does to produce it is to take one of the prior patented devices and substitute for one of its elements a well-known equivalent taken from another device of the same kind where it was used for the same purpose, operated in the same way and produced the same results, and the only result of the substitution is that the operation of the structure is somewhat improved.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 24.]

2. SAME—LARGE USE AS EVIDENCE OF INVENTION.

A valid patent must combine utility, novelty, and invention, and neither large sales nor popularity nor effectiveness of itself shows patentable invention, nor do all together.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 39.]

3. SAME—WAIST BELT.

The Gaisman patent, No. 661,447, claim 6, for a waist belt made of a single piece of material doubled or folded longitudinally, and having the edges sewed together by means of a loop or zigzag stitch which will permit the material to be flattened out so that the edges will abut and lie in the same plane, leaving the surface smooth, is void for lack of patentable invention; the only difference between the structure shown and others in the prior art being in the character of the stitch used, which was also old and had long been used for similar purposes where an elastic seam was desired.

In Equity. Suit in equity to restrain alleged infringement of claim 6 of United States letters patent No. 661,447, dated November 6, 1900, to Henry J. Gaisman, for "Apparel Belt."

T. F. Bourne, for complainant.

Bartlett, Brownell & Mitchell (H. B. Brownell, of counsel), for defendant.

RAY, District Judge. Claim 6 of the patent in suit, the claim in suit here, reads as follows:

"6. As a new article of manufacture, a waist-belt comprising material folded upon itself so that its edges meet and stitches joining said edges together, said stitches being looped together between apertures from which they pass, whereby the edges of the material can align or abut, the opposite walls or webs of said material being secured together, and a fastener attached to the belt, substantially as described."

The patentee in the specifications states the object of his invention in the following language:

"The object of my invention is to produce a lined strap or waist-belt in such manner as to simplify and cheapen the manufacture, while at the same time providing an improved structure. In carrying out my invention, I take a strip of material of more than the width of the belt intended, fold the same so that its longitudinal edges will lap, stitch said edges together in such manner that they can be made to abut or meet, and then arrange the abutting or meeting edges of the material along one face of the belt, and I then flatten the material and secure the opposed walls or webs together, whereby one wall or web forms the exterior or wearing side of the belt, while the other wall or web forms the lining. The belt has a buckle or other fastening device for holding it around the waist. The invention also consists in the novel details of improvement, that will be more fully hereinafter set forth and then pointed out in the claims."

He describes his mode or process of making his belt as follows:

"In forming the strap I take a piece of suitable material 3—say leather—of suitable length and of a width about double the width of the strap to be produced and fold the same upon itself longitudinally, so that its edges, 3a, 3b, will overlap (see Fig. 4), and I then stitch said edges together by such stitches as will allow the resulting tubular body to be flattened, so that the edges, 3a, 3b, will abut or meet (see Fig. 5)—that is to say, after said edges are stitched together the material of the tubular body thus formed is rolled or pushed laterally to move the stitched edges to one side of the position in which the stitching was done, so as to bring said stitched edges between the outer edges of the body thus formed (see Fig. 5). The character of stitch, 4, that I have shown and found adapted to the purpose is one in which the threads pass from the respective apertures in the form of loops that are interlocked at 4a about in line with the abutting edges of the material 3, which stitch I have shown is commonly known as 'overseaming' or 'zigzag.' Such a stitch, while joining the lapped edges of the material, as shown in Fig. 4, enables said material to be flattened out in two parallel walls or webs, 3c, 3d, while the edges, 3a, 3b, can abut or meet and lie in substantially the same plane. (See Fig. 5.) After the edges of the body are stitched together and moved to one side of the outer edges of the body the opposed walls or webs, 3c, 3d, are secured together, which may be done by glue or the like; but I preferably run lines of stitches 6 along through the material near the outer edges of the body and beyond the stitches 4, which bind the webs, 3c, 3d, so that they will not slip, thus producing a firm structure. By the means described I produce a lined strap or the like, because one of the webs can be used as the exposed surface and the other can be used as a finish or lining to the raw side of the first-mentioned web. It will be seen that by having the edges of the webs abut and by stitching them together, as described, they lie flat in line with the surface of the opposite web."

As to what he is enabled to do and does do, he says:

"By means of my improvements I am enabled to construct a strap, belt, or the like of double thickness, all made from a single piece of material, with finished edges, which are formed by the folded material, and the strap or belt is pliable and flexible and not liable to injury from folding or bending. It is evident that a strap or the like made in accordance with my invention can be used for various purposes, and while I have shown it arranged for a waist-belt I am not limited to such use."

Then in regard to his stitches and their character he says:

"I do not limit my invention to the precise formation of stitches shown, nor to the use of such stitches on the inner face of the belt, as it is evident that they could appear on the outer side of the belt to provide an embellishment thereto; nor do I limit my invention to the various details shown and described, as they may be varied without departing from the spirit thereof."

Therefore he may use any stitches which "will allow the resulting tubular body to be flattened so that the edges, 3a, 3b, will abut or

meet," etc. These edges are the edges of the belt-strap before being brought together by sewing. In short, he takes a strip of flexible material of suitable length for a belt, it may be one or more inches in width, and sews the edges together by any stitches that will allow the resulting tubular body to be flattened with the edges of the belt piece brought against each other, made to abut, and not with the one edge on top of or overlapping the other, thereby forming a ridge. He expressly says:

"The character of stitch, 4, that I have shown and found adapted to the purpose is one in which the threads pass from the respective apertures, 5, in the form of loops that are interlocked at 4a about in line with the abutting edges of the material, 3, which stitch I have shown is commonly known as 'overseaming' or 'zigzag.'"

Therefore there is no novelty in the stitch shown, and, further, he expressly says that any stitch that will permit the "material to be flattened out in two parallel walls or webs while the edges can abut or meet and lie in substantially the same plane" may be used. As the stitch is old and well known, we will inquire whether or not there is anything new or novel in thus sewing the strap or piece of material into a tubular body, so that, when flattened out, the edges will abut and not overlap and then flattening it out, whether lined or unlined with some other suitable material either sewn or pasted to the main piece of material called in the patent a "web or strap." We do not need to go much further, as the patentee expressly says that the buckle or fastener may be attached to the belt in any desired manner, and that he does not confine his claims to the connection thereof to the belt in the manner shown. The buckle and manner of fastening it to the belt are old.

Waist-belts and similar articles were not a new article of manufacture when this patent was applied for, October 26, 1899. The art was old and crowded. This waist-belt comprises (1) material folded upon itself so that its edges meet; and (2) stitches joining said edges together; and (3) said stitches being looped together between apertures (holes in and near the edges of said strip or web of material) from which they pass, and whereby the edges of the material can aline or abut; and (4) the opposite walls or webs of said material (meaning the opposite walls or webs when pressed together, or when the belt is made of two strips and pressed together) being secured together; and (5) a fastener attached to the belt. The mode of attaching together the opposite or opposed walls or webs of the belt is thus stated:

"After the edges of the body [folded material] are stitched together and moved to one side of the outer edges of the body, the opposed walls or webs, 3c, 3d, are secured together, which may be done by glue or the like; but I preferably run lines of stitches, 6, along through the material near the outer edges of the body and beyond the stitches 4 [the looped or other stitches attaching the two edges of the material in the first instance] which bind the webs, 3c, 3d, so that they will not slip, thus producing a firm structure."

In short, the two edges of the original strip or web of material having been sewed together, the edges abutting, so as to form a tubular body, the upper portion thereof is pressed down on the lower portion so as to form a double belt, or one having two thicknesses of material (opposed walls or webs), and we have in this new form two new

edges ("the outer edges of the body thus formed"), and, as this "body" has an upper layer or thickness of material and a lower one, and these are liable to move or slip, the one upon the other sidewise (not towards the end of the belt), and thus make a crooked unsightly belt, the upper layer ("wall or web") is gummed or glued to the lower or "opposed wall or web" or stitched thereto as mentioned. This sewing or glueing of the two parts was old in the art, as we shall see.

It is well perhaps to repeat what the patentee claims to have accomplished. He says:

"By means of my improvements I am enabled to construct a strap, belt, or the like, of double thickness, all made from a single piece of material, with finished edges, which are formed by the folded material, and the strap or belt is pliable or flexible and not liable to injury from folding or bending."

He also says, to repeat:

"By the means described I produce a lined strap or the like, because one of the webs (folds) can be used as the exposed surface and the other can be used as a finish or lining to the raw side of the first-mentioned web. It will be seen that by having the edges of the webs (folds) abut and by stitching them together, as described, they lie flat in line with the surface of the opposite web."

Taking up these accomplishments in detail, we find that any one can, and, so far as this court knows or has heard or read, every one has for centuries, constructed straps, belts, and the like of double thickness from single pieces of material by simply folding the one half upon the other half. By sewing the two edges thus brought side by side "with the over and over stitch" or any other, leaving the thread loosely drawn, and then turning the doubled fabric till the sewn seam is uppermost, and then pulling the sewn ends of such fabric in opposite directions, we have the edges brought into position where they necessarily abut and do not overlap. Every housewife and seamstress has used and will use the stitch, leaving it loosely or tightly drawn as occasion demands, that will permit the necessary movement to bring the edges into the abutting position, and she will pass the thread through the material, as she always has, at a suitable distance from the edges to permit the adjustment; or, before sewing, she will place the edges of the material to be united in the abutting position, keep them there during the sewing operation, and sew "over and over" or use, "as the patent says," the commonly known "overseaming" or "zig-zag" stitch and mode of sewing. When this is completed, press the upper fold on the lower, if pressing is required, and we necessarily and inevitably have, and always have had, the "finished edges" of the doubled fabric "which are formed by the folded material," and which are found at the point where the one fold turns upon the other. As to the pliability and flexibility of the strap or belt, this depends on the character and quality of the material used. Certainly it is not made more flexible or more pliable by being doubled or by the sewing operation. It remains in the same flexible or pliable condition it was before. It is neither more nor less liable to injury from folding or bending than it was before it was doubled and sewed. It is pliant and flexible, and not liable to injury from bending, etc., for the reason that such is the in-

herent nature or quality of the material used. All this to which I have referred was old in the art as numerous patents and structures demonstrate. Now, as to the lining of the strap or belt, etc., when the material is doubled on itself, both the upper outside and the lower outside face outwardly and in opposite directions, while both inside surfaces are in contact and face inwardly. Of course, one inside surface looks up and the other down, or one east as the other looks west, but they are face to face. This is the necessary and well-known result, so far as I know or have ever heard, of folding a piece of material upon itself. I do not regard it a new or novel discovery that if a piece of leather, or other material, is folded upon itself, has the edges then sewed together, and it is then of suitable width to be used as a belt, and we desire to have one of the sides outwardly at all times, as the show-side, that the other side will act and serve as a lining therefor. This is naturally and necessarily so and obvious to all observers. It will be the side next the wearer of the belt. It is a part of the belt and its office or function is that of a lining while it is not something added to the belt in the usual sense of lining. This result of the folding is natural and old and inevitable. The sewing of two ends of any material so that they abut, instead of lying the one end upon the other, thereby forming a ridge, results in both lying in the same plane. The ends of each will be in the same plane as the main part, as neither is elevated on the other. This is perfectly natural and old. It is not a new discovery. Such structures made by sewing materials together using appropriate stitches to make a flat joint with the edges abutting was very old in the art, as we shall see. I can discover nothing new or novel in this structure or in the mode or process of making it. I do not think it above the skill of the ordinary housewife or seamstress reasonably skilled in making ordinary garments with fastenings therefor.

The complainant called Mr. Crane as an expert witness, who did not claim, as I discover, to point out any novelty, but he did tell how the stitches shown in all the exhibits in the case, some of which antedate the patent in suit, hold the edges of the doubled fabric in the abutting position, and thus form a flat or flush surface. He says:

"Such abutting of the edges is necessary to form a flat or flush surface at the line of the seam, and it will be noticed in all of the exhibits that the edges of the leather are firmly held in such flattened and abutting position by the loops of the stitches, which are engaged between the apertures from which they pass, and directly across the abutting edges, so that the latter cannot roll or curl upward, but are held permanently in line. The edges of a thick material like leather remain abutted when rolled within the stitches, which is rendered possible by the mode of stitching employed, which embraces the edges of the belt during the stitching operation and does not connect the opposite walls together; but leaves them free so that the edges can roll within the loops of the stitches as already described."

That such is the result of the "over and over sewing"—the most primitive stitch in the art—as well as of that old and well known, and, as the patent itself says, "commonly known as 'overseaming' or 'zig-zag'" stitch, is and was well known to any observer. It was shown in the prior art. These zigzag stitches are the stitches shown, and they are, I think, the loop stitch referred to in claim 6. But, if not,

the prior art shows it plainly and beyond all question. R. S. Allyn, defendant's expert, said:

"To recapitulate, I find in the prior art referred to the full equivalent of the construction of claim 6 of the patent in suit. In my opinion the type of stitch employed is unimportant. The prior art shows the identical overseam or zigzag stitch of the Gaisman patent in suit to be old in the Blanchard patent, No. 167,492, and for the identical purpose of the Gaisman patent, namely, producing a flat seam. (See Fig. 1 of the Blanchard patent.) This type of stitch is also shown and for the same purpose in the Blanchard Patent, No. 174,764, dated March 14, 1876, in Figs. 7 and 8. In this case, it is true, that the seam is covered with suitable material, C, for protection. The flat seam referred to in this connection is the seam between the two strips, D-D, in Fig. 7, and shown at the edges, B-B, in Fig. 8 of the Blanchard patent. I also find a flat seam formed by the same type of stitch in the Henriksen patent, No. 215,615, dated May 20, 1879. See Figs. 15 and 16, showing the two sides of the material at the seam. The Bullock patent, No. 268,618, dated December 5, 1882, shows another type of stitch, E., for forming a flat seam along the edges, D, of the material. The Brownson patent, No. 312,081, dated February 10, 1885, shows the ordinary hand stitch in Figs. 3 and 4, for producing a flat seam. The Broadnax patent, No. 340,280, dated April 20, 1886, before referred to, shows the over and underhand stitch, h, Fig. 1, for producing a flat seam. These prior art patents show some of the various methods of producing flat seams by different stitches determined by individual preference. In the Ames patent, No. 454,404, dated June 16, 1891, the zigzag elastic stitch of the Blanchard patent, No. 167,492, is referred to for uniting the edges of breadths of carpet so as to produce an even surface at the seams when laid."

Mr. Allyn gives an analysis of claim 6 of the patent in suit, and says of it:

"In this claim we find that a new limitation not set forth in any of the previous claims is introduced. It is: 'Said stitches being looped together between apertures from which they pass, whereby the edges of the material can align or abut.'"

He then says:

"In each and every one of defendant's exhibits, 'Peak City Guards Belt, Wright Knapsack Harness, National Guard Belt No. 3, Crittenden Belt, Judson Military Belt and Oothout-Acker Belt,' I find all the elements of construction set forth in claim 6, except the particular type of stitch."

Also he says:

"The stitch employed is commonly known as 'overseaming' or 'zigzag.' In this type of stitch the thread is interlocked or looped together as at 4a, Fig. 5, of the patent in suit, between the apertures, 5-3, from which it passes."

All this is true, as an examination of the exhibits demonstrates. The question resolves itself into this: On this branch of the case, is patentable invention disclosed in the conception or idea of using this old loop stitch in place of the over and over stitch shown in National Guard belt No. 3 and Crittenden belt, especially when both serve the same purpose, perform the same function, produce the same result? Both were known. Was it not a mere matter of choice, of selection? Suppose that, with a dozen or more well-known stitches before him, a person, after experiment, finds that one, which others have not used in a certain place for a certain purpose, will do the work better than those in use, but it was well known that they would perform the same function, and produce the same result, is he an in-

ventor? Can he have a valid patent on such a discovery and monopolize the use of that stitch for that purpose in that particular art, when all were at perfect liberty to use it before, but did not so far as shown in the exercise of their right of selection? I think not.

The patentee, Gaisman, in claim 6 has reproduced the belts of the prior art, substituting for the over and over stitch this old loop stitch, a well-known equivalent, except that the loop stitch, it is alleged, makes the flat seam a little firmer and flatter, and keeps the edges in better alinement, so that as the belt bends the edges are less liable to show. The affect of the stitches is one of degree only. The one, at best, is superior to the other only in that it is a little more effective. Such a substitution is not patentable invention. *Smith v. Nichols*, 21 Wall. 112, 118, 119, 22 L. Ed. 566, quoted and approved in *Burt v. Ivory*, 133 U. S. 349, 358, 10 Sup. Ct. 394, 33 L. Ed. 647; *Sloan Filter Company v. Portland Gold Mining Co.*, 139 Fed. 23, 71 C. C. A. 460; *Crouch v. Roemer*, 103 U. S. 797, 26 L. Ed. 426.

In *Smith v. Nichols*, supra, the Supreme Court expressly decided:

"A mere carrying forward, a new or more extended application of the original thought, a change only in form, proportions or degree, the substitution of equivalents doing substantially the same thing in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent."

Here all we have is the substitution of an equivalent, the old and well-known loop or zigzag stitch, for the over and over stitch of many patents in this art, with better results, it is claimed, only. This says the Supreme Court of the United States is not invention. Merely transferring an old element to a new sphere of action, when it performs its old function in the same old way to produce the same old result, is not invention; but, if it be so transferred to meet a novel exigency and serve a new purpose, it may be. *Du Bois v. Kirk*, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. Ed. 895. In *Western Electric Company v. La Rue*, 139 U. S. 601, 606, 11 Sup. Ct. 670, 672, 35 L. Ed. 294, the court held:

"While the promotion of an old device, such, for instance, as a tonsorial spring, to a new sphere of action, in which it performs a new function, involves invention, the transfer or adaptation of the same device to a similar sphere of action where it performs substantially the same function does not involve invention."

In the case now before this court the patentee has made a belt, old in the art, by the use of the same processes and modes of construction and materials as were used in and well known to and described in the prior art; but he has substituted for the old and well-known over and over stitch, one of the things to be used in one of the several steps to be taken, the old and well-known loop or zigzag stitch, the one being the well-known equivalent of the other, doing the same work in the same way and accomplishing the same precise result, except that this result by such sewings in this belt is somewhat the better for the substitution. This sewing is an independent process in the construction of the belt, and is no wise affected or modified by, nor does it in any wise affect or modify, the other steps in the construction or manufacture of the belt or other similar article. This

substitution does not constitute or involve invention. Here we have no new or novel exigency. Here we have no new purpose to be served. The object of the sewing, the purpose to be served, is precisely the same as in the prior art, viz., "such stitches as will allow the resulting tubular body to be flattened, so that the edges, 3a, 3b, will abut or meet," and "such a stitch while joining the lapped edges of the material, as shown in Fig. 4, enables said material to be flattened out in two parallel walls or webs, 3c, 3d, while the edges, 3a, 3b, can abut or meet and lie in substantially the same plane." This is what the patent in suit says.

In August, 1873, Helen A. Blanchard obtained patent No. 141,987, for a sewing machine that would stitch or sew with this over-stitch. In September, 1875, she obtained patent No. 167,492, for "improvement in methods of uniting knit goods," etc. She speaks of prior methods, and says:

"The objections, however, to this method of joining knit goods are many. The operation is made dependent on selvage loops, and the stitches, if they may be called stitches, are governed by the number of loops."

Selvage loops are not made by the thread used in sewing or by the sewing operation. They are made a part of or attached to the fabric to be sewed. She shows her stitches in figs. 1 and 2 of the drawings, and it is obvious that they are the stitches of the patent in suit, and the witness Allyn also testifies to this fact, and then says:

"I purpose using what may be called the 'diamond overstitching seam,' which I apply in a manner altogether novel—that is to say, by sewing with a vertically-reciprocating needle directly through the two thicknesses of goods along their edges, placed upon a flat horizontal cloth-plate, and fed along under the needle progressively with formation of the stitches (which in no sense are dependent upon selvage loops), said needle passing alternately directly through the goods and outside the same, so as to form the diamond overstitch-seam, uniting the edges in a fine compact seam, which, at the same time, possess all needed flexibility and elasticity. \* \* \* Fig. 1 shows the elastic stitch, a, as used in uniting the edges of knit goods and hosiery, and set by a double-thread machine. Fig. 2 shows the stitch as set by a single-thread machine for the same purpose. \* \* \* Any sewing machine, with a few slight modifications which do not interfere with its ordinary work, can be used to carry my invention into effect. Any overseaming-machine capable of sewing a zigzag or irregular stitch may be used in uniting the edges by an alternate stitch inside and outside the goods, as aforesaid. One machine adapted for the purpose of my present invention, will be found in my letters patent No. 141,987, August 19, 1873."

Allyn says:

"As before mentioned, the stitch referred to by Ames is the same stitch as that selected by Gaisman for illustration in the patent in suit."

This establishes the fact that there was no novelty in the stitch used and adopted by the patentee of the patent in suit. In another patent to Helen A. Blanchard granted March 14, 1876, No. 174,764, "improvement in welted and covered seams," she shows the same stitch in Figs. 7 and 8. Her main purpose she says is to "Furnish protection to the parts of the threads exposed on the wearing surface. This I do in two ways, viz.: By the insertion of a piping or welt;



by sewing a strip over the seam." When she uses this stitch and protects the seam by a strip over it, she does not use the piping. She also says:

"My invention relates to seams of cloth, leather, or any other suitable material made by placing the two edges to be united, the one over the other, as shown in Fig. 8 of the accompanying drawings, and then alternately stitching within and without the edge; afterward flattening out the seam so that the edges will abut," etc.

Also:

"The sewing is then done by a machine adapted to sew zigzag, or over the edge, as for instance, is shown in my letters patent No. 161,471," etc.

And again:

"I do not claim the simple insertion of a piping or welt in a seam, nor the covering of a seam with a strip of suitable material sewed over the same; but in a seam made by alternately stitching within and without the edge of the material sewed, and then flattening the materials out so that the edges shall abut, as a protection," etc.

Here we have the prior art, as far back as 1876, plainly teaching this style of sewing, this stitch, as well as the idea of sewing two edges together so the parts may be flattened out and the edges made to abut. The patentee of the patent in suit, Gaisman, had every idea contained in the patent in suit plainly taught him by the prior art, with which he is presumed to have been familiar. All he had to do was to make a belt by this sewing and this flattening process taught him by a woman. Of course, to attach a buckle or other fastener at one end was simple enough. In the Ames patent of June 16, 1891, No. 454,404, "apparatus for sewing carpets," he says, referring to one of the Blanchard patents:

"I prefer, however, a machine which will make a well-known zigzag elastic stitch, substantially like that shown in letters patent, No. 167,492, of September 7, 1875, for the carpet will then present an even surface at the seams when laid."

If anything further is necessary, we may turn to the Morrow patent, No. 413,531, dated October 22, 1889, "method of overseaming fabrics." Here the fabric is placed together, one piece on the other. Then two of the edges at one side are crocheted together. Then the two parts are separated at the free ends and flattened out, and the crocheted edges abut. This looping stitch and flattening out of the material and abutting of edges was also shown and particularly described in the patent to Hans P. Henriksen, No. 215,615, of May 21, 1879, in the following words, viz.:

"The stitch, the construction and appearance of which will be understood by reference to Figs. 15 and 16 is formed in the following manner: The needle, perforating the material horizontally and at a right angle thereto, carrying the thread with it, crosses from disk v to disk w, where it is received upon and guided by the spring-cushion, 7. At the point where it has reached the end of its forward throw or motion, it is met by the descending oscillating shuttle, which catches in between the needle and upper thread, carrying its thread, d', under the needle-thread, e', while the latter is slack and commencing its double return motion—that is, reversing its oscillation within carrier M simultaneous with the retrograde movement of the said carrier itself, within which it is inclosed—at the time the take-up hook, S',

is at its highest point, and the needle-thread consequently tightened. At the end of the stroke of the needle on disk v this operation is repeated, so that two loops or locks are formed at each stitch, one on each side of the seam, by which a zigzag or cross stitch, formed by the thread d' crossing from one side to the other, is formed upon one side of the material or fabric, as shown at Fig. 15, and a series of crosswise parallel double-thread stitches on the opposite side, as shown in Fig. 16. The seam thus formed is not only very ornamental (especially if thread of different colors be used), but exceedingly strong, and yet very elastic, so that it may readily be flattened out by simply pulling the two pieces of fabric in opposite directions until their edges shall be perfectly flat and flush with each other, merely impinging upon, but not overlapping, each other, as seen in Figs. 15 and 16 of the drawings."

It will not do to find patentable invention in a device or structure where all its elements are found in the prior art, and all the alleged inventor does to produce it is to take one of the prior patented devices, and leave out one of its elements and substitute in place thereof a well-known equivalent taken from another device of the same kind, where it was used for the same purpose, operated in the same way, and produced the same results as is required in its new location, and the sole result of the substitution is that the substituted element operates or works a little better than did the displaced one, and thereby the operation of the alleged new structure is somewhat improved. This is improvement, but not invention. It may be a successful experiment, but there is no novelty. "While a combination of old elements producing a new and useful result may be patentable, if the combination is merely the assembling of old elements producing no new and useful result invention is not shown." *Computing Scale Co. of A. v. Automatic Scale Co.*, 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645. To constitute improvements in invention they must be the product of original conceptions. *Pearce v. Mulford*, 102 U. S. 112, 118, 26 L. Ed. 93; *Slawson v. Grand Street Railway*, 107 U. S. 649, 2 Sup. Ct. 663, 27 L. Ed. 576; *Munson v. N. Y. City*, 124 U. S. 606, 8 Sup. Ct. 622, 31 L. Ed. 586.

Here complainant contends that its belt as a whole, a completed thing, is made better, more durable, more attractive, more salable by reason of the substitution; but conceding all this to be true patentable novelty is not shown. The better result does not show invention. *Smith v. Nichols and Western Electric Co. v. La Rue*, supra. Its greater utility, durability, attractiveness, and marketability do not of themselves show patentable novelty. These facts are evidence on the subject, and in very doubtful cases may be persuasive and turn the scale in favor of the patentability of the device. A valid patent must combine utility, novelty, and invention. Neither large sales nor popularity nor effectiveness of itself shows patentable invention. Nor do all these combined establish it. See *Duer v. Corbin Co.*, 149 U. S. 216, 223, 13 Sup. Ct. 850, 37 L. Ed. 707; *Richards v. Elevator Co.*, 159 U. S. 477, 487, 16 Sup. Ct. 53, 40 L. Ed. 225; *American Sales Book Co. v. Bullivant*, 117 Fed. 255, 54 C. C. A. 287; *McClain v. Ort-mayer*, 141 U. S. 419, 429, 12 Sup. Ct. 76, 35 L. Ed. 800; *Union Biscuit Co. v. Peters*, 125 Fed. 601, 609, 60 C. C. A. 337; *Falk Mfg. Co. v. Missouri R. Co.*, 103 Fed. 295, 43 C. C. A. 240; *New Departure Bell Co. v. Bevin Bros. Mfg. Co.*, 73 Fed. 469, 19 C. C. A. 534; *Dodge Coal Storage Co. v. N. Y. C. & H. R. R. Co.*, 150 Fed. 738, 80 C. C.

A. 404. In *New Departure Bell Co. v. Bevin Bros. Mfg. Co.*, supra, Judge Lacombe said:

"But this precise mechanism was described and published to the world in the Bennett patent, and is used in complainant's bell with no other reorganization of operative parts than the insertion of an additional gear and pinion wheel, and such a shifting of the spring as introduces no new function. In our opinion such unsubstantial changes do not involve invention."

In *Dodge Coal Storage Co. v. N. Y. C. & H. R. R. Co.*, supra, Judge Townsend said:

"The would-be inventor or designer of novel mechanism for accomplishing these objects, therefore, is presumed to have before him the whole field of the art of the engineering construction applicable to the collection and removal, the elevation, and conveyance of such materials from one point to another. And the question here presented is, not what these particular patentees may actually have invented, but whether the state of the art in such engineering field was such that it would require invention to construct such apparatus, or to adapt the constructions known in the art to the exigencies of a particular situation, or the requirements of a certain class of materials. \* \* \* We conclude, therefore, that the patentees did not devise any novel means by which to carry out their ideas and put them in shape for practical operation."

In *McClain v. Ortmyer*, supra, the court said:

"This court has held in a number of cases \* \* \* that in a doubtful case the fact that a patented article had gone into general use is evidence of its utility. It is not conclusive even of that—much less of its patentable novelty."

Scores of pertinent quotations might be made, but it is not necessary. The complainant's belt is exceedingly attractive and neat. Evidently, so far as the evidence discloses, it is of great utility and the best on the market, but these facts do not prove patentable invention.

In view of the prior art and prior well-known uses, the complainant's patent fails to show patentable invention and is void.

There will be a decree for the defendant dismissing the bill, with costs.

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#### RAPP v. CENTRAL FIRE-PROOF DOOR & SASH CO.

(Circuit Court, S. D. New York. January 22, 1908.)

##### 1. PATENTS—INVENTION—COMBINATION OF OLD ELEMENTS.

That a combination of old elements in a structure may constitute invention, there must be a mental conception, a new and improved result that the ordinary mechanic skilled in the particular art could not have produced without the exercise of inventive skill.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 27-29.]

##### 2. SAME—FIREPROOF DOOR.

The Rapp patent, No. 653,400, for a fireproof door, consisting of an ordinary wooden door covered with metal sheets with panels, etc., to correspond to the door, their edges interlocked by means of marginal lips hooked together, discloses no feature not old in the art, and produces no new nor improved result, and is void for lack of invention. Claims 2 and 3; if conceded invention, held not infringed.

In Equity. Suit in Equity to restrain alleged infringement of United States letters patent No. 653,400, dated July 10, 1900, to John W. Rapp for "fireproof door."

Fred H. Bowersock (R. H. E. Starr, of counsel), for complainant.  
Grafton L. McGill (J. Nota McGill, of counsel), for defendant.

RAY, District Judge. The patentee says that he has invented certain new and useful improvements in fireproof doors, and that his invention of the patent in suit, No. 653,400, dated July 10, 1900, relates thereto. He describes a fireproof door, which he says embodies his invention. It comprises "a core or filler," which is nothing more nor less than an ordinary door of wood of any construction, and "a metallic covering which completely incloses the core or filler." This metallic covering has "panels," "horizontal connecting rails," and "vertical connecting rails"; also, "top and bottom rails," which are, in fact, also "horizontal connecting rails," and also stiles, in fact "vertical connecting rails." These correspond to the woodwork of any ordinary paneled door; that is, it has all the framework and panels of an ordinary door. Assume, first, that the core or filler, the wooden door, is complete. We are now to convert it into a "fireproof door." The metal panels are stamped into shape, any desired shape, only they must correspond in size with the core or filler. This stamping is done, of course, with a proper stamping machine suitable to stamp such a metallic substance, sheet iron, or steel, or tin. Each panel is provided with a "peripheral or marginal lip." This lip is nothing more nor less than the bending over of a part of or the whole of the outer edges of the panel. "This lip may be either continuous or interrupted." The horizontal connecting rails and the vertical connecting rails are provided with the same peripheral or marginal lips. These engage with the lips of the panels, hook into them so to speak. The top and bottom are formed "to fit over the top and bottom edges of the core or filler," simply bent over, and the stiles are formed "to fit over the side edges of the core or filler." Each face of the top and bottom rails and of the stiles is provided with a similar lip; that is, the edges bent over. These engage with the adjacent lips of the panels and rails, hook into each other. These panels are secured in position by blind nailing them to the core, and the connecting rails are next secured in position by engaging their lips with the lips of the panels, simply hooking them into each other. The top and bottom rails and the stiles are applied and connected in the same manner. The seams formed by thus engaging the lips are then pressed together, "preferably flattened by means of a mallet or other device." This method of uniting the parts is known as "seaming." The joints thus formed may be closed by welding. The construction is exceedingly simple and connection of the parts is easily and rapidly made. Such fireproofing can be applied to one or to both sides of a door, and, where the stiles and top and bottom rails are bent over the edges of the core, they may be nailed or provided with lips, and hooked together and flattened down. There is nothing new or novel in attaching one sheet of metal to another by means of such lips. There is nothing new or novel in the idea of covering a door of wood with suitable metal to make it fireproof.

The claims of the patent, three in number, read as follows:

"1. The combination in a fireproof door, of a core or filler and a metallic covering therefor, said covering comprising front and back panels and connecting-rails, and top and bottom rails and stiles for fitting over the edges of the core, or filler.

"2. The combination in a fireproof door, of a core or filler and a metallic covering therefor, said covering comprising front and back panels, each having marginal lips, connecting-rails having marginal lips which engage with the marginal lips of the panels, and top and bottom rails and stiles fitting over the edges of the core or filler and connected with adjacent panels and connecting-rails.

"3. The combination in a fireproof door, of a core or filler and a metallic covering therefor, said covering comprising front and back panels, each having marginal lips, connecting-rails having marginal lips which engage with the marginal lips of the panels, and top and bottom rails and stiles fitting over the edges of the core or filler, said top and bottom rails and stiles being each provided with marginal lips which engage with the lips of adjacent panels and connecting-rails."

Claim 2 adds to claim 1 the marginal lips and connection with the panels, while claim 3 adds the marginal lips, or connection, to the top and bottom rails and stiles. The elements of claim 1 without the lips or other means for engaging the parts and connecting them together would be an incomplete and inoperate and useless structure. In fact, no structure at all, but simply pieces of metal. We must read into it some means for connecting the various parts. Should they be nailed to the core or filler in the usual manner of nailing, we would not have a fireproof door. Defendant says that no patentable invention is disclosed in view of the prior art.

In the patent to C. K. Marshall of May 26, 1868, No. 78,218, for "improved metallic doors and shutters," we have in figure 1 an ornamental panel. In figure F we have plates, stiles, and rails. In figure 4 we have "interior view of panel," etc.; in figure 5 "corrugated plate or panel on one side and plain plate on the reverse"; in figure 6 "section of rail or stile, showing the mode of connecting the rail or stile-plate with the panel plate." In figure 7 of this patent we have another representation of what is shown in figure 6, and here we find the exact peripheral or marginal lips of the patent in suit engaged or hooked into each other.

The patentee, Marshall, says:

"My invention consists in constructing a metallic door, shutter, or base-panels for windows of two or more sheets of metal, either plain or corrugated, which are bolted, riveted, screwed, soldered, or seamed together. \* \* \* To the upper and lower portion of these panel-plates or sheets, I attach rails, and to their sides stiles, by means of rivets, bolts, screws, solder, or seaming. Between the panel-plates and the rails and stiles I insert braces similar in every style to those which are introduced between the panel-plates. \* \* \* Another feature of my invention consists in the system of ornamenting the panel-plate, which gives to the door or shutter a rich and beautiful appearance. I have only shown in the drawings one method of ornamentation, viz., attaching raised metallic designs by means of secret rivets. This I have done simply to illustrate the principle of ornamentation; for it will readily occur to any one skilled in the art that, while the designs from which selections for ornamenting the door are almost endless, they are scarcely more numerous than are the various metals by which they can be produced. \* \* \* We constantly see buildings erected of solid masonry, stone sills for the windows and doors, and with metallic roofs, all bespeaking security; still

we find the doors and shutters of wood. So long as this is the case, it is idle, no matter how massive and well built the structure may be, to pretend that it is either fire or burglar proof; for the burglar in a few moments cuts out one of the panels of the door and enters the building, or a fire in an adjoining house or across the street will soon so intensely heat the door or shutter, when made of wood, as is often the case, especially in our large cities, that ere you are cognizant of the fact the building is in flames. I am aware that metallic doors have been used, but they are such heavy, ungainly things that, whenever seen, the mind instantly and instinctively associates them with either a vault, a tomb, or prison. The object of my invention is to furnish the market with a double-cased, raised and ornamented metallic door or shutter, burglar and fire-proof, cheap and light, neat and ornamental, and such as can be painted so as to represent any kind of wood, and, if desired, any kind of carving. \* \* \* The braces having been properly arranged and attached to the panels, the latter are firmly united together, which can be done by means of rivets, bolts, screws, b, b, or they may be soldered or seamed. B, B, are rails, which inclose the upper and lower portion of the panels, and C, C, are stiles, which inclose their sides. These rails and stiles are united to the panels by bolts or rivets, b, b, as clearly shown in Figs. 6 and 7. Between the panel, A, A, and the rail and stile, B, C, there is necessarily left an opening, the width of the brace, a. This opening is closed by a moulding, D, which may be made in sheets, and soldered, as shown in Fig. 2, or seamed, as shown in Fig. 7, or it may be 'struck up' with the rails and stiles, as shown in Fig. 6."

The only substantial difference between this door and the one of the patent in suit is the core or filler. Marshall used braces or corrugated metal; but the core of the patent in suit is old in the art, as we shall see.

In patent to Hoyt, No. 124,271, March 5, 1872, for iron doors or shutters, he says:

"The whole surface of the door or shutter may be divided into panels and ornamented," etc.

In patent to Kittredge, No. 183,940, October 31, 1876, sheet metal doors, we find:

"Each side and end of the door-frame consists of a single piece of sheet metal, bent at right angles to form the thickness of the frame, as will be seen at A, Figs. 2 and 3, which represent transverse and longitudinal sections, indicated by the lines, a, and, b. The two sides, c, of the frame are turned outward at right angles, forming flanges B, whereby the panels are secured to the sides of the frame by having the sheet of metal forming the panel wide enough to admit of being depressed at E, Fig. 3, to form the emboss of the panel, and extend to the edge of the frame, at which point it is turned at right angles to form the flanges, F, the extreme edges of which are turned back upon themselves, making a return bend or lock, G, in which is received the flanges, B, of the door-frame, as will be seen in Fig. 3, representing a transverse section of the door in direction of the line, b."

Here we have stiles and panels and the same locking of the parts as in the patent in suit.

In patent to Walton, No. 227,934, of May 25, 1880, "improvements in fireproof construction of doors, shutters," etc., the patentee says, among other things, that his invention is to provide a new and useful mode of construction, "whereby their ability to resist the action of fire and their value as nonconductors of heat are greatly increased and their strength greatly enhanced." He has layers of metal and wood, just what we have in the patent in suit, for Rapp has an outside layer

of metal, an inside layer of wood, and then, on the other side, another layer of metal.

He says "the metal plates are preferably bent around the edges of the wooden layers," illustrating two methods of doing this. He also says:

"One great objection urged to metal shutters as commonly constructed is that, when a fire breaks out in an adjoining building, the shutters become so heated on the outside as to warp, allowing the flames to gain ingress through the windows or doors to the inside of the building. Another objection urged to metal shutters as commonly constructed is that, when there is a conflagration within the building, the shutter becomes heated, so that, if water is thrown against the outside of the shutter, the cold on the outside and heat within will cause a shutter made of metal alone to warp, so as to give entrance to the air, and thus the fire will burn much more furiously than it would could it be confined to the inside of the building, and air not be admitted. My invention provides against the warping of the shutters in the following manner: If the conflagration is without the building and the shutters closed, the outer plate of metal will become heated, and this will cause the layer of wood next to it to become heated; but, as the air, cannot get to this layer or any other of the intermediate layers, it does not become sufficiently heated to ignite or transmit the heat to the other layers to such an extent as to cause the shutter to warp. If the conflagration is within the building and the shutters closed, the inner layer of the shutter will become heated, but the intermediate layers of wood and metal prevent heat from being communicated to the outside of the shutter to such an extent as to cause it to warp when water is thrown against the outside. Thus the shutter is kept closely against the building over the window or door, and air is not permitted to enter."

Here we have the wooden core or filler and its utility and function fully described.

In patent to Henkle, No. 364,252, of June 7, 1887, we have a wooden door with metal panels, the metal "struck up" with "any suitable design" and "soldered or otherwise attached together"; also "the edges" of the panels "all around are swaged out forming sockets, c, c, of square, rounded, or beaded form and of sufficient size to receive the edges of the rails and cross pieces of the wooden door." Use metal rails and cross-pieces, and we would, of course, connect the socket of one with the lip or bent-over flange of the other, all shown in prior patents.

In patent to Thuener, No. 376,926, January 24, 1888, we have, "metal ceilings formed of plates, or panels." "These plates have \* \* \* and have lips, 18, which are made to tightly clasp the edges of the plates 1 at 13." The drawings exhibit the "peripheral or marginal lips" of the patent in suit hooked into each other. Here, as in the prior patents, we have sheets or panels of metal with edges bent over "up" on the one and "down" on the other, so they will hitch or hook into each other.

In patent to Kinnear, No. 382,094, May 1, 1888, we have "metallic ceiling of metallic plates or panels," and the mode of uniting is given, viz.:

"The corner panel is first put into position, the hooked edges, F, of the beaded edges, E, extending under the folded edge of the said cornice and the edges, D, resting upon the wooden strips, I and K. The said edges, D, are now nailed firmly to the said strips, and the said panel is securely fixed in position. The next panel upon each side is then placed in position, with the

hooked edges, F, of the edges, E, of the said panels extending under the folded edge, C, of the panel just placed in position and under the correspondingly-folded edge of the said cornice. The edges, D, of this panel, as in that previously described, rest upon and are nailed to the wooden strips, I and K."

July 12, 1889, there was published in an illustrated weekly journal, "Engineering," published in London, England, and having a large circulation in the United States, an illustrated article on fireproof doors, in which the construction of complainant's door, except in detail, is stated thus:

"The American method of constructing fireproof doors is not to build them of iron, as experience in the method indicates that iron will cripple when exposed to the heat of a burning building. But such doors are made of two thicknesses of matched boards, each about  $\frac{7}{8}$  in. thick, and at an angle of 90 deg. to the other. When the two courses of boards are 45 deg. from each other, the lateral contraction or swelling, according to conditions of moisture, will cause such doors to twist. These doors are then covered with tinned iron, all edges being bent over in what are called 'lock joints,' and secured to the door by frequent hanging strips, or strips of metal hugged into the edge of the tin and nailed to the door independent of the sheet of tin. The edges of such doors should be covered by sheets lapping around on either side, so as to leave no joint on the edge, and without any nails with heads exposed through the tin. Such a door will resist a very heavy fire, because, under most circumstances, the tin will reflect away the heat; but, even when the temperature has risen high enough to remove every vestige of tin from the iron, the metal still serves as an airtight cell, preventing the combustion of the wood behind, which is slowly converted into charcoal—not burned to ashes."

In the Engineering News, a regular United States publication, of November 9, 1899, we find an article on "Fire Tests of Fireproofing," containing the following:

"The two doors tested by the British committee were a wooden door covered with tinned steel much similar to the well-known underwriters' fireproof shutter employed in this country, and an all-iron framed and panelled door. Both of these doors were subjected to test under identically the same conditions. \* \* \* The armored wooden door was obtained in the open market. It was 4 ft. 3 in. wide by 7 ft. 6 in. high, fixed close to the wall by the maker and overlapped 3 in. on each side. This door was 2 in. thick, made of  $\frac{7}{8}$  in. pine boards, planed, tongued-and-grooved, and nailed together, diagonally, with wrought-iron nails, clinched on the other side. These boards were completely covered inside and out with tinned steel plates, No. 26 standard wire gage, with weltd joints and screwed in the joints. The screws were 6 in. apart, penetrated three-quarters of the thickness of the door, and the screw-heads were entirely covered by the weltd joints. \* \* \* The wrought-iron door and frame were also obtained in the open market. The frame was made of angle-iron  $2\frac{1}{2}$  in. by  $\frac{3}{4}$  in., and a wrought-iron stop was carried all around the frame and secured with iron screws. The door was  $\frac{1}{4}$  in. wrought-iron plate; and on the inside, forming panels, were 3 in. by  $\frac{1}{4}$  in. wrought-iron stiles, screwed to the iron plate."

In March, 1897, the New York Board of Underwriters issued a publication "Instructions for Construction of Fire Doors and Shutters," and adopted by that board. On the first and second pages we find the following:

"There should be no woodwork or furring about the opening. The doors should be made of two thicknesses (except where openings are made larger than called for in the Standard. See page 11) of 1 inch narrow, tongued and grooved, soft white pine boards (free from sap, pitch, or moisture of any kind), laid diagonally (both sides) and nailed with wrought iron nails driven through



and clinched, then covered on both sides and edges with 10 x 14 inch sheets of 'bright I. C.' tin, except where doors are exposed to an atmosphere liable to cause rust (then Terne Plates should be used in place of tin), joints flat-locked and securely nailed under laps (barbed wire nails to be used, 1½ inches in size, to be driven 2 inches apart; for shutters 1 inch barbed wire nails should be used), but not soldered."

In a publication on "The Prevention of Fire," issued by Wm. Paul Gerhard at 39 Union Square, New York City in 1887 (second edition), we find:

"With all woodwork the aim should be to prevent the immediate access of air, so as to retain its strength and soundness, even during hours of exposure to heat and flames."

He was referring to wood covered by metal.

Also:

"Elevators must have well-closing doors in order to cut off all drafts and currents of air. It is desirable that the doors be fireproof, not, however, plate iron doors, which warp in case of fire, but tin-encased wooden doors, which are far more efficient. Such doors are made of two thicknesses of tongued and grooved boards, crossing each other diagonally and nailed together. The sheets of tin should be bent over the edges in such a secure way that no air can reach the wood when the door is exposed to heat and flames."

In patent to Kinnear, No. 443,324, we have "metallic ceiling," metal sheets attached by loops formed by turning the edge on itself, and thus forming a lip.

In Richardson patent, No. 443,541, of December 30, 1890, we have the following:

"The object of this invention is to provide a double paneled sheet metal fireproof door for dwelling houses and the like buildings, which is of simple, economical, and durable construction. The invention consists of an interior door composed of a frame or core of wood or equivalent material, an outer covering or casing comprising two like or similar sections of sheet metal entirely concealing the wooden frame or core, and means for securing said metal sections to the wooden frame or core, substantially as hereinafter more particularly set forth and claimed. \* \* \* After these metal sections, D, are thus stamped, rolled, or pressed into the desired shape the edges thereof are bent at right angles to form flanges, e, which serve to conceal the edges of the wooden frame, and also aid in securing the metal sections to the frame or core. One of these metal sections, d, is placed upon each side of the frame or core, and the flanges, e, of said sections are fitted over and upon the sides and ends of the frame and are fastened thereto by means of screws or nails. \* \* \* I have herein shown the metal sections, d, as constructed of a single piece of sheet metal; but I wish to be understood as not limiting my invention to this exact construction, as each section may be constructed of as many smaller sections as may be desired. The wooden frame or core not only serves to stiffen and strengthen the door, but also serves to prevent it from warping—a difficulty heretofore experienced in doors made entirely of sheet metal. I am aware that it is not new to make a door of an interior core of wood and an outer covering or casing of sheet metal, entirely concealing the wooden frame or core."

Patent to Kinnear, No. 445,262, January, 1891, we have the sheets of metal locked, and he says:

"Before thus turning up the flange, A', its outer edge is set back to form the extension, a, the purpose of which is to form a joint in conjunction with the flange, B', on the section, B."

There are other patents of the same general construction, but it is wearisome to enumerate them. We have every feature of the patent in suit disclosed and plainly shown and taught in the prior art. The wooden core or filler is shown and described, and its utility pointed out in several respects. Kept from the air and direct action of the flames it will retain its form and turn to charcoal. It serves to keep the front and back plates apart. It makes the door light, but still strong and keeps it in place and prevents warping. We have in the prior art the metallic covering with front and back panels and marginal interlocking lips. We have the connecting rails, the top and bottom rails and stiles, all connected by lips united in various ways but by marginal lips, seamed, welded, pressed, hooked, flat-locked, etc., including the very lip and mode of uniting the various parts shown in the patent in suit. And we have stiles fitting over the edges of the core or filler and the importance of this emphasized. The necessity of covering the entire core or filler with metal and of not having any exposed nail heads is also emphasized. Ornamental panels, the metal being "struck up," or otherwise ornamented, are also shown and described. Whether we shall have several panels or a few is immaterial. Some designs in the prior art show more, some less. The idea is to entirely cover the filler with metal, keep out air, unite the joints in some way so they will not melt or fall apart, or permit the inflow of air to the core or filler in case of exposure to fire. If ornamentation is desired, use ornamental panels, and even ornamental stiles and rails if desired. It is true that the Underwriters' fireproof door does not show ornamentation, but it does show many pieces of metal united by "joints flat locked"; that is, by lips of the metal hooked into each other, and then pressed down so as to make them flat. Clearly, in view of this prior art, no patentable conception or invention is shown in the patent in suit. The elements are old, except, possibly, in form, and the combination is old, and the means of combining the parts are old. There is no new combination of old elements to produce a new or even an improved or better result. All the patents of the prior art to which reference has been made were in evidence and explained, to some extent at least. Most of them explain themselves.

But complainant says his witnesses should be fully credited and defendant's expert given little attention or credence. Of course, this court recognizes the fact that in many cases the practical experience of men who know is the best qualification of a witness, and that such evidence is far more persuasive and convincing as a rule than mere expert opinions given by persons of no practical experience in the particular art or matter in controversy; but experts cannot change this prior art shown in patents and publications. Neither can witnesses of practical experience destroy or belittle it. Complainant contends that defendant in its structure has substantially copied, line for line, the patent in suit. But in so doing, if it has, the defendant company has also merely copied the prior art. It could not well do the one without doing the other. It is immaterial, in constructing a fireproof door, whether you have one panel or ten, so long as you do not so cut it up as to destroy its strength or make the expense

too great. And the panels may be arranged in any form. You may have one row or two rows perpendicular to each other, or three or four, or more, depending on the size of the door and the size of the panels and connecting rails; but each panel, each rail, and each stile must have marginal lips on their outer edges so as to connect with the adjacent panel, stile, or rail. The patent is *prima facie* evidence of patentable novelty. Commercial success is evidence on that subject and in close cases may turn the scale. The fact, if it be a fact, that one device has superseded another, is some evidence on that subject, but all this may be overcome, and mere commercial success, etc., do not prove patentable invention.

Complainant says in his brief "that the combination of old elements is the highest form of invention." He cites *Cantrell v. Wallick*, 117 U. S. 694, 6 Sup. Ct. 970, 29 L. Ed. 1017, *Loom Company v. Higgins*, 105 U. S. 591, 26 L. Ed. 1177, and *Walker on Patents*, § 26. This is hardly a correct statement of the law, or of the cases cited. The combination of old elements, if it be a new combination and it differs from the old in its operation and produces a new and useful result, or an improved result (in many cases), shows patentable invention. "It is not invention to combine old devices into a new machine or manufacture, without producing any new mode of operation." *Walker on Patents* (4th Ed.) § 37; *Burt v. Evory*, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647; *Flörshheim v. Schilling*, 137 U. S. 77, 11 Sup. Ct. 20, 34 L. Ed. 574.

In *Loom Co. v. Higgins*, 105 U. S. 591, 26 L. Ed. 1177, Mr. Justice Bradley said:

"It may be laid down as a general rule, though perhaps not an invariable one, that if a new combination and arrangement of known elements produces a new and beneficial result, never attained before, it is evidence of invention."

It is settled that novelty and utility must characterize the subject of a valid patent; but even these are not enough for we must have invention. The new or improved thing must be the product of some exercise of the mental faculties, the result of a mental conception. *Pearce v. Mulford*, 102 U. S. 112, 26 L. Ed. 93; *Atlantic Works v. Brady*, 107 U. S. 199, 2 Sup. Ct. 225, 27 L. Ed. 438. *Burt v. Evory*, 133 U. S. 349, 10 Sup. Ct. 394, 33 L. Ed. 647. In the patent in suit we have no mental conception whatever that was not old and evidenced in the prior art. Given the prior art, and any carpenter and joiner of reasonable skill would have constructed the fireproof door shown in complainant's patent. The complainant may have improved on the form of the doors of the prior art, but not every improvement is invention. There must be the mental conception, a new or improved result that the ordinary mechanic skilled in the particular art could not have produced without the exercise of inventive skill.

The claims of the patent in suit are invalid for want of patentable invention in view of the prior art.

Should we concede the validity of claims 2 and 3 of the patent in suit, defendant does not infringe. Those claims call for the peripheral or marginal lips of the patent on the vertical edges of the panels. They are essential in fact, and are made so by the patent. Defendant

does not use them, but a substitute, the anchor strip, a device in which the panel sheets are rested. This would be the use of an equivalent if the patent in suit were of a pioneer character; but it is not. Complainant was a mere improver in an already crowded art, and is not entitled to any considerable range of equivalents; in fact, is confined substantially to the means shown by him. *Computing Scale Co. v. Automatic Scale Co.*, 204 U. S. 609, 617, 621, 27 Sup. Ct. 307, 51 L. Ed. 645; *Cimiotti N. Co. v. American F. R. Co.*, 198 U. S. 399, 406, 410, 25 Sup. Ct. 697, 49 L. Ed. 1100.

The bill of complaint must be dismissed, with costs. There will be a decree accordingly.

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THE J. G. LINDAUER.

(District Court, W. D. Washington, N. D. December 31, 1907.)

No. 3,443.

1. SHIPPING—NEGLIGENT OBSTRUCTION OF SLIP BY MOORING LINE—LIABILITY FOR DAMAGES CAUSED.

A schooner lying diagonally in a slip between two wharves, with her bow against one wharf, in order to prevent her stern from chafing against another vessel which she overlapped, ran a hawser across the slip to the opposite wharf and permitted it to remain at night unmarked by lights. Libellant's tug, entering the slip after dark to go to her accustomed berth, struck such hawser and was injured, and her captain, who was on the deck, received serious injury. *Held*, that the hawser was an unlawful obstruction to navigation, and, being a part of the equipment of the schooner, she was liable in rem for the injuries; that the tug was not debarred from recovery because of her failure to signal her approach to the slip which did not apparently contribute to the casualty, since there was no person on the schooner in a position to have removed the hawser, or to have given warning of its presence.

2. DAMAGES—PERSONAL INJURY—AMOUNT OF AWARD.

The captain of a tug who was injured through the negligence of another vessel, having his jaw broken and his teeth knocked out, by reason of which he suffered great pain, was disabled from working for 10 months, put to large expense and permanently injured and disfigured, awarded damages against the offending vessel in the sum of \$4,500.

In Admiralty. Suit in rem to recover damages for injuries to a steam tug caused by coming in contact with a mooring line extended across a slip between two wharves, and for personal injuries suffered by the captain of the tug. Decree for libellants.

Fairchild & Bruce, for libellants.

Austin E. Griffiths and Roberts & Hulbert, for respondents.

HANFORD, District Judge. Two libels are included in this case, one by the captain of the steam tug Carlyle to recover damages for personal injuries which he suffered, and the other by the owner for damages to the tug, caused by a hawser stretched across a slip between two wharves in Bellingham Bay, known, respectively, as the "Sehome" dock and the "Bellingham Bay Improvement Company's" dock. On the day of the accident the steam schooner G. C. Lindauer arrived at Bellingham to receive a cargo of lumber, and was assign-

ed to a berth in the slip next to the improvement company's dock. Two other vessels, the steamer Meteor and the schooner A. M. Baxter, were occupying berths on the same side of the slip, and receiving cargoes of lumber; the Baxter's position being next to and shoreward from the Meteor and the berth assigned to the Lindauer being shoreward from the Baxter. For lack of sufficient space to accommodate her length, so that she could lie snug to the wharf, the Lindauer was moored obliquely with her bow against the wharf, and the stern lapping beyond the Baxter's bow. To hold her so that the two vessels would not chafe against each other, a mooring hawser was taken from the Lindauer's stern across the slip, and made fast to a pile on the Sehome dock, and, notwithstanding a warning shouted to the men on the ship from the Sehome dock by the man in charge there, to the effect that the hawser was an improper obstruction, as other vessels would be coming into the slip, it was left in that position without a light suspended upon it until the accident happened. The Carlyle was operated as a jobbing boat on the bay, and she was usually tied up at night to the Sehome dock in shallow water near the shore, and it was necessary for her to go inside of the line stretched across the slip in order to come to her berth. Her owner paid for use of the berth a monthly rental. She is a small tugboat, having engines of 65 horse power. Her deck forward of the pilot house is about 15 feet in length. She has a mast for carrying lights supported by wire rope stays. She came into the slip for the purpose of tying up at her usual place a few minutes before 8 o'clock on the evening of March 29, 1907. It was then quite dark. With her engine stopped, and moving by the momentum of her headway, she came against the hawser—that is to say, her stays came in contact with the hawser—with sufficient force to break her mast. Her captain was on the deck, giving directions to her owner, who was in the pilot house, steering the boat and operating her engine room bells. Two fragments of the broken mast fell to the deck, and the stays were twisted and fouled with the hawser which was cut to release the boat. Neither the captain nor any person on the tug knew that the hawser had been placed across the slip, and it was not seen until the moment of the crash. The captain was struck on his body and face, and knocked senseless by a piece of the broken mast, or some part of the stays. His jaw was fractured in three places, all of his upper teeth were knocked out or broken, and his right arm and body were bruised. Besides the pain which he suffered, he was incapacitated for work several months, and his expenses for surgical treatment and dentistry amount to several hundred dollars. His face is permanently disfigured, and it will always be difficult, if not impossible, for him to masticate food.

It is the opinion of the court that the hawser was an unlawful obstruction of navigation; and, it being a part of the equipment of the ship, she is to be regarded as a guilty thing, and perpetrator of a wrong, and subject to a lien for the consequential damages. I do not find in the evidence any support to the charge of negligence made against the libelants in the respondent's answer. It is true that the evidence does not show affirmatively that the tug blew her whistle or

gave warning of her coming into the slip, but her failure in that regard, if a fault, did not contribute to the casualty, for the reason that there was no person in a position to have given her a responsive warning of danger ahead, or to have removed the hawser, and it is not probable that her whistle would have received any consideration on board of the Lindauer different from the warning which was given by the man in charge of the Sehome dock. The captain and first mate of the Lindauer did not hear the warning given by Mr. Henderson, the man in charge of that dock, but it is not shown that others of her crew did not hear him, and, if the captain had observed the ordinary rules of good manners, he would have requested permission to make his mooring line fast to the Sehome dock before presuming to take that privilege, and, if he had not been negligent in that particular, he would certainly have been told that it was improper for him to obstruct the passageway between the wharves. A sensible man should have known that much without being told. Therefore it may be fairly assumed that the Carlyle's whistle would not have been heeded on the Lindauer. In maritime law a fault which does not contribute to the production to an injury is not ground for a division of damages. *The Blue Jacket*, 144 U. S. 371, 12 Sup. Ct. 711, 36 L. Ed. 469. Under the circumstances, failure to see the hawser was not a fault. The light on the dock might have revealed it to a person who was looking for it, but the libelants had no reason to expect anything so unusual, in such a place, as an obstruction to the passage of the vessel suspended in the air, and there was not sufficient light to make it plainly visible. It was not unlawful nor negligence to permit a man, who was not licensed to perform the functions of an officer of a steam vessel, to steer the tug and operate her signal bells. The captain was on duty and in a proper position, and he performed the duties of pilot and lookout.

Upon the evidence I find that the sum of \$100 is a reasonable estimate of the damages to the tug, and that amount will be awarded to her owner. I consider that the captain is entitled to a pension to solace him for the permanent disfigurement of his features and his impaired ability to enjoy life. The amount of an annuity purchasable by one payment of \$2,000 I consider to be a reasonable allowance. As captain of the Carlyle he was earning \$100 per month. His time was worth that much, and 10 months is a conservative estimate of the lost time to be compensated for. I also allow him \$1,500 as compensation for pain and expenses, making the total amount of damages awarded to him \$4,500. Both libelants will be entitled to legal interest on the sums awarded from the date of the decree to be entered until paid, and their taxable costs.

## THE ERASTUS CORNING.

(District Court, D. Connecticut. January 8, 1908.)

No. 1,532.

## SHIPPING—STRANDING OF VESSEL—LIABILITY FOR NEGLIGENCE IN CARE OF PASSENGERS.

Where a steamer ran upon a rock in the night, it was negligence for those in charge to permit passengers to leave in a small boat without a competent seaman in charge, which rendered the vessel liable to one of such passengers for the loss of his effects, and for physical injuries resulting from his exposure for several hours in the open boat, with only his underclothing to protect him from the cold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Shipping, §§ 538-552.]

In Admiralty.

Cushman, Dewell & Cushman, for libelant.

Edward H. Rogers and Convers & Kirlin, for damage claimant.

PLATT, District Judge. The claim of Raffaello Granicci for \$2,000 was duly made before the commissioner by affidavit dated February 19, 1907, and a report filed February 26, 1907, shows that no other claims were presented. In the spring of last year I heard the evidence, but became seriously ill before I could consider the matter. Since recovering a fair share of health, the burden of new work, coupled with an attempt to clear up at odd moments the accumulation of cases heard but undisposed of when the illness came, has delayed final action herein until now. It will be obvious to the dullest understanding that brevity is an essential factor in the equation between work decently performed and the maintenance of a steady recovery of my former vigor.

The steamer Erastus Corning left New Haven on the night of December 22, 1903, bound for New York through Long Island Sound. At about 1:30 a. m. December 23d she ran upon a rock off South Norwalk, Conn. The libelant has produced no proof sufficient to show that the accident was unavoidable, and I am satisfied, from the evidence presented to me, and find, that the accident was due to the negligence of those in charge of the steamboat. This point, however, seems unimportant because I shall find positively that the claimant's loss and damage were caused directly by later acts of negligence for which they are clearly chargeable. The claimant had worked for a farmer at Montowese, near New Haven, for some years. Just prior to the accident, he applied to the farmer for money due him for his work. The farmer went to New Haven, obtained some cash, and brought it out to the farm in bills. These bills were put in a handkerchief, which was placed in his inside coat pocket, and secured by a pin so that it could not slip out. He swears there was \$800 in bills so placed, and the farmer swears to the same thing. The farmer's wife and another witness only tell about bills being placed in the handkerchief and pinned in the pocket. I believe the handkerchief and pinning part of the story, but I do not believe the claimant and the farmer about the amount. My rea-

sons for this are many. I was not pleased with their manner. They were too circumstantial, paid too much attention to trivialities, agreed too well in minor matters. It was too large a sum to be left by such a man in the hands of his employer for so long a time. No one was produced to tell when and how the farmer got the money, and how much he got. Then, too, this claimant brought a suit in the City Court of New York right on the heels of the accident. He made oath to the complaint on December 30, 1903. To such a man the loss of \$800 would have looked as big as a mountain, and yet he only complained that he "lost all his baggage, consisting of necessary wearing apparel and traveling conveniences, and all his personal effects, including his necessary traveling expenses and money in the possession of the plaintiff at the time, all of which he was compelled to forsake in his flight from said vessel." He fixes the value of all this at \$500. The language is peculiar—"necessary traveling expenses and money in the possession of the plaintiff at the time." I can interpret that allegation by the light of what I now know. He pinned the bulk of his money into his coat pocket, and kept out a small amount which he placed in his trousers pocket for his New York trip, which he calls necessary traveling expenses. The coat and trousers were both left behind, and so he lost both sums. It is queer, though, that he puts the smaller amount first. It would be easy for a man who had placed \$300 in his inside pocket to magnify it into \$800 as the years rolled by. If I give him, for lost effects and money, all that he asked for in the City Court, he ought not to feel badly in his mind.

To go back, after pinning the money in his pocket, he went to the dock in New Haven and bought a ticket for New York. He bunked in the hold, taking off his coat, trousers, and shoes. He was awakened by the shock when the boat struck the rock, and found a heavy volume of water rushing into the cabin. In a dazed condition and intensely frightened, he ran to the stairs and up to the deck, leaving his belongings behind him. By the way, the fright must have been more than intense if it forced him to leave his coat behind him, with so much money in the pocket as he says he placed there, but I only throw this in by way of exclamation. He, after 10 minutes, still minus his clothes, with four other passengers, got into a small boat which was fastened by a line to the ship. The captain had ordered the boat lowered, and knew what was done. The small boat became loosened from the ship, and drifted away into the darkness. No one belonging to the ship was in the boat, or in control of it, after the claimant entered. The boat was out on the waters of the Sound for many hours, and at about noon of that day its occupants landed at some distance from a farm house, at which they found food and shelter. The claimant was not a pleasant companion to his fellow castaways, and his conduct was such as to dampen the feeling which one would naturally have for a person in such a plight. He lost, however, all his belongings except what he wore when he jumped from his sleep into the water of the cabin. He was chilled and exhausted. On that same day he reached friends in Brooklyn, who cared for him, and from whose shelter he



set in operation the suit in the City Court above mentioned. He had two or three more or less bad months, but he appears to have taken up work again for his former employer in Montowese about as soon as the real outdoor work of a farm was ready to be turned off. He had some medical advice, and used some liniments and other medical supplies for muscular rheumatism. He states the cost thereof in round numbers, but nothing very definite about it. The New Haven doctor says the man came to him three times for liniments on account of his troubles, and he charged him \$1 a visit. The claimant testified that he spent \$60 to \$70 on the doctor and medicines after he returned to Montowese. His testimony about the Brooklyn illness is of the same kind.

I think that \$300 for his pain, expense, and loss of time is ample. He can have that, and he can have \$500 for his lost effects and money.

Those in charge of the ship were clearly negligent in permitting the claimant to embark in the small boat without a competent seaman in charge and control thereof. That negligence makes the ship responsible for this claim.

The claimant is entitled to \$800 and costs.

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#### THE DRUMELTON.

(District Court, S. D. New York. December 13, 1907.)

1. SEAMEN—INJURY IN SERVICE—DUTY OF VESSEL TO PROCURE MEDICAL ATTENDANCE.

Where a seaman serving on a bark on a voyage from New York to South Africa had his leg broken, and the bones were set by an officer, and he was given good care, the vessel was not under duty two or three weeks afterward to go 200 miles out of her course to obtain medical treatment at Cape Verde Islands, of which she had no chart, there being no request therefor by the injured man nor apparent necessity for it, and no evidence that competent medical attendance could have been there procured.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, § 39.]

2. SAME—LIABILITY OF VESSEL FOR INJURY TO SEAMEN—DEFECTIVE STRUCTURE OF VESSEL.

Where an engine cover fell from a deckhouse on a vessel, and injured a seaman by reason of the insufficient fastening of a cleat to which it was lashed, which cleat was a permanent fitting of the vessel, the defect rendered her unseaworthy, and liable to the seaman for his injury, whether the cleat was fastened by the builders or by the officers of the ship after she was in commission.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Seamen, § 188.

Rights and liabilities of seamen as to medical treatment, see note to The Cuzco, 83 C. C. A. 186.]

In Admiralty. On final hearing.

Libelant was a seaman on the Drumelton, bound from New York to South Africa. On the voyage a wooden donkey engine cover weighing over 200 pounds fell from the forward deckhouse to the spar deck, breaking Lincoln's leg. He was cared for as well as the conveniences on the ship permitted, and his leg set by one of the officers. At the time of trial libelant was in good health for a man of 67, but his leg was crooked; the broken pieces of bone having partially slipped past each other, owing probably to unskillful setting.

Between two and three weeks after the injury the Drumelton passed within about 200 miles of the Cape Verde Islands. Libelant never requested that the ship put in there. The libel claims damages for the original injury, and not putting in to the Cape Verde Islands for surgical assistance.

Abbott & Coyne, for libelant.

Convers & Kirlin, for claimant.

HOUGH, District Judge. The damage claim for failure to put into the Cape Verde Islands is very clearly an afterthought. Indeed, so far as the testimony shows, libelant has never thought of it down to the trial. He was humanely treated, and given the best care that the ship could afford. There was nothing in the nature of a leg fracture, supposed to be of one of the small bones only, to leave the master "no alternative, as a reasonable and prudent man exercising a sound judgment and acting for the best interests of all concerned, but to depart from the usual course of his voyage." There is no evidence that competent medical assistance could have been obtained at Cape Verde, and there is evidence that it would have been distinctly dangerous for a vessel of the size of the Drumelton to go there, being wholly unprovided with proper charts. I think this portion of the case falls far short of the rules laid down in the *Cuzco*, 154 Fed. 177, 83 C. C. A. 181.

According to libelant's belief (and he seemed a very honest seaman), the donkey engine cover fell upon him because proper lashings, although provided, had not been made fast. If this be true, he is certainly not entitled to any recovery under the fourth statement of law in *The Osceola*, 189 U. S. 175, 23 Sup. Ct. 483, 47 L. Ed. 760. But in this explanation of the accident I think he is mistaken. There is no reason to doubt the evidence of the ship's officers that the cover fell because the lashings were by the force of the sea or the wind, or both, torn from their fastenings, and that by such violence at least one cleat to which the lashing was attached was wrenched from the deck. If this accident had occurred through peril of the sea in any proper sense of that phrase, it would be equally true that the libelant would not be entitled to a recovery, and the entries in the log and some of the testimony on the part of the claimant are clearly calculated to produce the impression that this tearing out of the cleat was the unavoidable result of extraordinary sea violence. But the testimony does not bear out the argument based on this assumption. At the time of injury this four-masted bark was carrying all sail, except, perhaps, her outer jib and certainly her royals, and during the sea day covering the time of the injury she maintained substantially the same sail and averaged over 10 knots an hour. These facts cannot be overlooked, and prevent the belief that the cleat was torn from its bed by unusual violence of the ocean. I am convinced that the injury was received because the cleat was insufficient and unfit for the force which might reasonably be expected to affect it, and which did actually tear it out. If this be true, as I think it is, the Drumelton was in respect of this cleat unseaworthy; that is, she had a permanent appliance, a part of her structure, not reasonably fitted to withstand the usage ordi-

narily to be expected in the course of an ordinary voyage. This I believe to be the doctrine of the second declaration of law in *The Osceola*, supra. The distinction between that which is a permanent and irremovable part of the structure of a vessel and that which is detachable and in its use temporary is well illustrated by the judgment in *Hedley v. Pinckney & Sons S. S. Co.* (1894) App. Cases, 222. The failure in that case to put and maintain in place the stanchions and rails which were designed to prevent such accident as was there considered was negligence of the master and officers; but, if no stanchions and rails had been provided, or if put in place had been insufficient for the reasonably to be expected violence of the sea, the judgment in the case cited would have been different.

It is, however, ingeniously argued, that because the defectively fastened cleat was in and of itself a good cleat, fastened with good spikes and put in place by the officers of the ship themselves, the fastening of this good cleat with good spikes to a weak piece of wood was negligence, and no more. This proves too much, for it would necessarily follow that an owner might hand his vessel over to the master and officers incomplete in numerous minor, but vital details, leaving it to them to finish the ship, and then claim, if defects appeared, that the vessel was not unseaworthy, because the defective workmanship resulting from the labors of the master and officers was no more than negligence in the operation or management of the vessel. This cannot be. The ship and her permanent appliances constitute an entirety, and it can make no difference whether such entirety be produced by the labors of the officers and master or those of a shipwright. The defect of unseaworthiness is the same defect, whether it be the result of workmanship before or after she is in commission.

For these reasons, I think Lincoln is entitled to some indemnity for his injuries. Considering his age, the full payment of all his wages and expenses, and the great consideration with which he was treated by his superiors, I think a small indemnity will be sufficient.

There will be a decree for the libellant for \$600, and costs.

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#### UNITED STATES v. BRAUN & FITTS.

(District Court, D. New Jersey. December 30, 1907.)

#### FOOD—ACT REGULATING SALE OF OLEOMARGARINE—CORPORATIONS—CRIMES—PUNISHMENT BY IMPRISONMENT.

Act Cong. May 9, 1902, c. 784, § 5, 32 Stat. 196 [U. S. Comp. St. Supp. 1907, p. 640], regulating the sale of oleomargarine, provides that any person, firm, or corporation violating any of the provisions of the section should, on conviction, be punished by a fine or imprisonment or both, while section 6 (32 Stat. 197 [U. S. Comp. St. Supp. 1907, p. 641]) declares that wholesale dealers shall keep books and make such returns as is required by the Commissioner of Internal Revenue, and that "any person who willfully violates the provisions of the section" shall be fined not less than \$50 and not exceeding \$500, and be imprisoned not less than 30 days nor more than 6 months. *Held* that, since in case of a conviction for violating

section 6, the court is bound to include imprisonment as a part of the punishment which could not be imposed on a corporation, such section is not applicable to a corporation.

On Motion for New Trial.

Walter H. Bacon, Asst. Dist. Atty.

William H. Speer and J. Merritt Lane, for defendant.

LANNING, District Judge. The defendant is a corporation of the state of Illinois, and has been convicted by a jury upon an indictment founded on section 6 of the Oleomargarine Act of May 9, 1902, c. 784, 32 Stat. 197 [U. S. Comp. St. Supp. 1907, p. 641], which is as follows:

"That wholesale dealers in oleomargarine \* \* \* shall keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require; and such books shall be open at all times to the inspection of any internal revenue officer or agent. And any person who willfully violates any of the provisions of this section shall for each such offense be fined not less than fifty dollars and not exceeding five hundred dollars, and imprisoned not less than thirty days nor more than six months."

At the trial the defendant offered no evidence, and asked for a direction to the jury that it render a verdict of "not guilty" on the ground that the section above quoted is not applicable to a corporation. The request was denied, but with an intimation that, in the event of a conviction by the jury, the court would hear argument on the question upon a motion to set aside the verdict and quash the indictment. Such an argument has now been heard.

The point urged in behalf of the defendant is that the section provides for the punishment only of any "person" who "willfully violates" any of its provisions, and that the punishment must be both fine and imprisonment. The provision of section 5 of the act is referred to as giving force to the argument. The concluding words of that section are:

"Any person, firm or corporation violating any of the provisions of this section, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment not less than one month nor more than six months, or by both said punishments, in the discretion of the court."

Section 5 applies, in express terms, to corporations, and gives the court discretionary power to punish either by fine or imprisonment, or both. Since a corporation cannot be imprisoned, may the court, under section 6, disregard so much of that section as prescribes punishment by imprisonment and punish only by fine? One may not easily discover a reason for including corporations in the provisions of section 5 and excluding them from the provisions of section 6. Each of the sections must be read, however, in the light of the ordinary rules of construction. One of those rules is that, in a criminal case in the courts of the United States, the judgment must conform strictly to the statute. In the *Karstendick Case*, 93 U. S. 396, 399, 23 L. Ed. 889, Mr. Chief Justice Waite, in applying that rule, declares that "in cases where the statute makes hard labor a part of the punishment, it is im-

perative upon the court to include that in its sentence." This language has been frequently quoted in subsequent opinions as a correct statement of the law. See *In re Mills*, 135 U. S. 266, 10 Sup. Ct. 762, 34 L. Ed. 107; *United States v. Pridgeon*, 153 U. S. 60, 14 Sup. Ct. 746, 38 L. Ed. 631; *In re Johnson* (C. C.) 46 Fed. 481; *Harman v. United States* (C. C.) 50 Fed. 922; *In re Christian* (C. C.) 82 Fed. 200; *Whitworth v. United States*, 114 Fed. 303, 52 C. C. A. 214. In *Woodruff v. United States* (C. C.) 58 Fed. 766, Judge Caldwell held, in a case in which the statute prescribed a penalty of fine and imprisonment, that a sentence of imprisonment only was erroneous and the judgment was reversed.

The counsel for the government insists that the defendant in the present case should be punished by the imposition of a fine. But the section on which the indictment stands requires that a defendant convicted under it shall be punished both by fine and imprisonment. The court has no authority to impose a fine only. The rule of construction above referred to will not permit the court to impose a fine without imprisonment, or imprisonment without a fine, where the Congress has said it shall impose both fine and imprisonment. Furthermore, the fact that section 6 does not expressly include corporations amongst the parties who may be punished thereunder, while they are expressly included in the provisions of section 5, and the fact that the penal provisions of section 6 are applicable only to "any person" who "willfully" violates the provisions of that section, show that it was not the legislative intent by section 6 to regulate in any wise the business of any corporation. It may be that such a construction discloses a serious defect in the law; but, if so, that defect must be cured by congressional and not judicial legislation.

The verdict of the jury will be set aside, and the indictment quashed on the grounds presented at the trial.

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In re SCHINDLER.

(District Court, S. D. New York. December 28, 1907.)

**BANKRUPTCY—PROPERTY VESTING IN TRUSTEE—SALES—MEMORANDUM TRANSACTIONS—SALE OR RETURN.**

Where goods were delivered to a bankrupt on memorandum, the expectation of both parties being that, if the bankrupt signified his desire to keep the goods within 30 days from delivery, they should be charged to him, otherwise they should be returned, the transaction constituted a "sale or return," the title remaining in the seller until the expiration of the buyer's option, so that, on the buyer's becoming a bankrupt, the seller was entitled to a return of all such goods as had been delivered to the bankrupt within 30 days prior to the filing of the bankruptcy petition.

A petition in bankruptcy was filed against Schindler October 23d. On the previous September 21st he obtained from Dommerich & Co. certain goods "on memorandum," and in like manner obtained certain other goods on September 30th. By this motion Dommerich & Co. seek to recover the merchandise, alleging that when the petition was filed the title to the same was in them.

James, Schell & Elkus, for Dommerich.  
Engel, Engel & Oppenheimer, for receiver in bankruptcy.

HOUGH, District Judge. The inquiry concerns the nature of "memorandum" transactions now so common in mercantile circles. The question is primarily one of fact, and from the affidavits submitted I find that the goods when delivered were accompanied by an invoice, stating their delivery on "memorandum," and declaring them to be at risk of the person to whom delivery made. The invoice did not state any charge against Schindler, but did give the price per yard of the material delivered. The expectation of both parties was that, if Schindler signified his desire to keep the goods within 30 days from delivery, they would be charged to him on the vendor's books. If he did nothing, they were charged as of course at the expiration of the 30-day period. Within 30 days the goods could be returned without liability on Schindler's part. So far as the bankrupt was concerned, he preferred to take goods on memorandum rather than by immediate purchase, chiefly, if not wholly, because his term of credit would run from the end of the 30-day period rather than from date of delivery. This desire of his does not in my opinion change the legal result. Schindler had a 30-day option to purchase the goods if he liked. The privilege of return rested entirely with him, and was not dependent upon any act of Dommerich's. It was therefore a contract of "sale or return" of the kind described as a purchase if the purchaser likes, and within the ruling of *Hunt v. Wyman*, 100 Mass. 198, approved in *Sturm v. Boker*, 150 U. S. 329, 14 Sup. Ct. 99, 37 L. Ed. 1093, and again in *Guss v. Nelson*, 200 U. S. 302, 26 Sup. Ct. 260, 50 L. Ed. 489, and also followed in *Carter v. Wallace*, 35 Hun, 189. Title did not pass to Schindler until the exercise or expiration of his option; expiration being by agreement the equivalent of affirmative action.

The receiver will therefore surrender the goods received on September 30th, and the motion will be denied as to the goods delivered on September 21st.

## PENNSYLVANIA STEEL CO. et al. v. NEW YORK CITY RY. CO. et al.

(Circuit Court, S. D. New York. January 4, 1908.)

## RECEIVERS—INTEREST ON BONDS—ACCOUNTING.

Where, on an application to require receivers of a railway company to pay interest on certain bonds, a report of assets and liabilities had been made on behalf of the bondholders, but no accountant had been applied for on behalf of the stockholders, and the report made might not be correct in all respects, a master would be appointed to take evidence with reference to the account and report the same to the court.

See 157 Fed. 440.

Mr. Coudert, for the Attorney General and the state receivers.

Mr. Kirlin, for the Metropolitan Street Railway Company.

Mr. Kramer, for a committee (not yet advertised) of minority stockholders of the Metropolitan.

Mr. Thacher, for a committee of Metropolitan stockholders, John I. Waterbury, chairman.

Mr. Geller, for a committee of bondholders of the Metropolitan Street Railway Company Four Per Cent. Refunding Bonds, of which Edwin S. Marston is chairman.

Mr. Quackenbush, for the New York City Railway Company.

Mr. Catchings, as general creditor of the New York City Railway Company.

Edward M. Shepard, for a committee of Third Avenue stockholders, Edward M. Kremer, chairman.

Mr. Winthrop, for the Morton Trust Company.

Thomas & Oppenheimer, for "a substantial number of bondholders of the Third Avenue."

Mr. Bowers, for a committee of bondholders under the Third Avenue consolidated mortgage, of which James Wallace is chairman.

Mr. Blanc, for the Farmers' Loan & Trust Company, trustee of the Third Avenue first mortgage.

Mr. Wollman, for Mr. Kohn, a petitioner for intervention.

Arthur H. Masten, for petitioner.

LACOMBE, Circuit Judge. At the hearing of December 19th on petition of receivers for instructions as to what they should do in regard to interest about to fall due on Third Avenue railroad bonds, and in such briefs as have been since submitted, the general consensus of opinion seemed to be that counsel representing the various interests desired more time to examine into the facts before making any suggestions. No one suggested any way to overcome the practical difficulty indicated in receiver's petition, viz., the lack of funds to pay the \$875,000 of interest on such bonds, which fell due January 1, 1908, or any substantial part thereof. The receivers, therefore, did not pay such interest.

Now comes the Third Avenue Railroad Company upon a notice of motion for December 31st, adjourned to January 3d, and asks that the receivers be directed to pay such interest. Upon this hearing it was suggested that it be sent to a master to take proofs upon which the existing situation can be more fully set forth, and it appears that

by reason of the terms of the mortgage there is a period of 60 days' grace for payment of the mortgage interest, so that no rights of any one will be cut off in the interim. That course will be taken, a special master will be appointed to take proofs upon issues presented by the petition of Third Avenue Railroad Company and such other proofs as may be relevant thereto, and report thereon with all convenient speed. Upon the coming in of such report there will be a further hearing on this petition.

It is proper and desirable, however, that the court should call attention to the great importance of expedition on the part of all concerned. At the very outset of this receivership, as soon as it learned through receivers that very heavy payments under this Third Avenue lease were to fall due in the near future, the court in a memorandum filed early in October intimated that the question of their payment would soon have to be taken up. It was supposed that all different interests would move promptly to secure representation through committees and counsel, and the accountants employed by the receivers were instructed to give their first attention to the subject of Third Avenue operation. They did so, and after several weeks of investigation prepared an elaborate report, which was the basis of receivers' application (December 13th) for instructions. The receivers also were instructed to (and did) accord right of way to any accountants who might apply to examine the records on behalf of Third Avenue interests. Such an examination was made on behalf of Third Avenue bondholders, and it is understood that a report has been made by these accountants; but, of course, that has not been laid before receivers or the court. No accountant applied on behalf of stockholders. Such reports as these, made after careful investigation by wholly disinterested and competent experts, are, in the nature of things, more persuasive than the suggestions and assertions of persons who have not made a like investigation. It is by such investigations and reports that a court obtains the information on which instructions to receivers are given. Nevertheless they may be incorrect in some respects, either as to facts reported, or as to facts overlooked, or deductions drawn; and for that reason a hearing before the master seems to be the only way by which the court can be more fully advised in advance of final instructions. But the importance of prompt action on the part of every one interested in presenting facts before the master is surely manifest. The receivers will afford every facility to such accountant as the petitioner may send to examine the records bearing on Third Avenue operation; and they will forthwith put on file in the clerk's office a copy of the report of the accountants, Price Waterhouse & Co., as to that road.

Counsel for Third Avenue Railroad may take an order for appointment of special master to take testimony and report as above indicated. Order to be settled, on two days' notice, any day after 2 p. m.



## BENJAMIN MOORE &amp; CO. v. AUWELL.

(Circuit Court, E. D. New York. January 3, 1908.)

## TRADE-MARKS AND TRADE-NAMES—INFRINGEMENT—PRELIMINARY INJUNCTION.

Where, in a suit to restrain defendant from using the name "Muresco" to indicate a wall finishing product sold in competition with complainant's product, called "Murafresco," defendant submitted affidavits claiming a prior use of defendant's word in the trade for a similar product and a general use of combinations of the stem of the Latin word "murus" with various terminations, no adjudication having been had in favor of complainant, a preliminary injunction would be denied under the rule that such a writ will not be granted except when the papers present a clear case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 108.]

Clifton V. Edwards (Robert Goeller and Jacob H. Shaffer, of counsel), for complainant.

Archibald Cox, for defendant.

CHATFIELD, District Judge. This motion is for a preliminary injunction against the defendant, which is putting upon the market a wall finishing product called "Murafresco." The complainant has for some time sold, and has built up a considerable trade in a product which it has named "Muresco." This name of "Muresco" is not only well known, but is a component part of complainant's trade-mark, which could have been used with reference to all of the complainant's products. The complainant, however, has not sold its wares generally under the guise of Muresco products, but has made the word known to the trade generally as a cognomen for the wall finishing article alone. Affidavits claiming a prior use of the word "Murafresco" in the trade for a similar product, and a somewhat general use of combinations of the stem of the Latin word "murus," with the various terminations, have been submitted by defendant. The rule that no preliminary injunction will be granted "except when the papers present a clear case" has often been stated, and is set forth in a case much like the present in principle, viz., *Star Co. v. Colver* Pub. House (C. C.) 141 Fed. 129. No adjudication in favor of the complainant has been had in any court, and no decision upon a motion like the present can be made, without in effect deciding the merits of the action upon affidavits, rather than upon the testimony which shall be hereafter taken upon the trial of the cause.

The motion for a preliminary injunction, therefore, should be denied.

### NEW YORK LIFE INS. CO. v. BOARD OF ASSESSORS FOR THE PARISH OF ORLEANS et al.

(Circuit Court, E. D. Louisiana. January 11, 1908.)

#### 1. TAXATION—TAXABLE CREDITS—"POLICY LOANS" MADE BY LIFE INSURANCE COMPANY.

Complainant, a New York life insurance corporation, made so-called "policy loans" to policy holders in Louisiana; the transactions being as follows: When sufficient premiums had been paid on a policy to give it a recognized reserve value, complainant on application would advance the amount of such reserve value to the holder, taking the policy in

pledge, and requiring the insured to pay in addition to each future annual premium a sum equal to the interest on the amount of the advance. Such advance was never collected until the policy matured or lapsed, when it was deducted from the amount due from complainant thereon. Complainant also made to some policy holders what were called "premium lien note loans," which were essentially the same as the policy loans; the only difference being that, instead of making an advance, complainant extended credit for premiums when due, taking notes which were in like manner charged against the reserve value of the policy. *Held*, that the transactions were not loans in either case, but were merely advance payments on the earned value of the policies, and did not constitute "credits" in favor of complainant, which were taxable.

2. SAME—BANK DEPOSIT—MONEY DEPOSITED SOLELY FOR TRANSMISSION.

A bank deposit kept by a New York life insurance company in New Orleans, in which collections were placed solely for transmission to New York, the amount deposited being reported daily, and a draft made each week by the treasurer of the company for the full amount of the week's deposits, against which no one in Louisiana was authorized to draw, and no part of which was used in the company's business in that state, is not taxable in Louisiana.

In Equity.

This is a suit, in effect, to annul an assessment which is alleged to be illegal, null, and void. The New York Life Insurance Company, a New York corporation, seeks herein to have annulled, as illegal and void, an assessment against it for property taxes for the year 1906, made by the board of assessors for the parish of Orleans, state of Louisiana. The Louisiana statute requires every taxpayer to make annually in January a written and sworn return of all the taxable property owned by him in the state. When the board of assessors are satisfied that such return is incorrect or untrue, they are given authority to disregard it, and, from the best information they can obtain, to make such assessment of the taxpayer as in their judgment is right and fair. If the taxpayer objects to the assessment thus made by the board, he must make to them a written application to cancel their assessment and adopt his own return. When the board refuses this application, the taxpayer must then seek relief before the committee of review of the city council, and, if that committee also denies his request for the reduction or cancellation of the board's assessment, he is then permitted to bring suit against the board of assessors to demand the reduction or cancellation of the assessment complained of. The right to bring this suit is conditioned upon the taxpayer's prior compliance with the statutory requirements, first, to make a written and sworn return to the board of his taxable property; second, to apply to the board for the relief he claims; and, third, if the board refuses such relief, then to apply for it before the committee of review of assessments of the city council.

On January 25, 1906, complainant made in proper form and filed with the board of assessors its written and sworn return of its taxable property in Louisiana, as follows:

Money in possession, on deposit, or in hand.....	\$1,000 00
Furniture .....	500 00
	<hr/>
	\$1,500 00

The board of assessors declined to accept the above as a correct return of complainant's taxable property in Louisiana, and proceeded to enter in lieu thereof the following assessment against complainant on the assessment rolls for 1906, viz.:

Money loaned on interest, all credits, and all bills receivable for money loaned or advanced for goods sold..	\$568,900 00
Money in possession, on deposit, or in hand.....	51,700 00
Furniture .....	500 00
	<hr/>
	\$621,100 00

The board's assessment includes complainant's return of \$1,500 and adds thereto the further sum of \$619,600. The tax due on the assessment shown by complainant's return is \$42. The tax due on the assessment as made by the board of assessors would be \$17,390.80. The complainant tendered the tax admitted to be due on its own return (\$42) and brought this suit to enjoin the collection of the remainder of the tax (\$17,348.80), calculated on the board's added assessment of \$619,600. The bill herein alleges that the complainant complied with the three statutory requirements and then tendered the tax admitted to be due. It is conceded that these averments are true and that the complainant is, therefore, properly before the court. The bill then alleges:

First. That the item on the board's assessment reading, "Money loaned on interest, all credits, and all bills receivable for money loaned or advanced for goods sold, \$568,900," is based wholly on the board's conclusion that certain arrangements between complainant and its Louisiana policy holders made complainant the creditor of such Louisiana policy holders in the sum of \$568,900. And it is alleged in the bill or urged in oral argument that this conclusion of the board was erroneous for two reasons, substantially as follows: (a) That the said arrangements were not in fact or in law loans by complainant to its Louisiana policy holders, but were in reality partial and advanced settlements made by complainant with these policy holders, pursuant to stipulations in the policies, of sums already earned under the policies, and it is claimed that the terms of these arrangements do no more than provide for crediting the complainant in its final settlement of the policies with the amounts so paid in advance to the policy holders, and at the same time secure to complainant the right to make this compensation. (b) That the arrangements in question, if held to be loans, were negotiated and made payable in the state of New York, and were evidenced by written instruments always kept in the state of New York, and which were never intended to be sent, nor ever by any business exigency, required to be sent, nor ever in fact sent for any purpose, to the state of Louisiana.

Second. The bill alleges that the increase made by the board in the item reading "Money in possession, on deposit, or in hand, \$51,700," is based on an attempt by the board to tax money belonging to complainant while in transit or process of remission, from Louisiana to New York; the facts being as follows: Complainant keeps two bank accounts in the city of New Orleans, La., known as "No. 1 Account" and "No. 2 Account." In No. 1 account are deposited all premiums collected for complainant in Louisiana. Complainant's cashier in New Orleans mails every evening to complainant in New York a statement of the deposits on that day in this account. Complainant's treasurer in New York on Thursday of each week draws for the entire amount of the No. 1 account, as shown by the daily statements for the past week. The deposits in the No. 1 account are, so the bill alleges, solely for the purpose of transmission to New York, and no person in Louisiana has, or ever has had, the right to draw against this account or to make use of it for any purpose, and as a matter of fact the money in this account never has been drawn against or used in Louisiana, and no use has ever been made of the account, except for remission to New York in the way just stated. In No. 2 account money is deposited to an amount never to exceed \$1,000 to pay the current expenses and disbursements of the New Orleans office, and the cashier in New Orleans has authority to draw on this No. 2 account. The board of assessors insist that complainant is taxable on the No. 1 account, as well as on the No. 2 account, and accordingly raised the assessment so as to include the average balances in the No. 1 account, thus making the item now in question \$51,700, instead of \$1,000. The bill claims that the money in the No. 1 account is money in transit, or in process of transmission, from Louisiana to New York, and is not taxable in Louisiana.

The answer admits, first, that complainant is a New York corporation, organized and domiciled as alleged in the bill, and generally engaged in the life insurance business in the manner stated in the bill, and that it has duly paid all license taxes imposed upon it by the Louisiana law; second, that the increase in complainant's assessment was made as alleged in the bill. But the answer insists, (a) that complainant had, within the state of Louisi-

ana, during the year 1906, credits to an amount much greater than \$568,900; (b) that the amount on deposit in No. 1 account was properly and legally assessed, "for the reason that it is money in this jurisdiction, and enjoys the protection of this government, and is in no wise distinguished from any other taxable property so situated." It is conceded that complainant has no credits in Louisiana, unless such credits, if any, as arise from the arrangements between complainant and its policy holders hereinafter to be considered; and there is no dispute as to the facts of these arrangements. All the evidence respecting them was that given by complainant's own officers and witnesses, and no attempt was made to contradict or vary the account of the transactions as given by them.

Rice & Montgomery and James H. McIntosh, for complainant.

Geo. H. Terriberry, F. C. Zacharie, S. L. Gilmore, and H. G. Dupre, for defendant.

SAUNDERS, District Judge (after stating the facts as above). Under the foregoing pleadings and facts the issues to be decided are, first, whether the arrangements between complainant and its policy holders in Louisiana—said arrangements being known as either "policy loans" or "premium lien note loans"—constitute complainant a creditor of the Louisiana policy holders making such arrangements with it; and, second, whether the balances in complainant's No. 1 account in New Orleans are taxable in Louisiana. We will now consider the transactions out of which the board of assessors assume that credits have arisen in favor of the New York Life Insurance Company and on which they are taxable in Louisiana.

1. It is admitted, and it is, moreover, proved, that the complainant has no credits of any kind in the state of Louisiana, except such credits, if any, as grow out of those arrangements with its Louisiana policy holders that are known as either "policy loans" or "premium lien note loans." If then these arrangements are not, in reality, loans by complainant to its Louisiana policy holders, if they are essentially nothing but partial and anticipated settlements by complainant of its ultimate liability under the policies to its policy holders, then complainant has no credits in any shape in Louisiana on which it can be taxed there. The general and undisputed facts with regard to these two transactions are briefly as follows:

(a) Policy Loans. When the annual premium stipulated in a policy of life insurance has been paid for a certain number of years, the policy is said to have acquired, or to have earned, a "reserve value" in favor of the insured; that is, even though the insured should surrender the policy, or should fail to keep it up, he would none the less be entitled to demand that the company pay him a sum representing the reserve value of the policy. This reserve is, therefore, a fixed and certain sum, which the company is bound, in all events, to pay the insured at the maturity of the policy. But ordinarily it cannot be compelled to pay the reserve value before the policy matures. The amount of the reserve, at any given date, can always be accurately computed, and is in a compound ratio to the amount of the annual premium and the number of years for which the annual premium has been paid.

For the purposes of this case it is not material to consider the principles on which a reserve value is allowed to a life insurance policy holder, nor is it material to consider the factors in the calculation by

which actuaries compute the exact amount of this reserve. So far as concerns the matters involved in this suit, it suffices to recognize the fact that after it has been in force for a certain time every policy does acquire a reserve value as above stated, and that this reserve value increases steadily from year to year. After a policy has acquired a reserve value, the policy holder may obtain the use thereof in either of two ways: (1) A policy holder may not care to pay, or may not see his way to pay, the annual premiums accruing on the policy in the future, and may therefore decide to give up the policy altogether and to demand the payment to him of the whole of the reserve value. This election would completely and finally terminate the relations between the insured and the company, and would forever cut the insured off from any right to claim further benefits under the policy at its regular maturity. (2) If the insured is able and desirous to continue further payments of the annual premium on the policy, and so to keep it in force until it regularly matures, he may, with the consent of the company, but not as a matter of absolute right, take down the reserve value which the policy has already earned at a given date, under an agreement binding him to credit the company in the final settlement of its liability under the policy when it matures with the amount so taken down in advance by the policy holder. The company has the right to permit, or to refuse to permit, such anticipated withdrawal by the policy holder, and if it does consent to the withdrawal it does so on two conditions, viz.: (a) That the company shall be strictly secured in its right to deduct, in the ultimate settlement of its liability under the policy, the amount of the reserve so paid in advance of maturity to the policy holder. The most effective way to secure this right is by requiring the policy holder to deposit the policy in the hands of the company, with the agreement consenting to the company's crediting the advance payment in its final settlement. This delivery of the policy into the company's possession is naturally and not improperly spoken of as a "pledge." (b) That the interest-earning capacity of the fund from which the reserve value is taken shall not be diminished by such anticipated payment.

In the operation of all insurance companies, the amount of the annual premiums charged, the results promised by the companies to their policy holders, and the provision of a fund out of which the policies are eventually to be paid at maturity, are based upon calculations as to the total fund which will be accumulated from payments of annual premiums and from the interest that will be derived from the investment of these annual premiums as paid, and the reinvestment of this interest when earned, and so on. These calculations assume that all the premiums paid will constitute an interest-earning fund. Obviously, then, the calculations would be vitiated, and the results would be less than computed, if parts of the premium fund were used to pay reserve values and thus be withdrawn from the interest-earning fund. But this error can be avoided if the persons withdrawing earned reserve values and yet continuing their policies in force are required to pay annually to the company the same sum which the amount withdrawn by them would have earned as interest if it had not been paid to them. It is estimated that this fund from which the reserve values

are taken earns an average interest of 5 per cent. per annum. In order, therefore, that the final result may not be impaired, the policy holder who takes down the earned reserve value of his policy before its maturity must pay a sum equal to 5 per cent. per annum interest on the amount which he thus takes down. This additional payment may be called "interest," or it may be called an "additional premium." As a matter of fact it is essentially an additional premium paid by the policy holder in order to obtain the privilege of drawing down the earned reserve value of his policy. It is thereafter treated strictly as a part of the premium. The company requires payment of this additional sum on the same day on which the original premium is paid. The same notice is sent by the company to the policy holder to remind the latter of the approaching advent of the day on which the premium and the additional sum will become due, and failure to pay this additional sum is attended by the same consequences which attend the failure to pay the original premium.

As I have just stated, the company is not ordinarily under any obligation to pay to a policy holder the earned reserve value of a policy until the policy matures in any of the ways stipulated by its terms and there is a complete and final settlement of the company's entire liability under the policy. But the company may, and in many cases does, consent to make this anticipated payment. Before doing so, however, it appears that the company considers the facts of each case. The title to the policy may have become involved, so that it may be questionable who has the legal right to demand and receive the anticipated payment and to agree that it shall be used as a credit to the company in its final settlement under the policy; or it may be that the policy is one which, for business reasons, the company would desire to be relieved from, and in this situation it would not care to give any assistance to the policy holder which might enable him to keep it up. And there may be other business reasons why the company in a particular instance would be unwilling to assist the policy holder by consenting to pay in advance the earned value of the policy. Accordingly, in every instance except in the policies in which there is a contractual agreement to permit the policy holder to take down the earned value whenever he desires, the policy holder must apply to the company for its consent to the arrangement, and must make the arrangement, if at all, on the terms dictated by the company as the conditions of its consent.

The arrangements above described are called "policy loans." This name is from every point of view a misnomer. The transaction is not a loan at all. It is merely a consent by the debtor to pay in advance of the maturity of the debt which he owes, and to pay under conditions which the protection of the debtor's business requires. The personal solvency or desirability of the policy holder as a borrower is not considered at all, but only the sum that the policy has already and certainly earned for the policy holder through the premiums already paid in. No matter how solvent the policy holder may be, he cannot, under the policy loan obtain from the company more than the reserve value already earned by his policy. No matter how insolvent he may be, if the arrangement is made with him, he will get the amount of the reserve value. Neither is the policy holder under any obligation, on

thus obtaining the reserve value of his policy, to repay that amount at any time to the company. His only obligation is to pay an additional premium equal to 5 per cent. on the reserve value drawn down, and to credit the company with the reserve value paid to him in the final settlement between himself and the company.

It may be further noted generally, with regard to the so-called policy loan arrangements, as just described, that it is provided that the policy holder may, if he wishes, return to the company the reserve value which he has taken out, and on such return his obligation to pay the additional sum equal to 5 per cent. of the reserve value taken out at once ceases. But if it is not convenient to the withdrawing policy holder to make this return he cannot be compelled to do so, but may keep the money so paid him until the policy matures, and then simply credit it on the total amount of the company's ultimate liability under the policy. Further, some policies contain statements, printed in the policy or indorsed on them, showing the amount of the reserve value from year to year, and giving the policy holders the right to claim such reserve value on the terms above stated. In other policies there is no such statement, and the policy holder has no right to claim such reserve value, and in every such case, where the policy holder applies for the benefit of the reserve value, it is necessary to require the company's actuary to calculate the amount of the reserve value.

The real nature of the policy loan arrangements is clear enough, if regard be had only to the facts of the situation. It has been greatly obscured, however, by the terms used by the company to designate it. In hereafter referring to the arrangement as a "policy loan," I do not mean to intimate that it is a loan at all. I merely designate by this name the arrangement between the policy holder and the company whereby the policy holder gets immediate use and control of the earned reserve value of the policy. The only evidence in the record as to the conditions and terms under which and the manner in which the arrangements known as "policy loans" are made by the company with its policy holders is that given by the complainant's officers. The defendants have made no effort to contradict or qualify in any particular the testimony of these witnesses, which may therefore be accepted as accurately stating the facts.

Mr. John C. McCall, the secretary of the New York Life Insurance Company, testifies:

"Loans made by the company to policy holders in Louisiana are made because the policy holders hold policy contracts and have paid in cash premiums enough to create a reserve which makes their policy contracts adequate security for the loans; and because they have made application to the company for such loans; and the division of policy loans, on investigating the policy and the title to it, was satisfied the policy as a pledge would adequately secure the repayment of the loan. \* \* \* Some policy contracts provide for loans. Some do not. As a rule, the company will make a loan on the security of any policy upon which premiums in cash have been paid so as to create a reserve which will fully secure the repayment of the amount of the loan applied for, whether the policy provides for the loan or not."

Mr. George C. Newton, superintendent of the division of policy loans, testifies regarding these arrangements as follows:

"The functions of the division [of policy loans] are to receive and consider applications for such loans, to accept or reject them, and, if it accepts them,

to cause the loan contract to be properly executed, and to accept delivery thereof and receive the policy in pledge as security for the repayment of the loan, to pay to the borrower the proceeds of the loan, and to transmit the loan contract and the pledge security to the company's division of policy loan securities, when the loan transaction is completed. \* \* \* The company commenced to make loans or policies in 1892, and has made loans of that kind from 1892 until the present time. Most of the company's policies ever since 1892 have contained an agreement under which the policy holder may obtain from the company a cash loan on the sole security of the policy, on written request at any time after the policy has been in force a specified number of years, if premiums have been paid to the anniversary of the insurance next succeeding the date when the loan might be obtained; the insured to pledge the policy and its accumulations as collateral security for the loan in accordance with the terms of the company's form of loan agreement; the policy in most cases stating the amount of loan available at any given time, and requiring that the loan should bear interest at the rate of 5 per cent. per annum, payable in advance. \* \* \* It has never been the practice of the company to and it never has asked a policy holder to pay a loan as long as his policy continued in force and he paid his interest according to the terms of the loan agreement. It never sent a policy loan agreement into the state of Louisiana for collection, and does not expect to do so. It never collected the amount of a loan, and does not contemplate doing so on any policy made to any policy holder in the state of Louisiana by legal process, either in the state of Louisiana or elsewhere. The company has never made a loan unless it had in its own possession on account of the value of the policy acquired by the payment of premiums thereon in cash ample value as security for the loan. \* \* \* Q. In making loans on policies, you may state, if you know, on what the company places its reliance for their final payment? A. It relies solely for the payment of such loans upon the reserve value of the policy which is pledged as security for the loan. The financial responsibility of the policy holder is never an element that enters into the company's consideration in making such loans or in dealing with them."

The foregoing extracts sufficiently show that the question in every application for the policy loan is whether the company will consent to pay the policy holder in advance the then earned reserve value of the policy. When the policy holder has made application for the so-called policy loan, and the company has agreed to allow his application, the next step is for the policy holder to execute what is known as the "policy loan agreement." That document reads as follows:

#### Policy Loan Agreement.

Whereas, the undersigned have this day duly received from the New York Life Insurance Company ——— dollars (\$———), in cash, as a loan upon policy No. ———, issued by said company on the life of ———: Therefore, in consideration of the premises, the undersigned hereby agrees as follows:

(1) To pay said company interest on said loan at the rate of five per cent. per annum, payable in advance from this date to the next anniversary of said policy, and annually in advance on said anniversary and thereafter.

(2) To pledge, and do hereby pledge, said policy as collateral security for the payment of said loan and interest, and herewith deposit said policy with said company at its home office.

(3) To pay said company said sum when due, with interest, reserving, however, the right to reclaim said policy by repayment of said loan, with interest, at any time before due, said repayment to cancel this agreement without further action.

(4) That said loan shall become due and payable:

(a) Either if any premium on said policy or any interest on said loan is not paid on the date when due, in which event said pledge shall, without demand or notice of any kind, every demand and notice being hereby waived, be foreclosed by said company by deducting the amount due on said loan from



the reserve on said policy computed according to the American Experience Table of Mortality and interest at the rate of four and one-half per cent. per annum; and if after said deduction there is any balance of said reserve as so computed, said balance shall be taken as a single premium of life insurance at the published rates of said company at the time said policy was issued, and shall be applied to purchase upon the life of the insured under said policy, at the age of said insured on said due date, paid-up insurance for such amount as said balance will buy, payable under the same conditions as the original policy, but without premium return, participation in profits, or further payment of premiums.

(b) Or (1) on the maturity of the policy as a death claim or an endowment; (2) on the surrender of the policy for a cash value; (3) on the completion of any tontine or accumulation dividend period. In any such event, the amount due on said loan shall be deducted from the sum to be paid or allowed under said policy.

(5) That the application for said loan was made to said company at its home office in the city of New York, was accepted, the money paid by it, and this agreement made and delivered there; that said principal and interest are payable at said home office; and that this contract is made under and pursuant to the laws of the state of New York, the place of said contract being said home office of said company.

In witness whereof, the said parties hereto have hereunto set their hands and affixed their seals this \_\_\_\_\_ day of \_\_\_\_\_, 190—.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
[L. S.]  
[L. S.]  
[L. S.]

Signed and Sealed in presence of

Forwarded from \_\_\_\_\_ Branch Office, Prem. Paid in full to \_\_\_\_\_,  
\_\_\_\_\_, 190—.

B. N. \$ \_\_\_\_\_,  
\_\_\_\_\_, Cashier.

The foregoing agreement recites that the policy holder has received a stated sum of money as a loan upon a given policy issued by the company, and that in consideration thereof the policy holder agrees to pay annually, in advance, 5 per cent. per annum interest on the amount of said sum, to pledge his policy as collateral to secure the payment of the loan and interest, and, finally, to pay said company said sum when due; and then the agreement goes on to declare that said loan shall become due and payable (1) on the failure to pay any annual premium, or the above stated interest, when due; (2) when the policy matures. That is, the so-called loan agreement expressly provides that the so-called loan shall not be due until the policy matures in one of the ways provided for by its terms, and the so-called loan is then, under the very terms of the loan agreement, to be paid by crediting the amount of the so-called loan on the company's eventual liability under the policy when matured. The stipulation contained in the loan agreement thus demonstrates that the transaction is not a loan, but is a partial payment by the company on account and in reduction of its eventual liability. As long as the 5 per cent. interest on the payment is paid by the policy holder, under the very terms of the loan agreement, he cannot be required to repay the principal, and, as the stipulation shows, the sum charged as interest is, in reality, an additional premium, which is necessitated by the reasons hereinabove stated.

Mr. McCall testifies:

"Notice of interest due on such loans, as well as on premium lien note loans, is made up at the comptroller's department in the home office at the

same time with and as a part of the notice of premium, and is sent by mail to the policy holder at least 15, and not more than 45 days before the due date of the premium and interest; the interest on all loans being made payable the due date of the premium. \* \* \* The receipt of the premium and interest at the home office the company treats as a continuation of the loan, and never takes any formal action in respect of renewal. If the premium or interest is not paid when due, the loan is foreclosed at the home office."

Mr. John J. Mahoney, chief clerk in the note division of the comptroller's department of the New York Life Insurance Company, says, on the same subject:

"The amount of interest due on the anniversary of the policy is made a part of the premium notice that the company sends out before the premium becomes due and the interest is collected with the premium. \* \* \* If, however, default is made in payment of interest on the note, it has always been the company's practice to, and it does, thereupon satisfy the debt evidenced by the note at the home office of the company by deducting the amount of it from the value of the policy."

And he further says:

"Subsequent interest payments are not indorsed on the note, but are indorsed on the company's premium card in the comptroller's department."

Mr. Newton testifies:

"My division figures the interest on policy loans which will be due on the due date of the premium and sends a memorandum thereof to the comptroller's department. That department before the maturity of the premium makes up a notice to the policy holder showing the amount of premium and interest that will be due, the due date thereof, and advising the policy holder that the premium is payable at the home office, but usually also authorizing him to pay it to the cashier of the branch office in his vicinity. If the policy holder pays the premium, he usually also pays the interest, and both are paid either by remitting directly to the home office, where it is received in the comptroller's department, or if they pay to the office in their vicinity, it is reported each day by that office to the comptroller's department, and drawn out of the company's No. 1 bank account by the treasurer's department on Thursday of each week."

It is shown by the evidence that the nonpayment of the so-called interest on policy loans has the same effect in terminating the policy that the nonpayment of the premium itself has. Mr. Newton testifies:

"If interest on the loan was not paid when due, or the policy lapsed for the nonpayment of premium, it was the duty of my division to, and we did, foreclose the loan in the manner described in the loan agreement and sent a letter to the policy holder advising him of the foreclosure."

These notices are in the testimony, and show that the policy holder is informed by them that:

"The premium and interest due on said policy on the — day of —, 190—, not having been paid, the principal of said loan became due, and settlement of said indebtedness has been made in accordance with the terms of the policy, which is returned inclosed, indorsed for — years and — months continued insurance. Yours truly."

The so-called foreclosure is simply treating the policy as matured, just as it would be by the nonpayment of a premium, by death, or by the expiration of a tontine period, or by the effect of any other

condition in the policy. On this assumption the policy holder has various options as to what shall be done with the balance due him under the policy, treated as matured, remaining after crediting the company with the advance payment. The policy holder may apply the balance remaining to his credit on the matured policy, either in purchasing paid-up insurance, or in paying for continued insurance, or he may take the balance down in cash.

To me it is very clear that this entire transaction called the "policy loan" is not in any respect a loan, but is an anticipated settlement made with the consent of the company, and based upon the earned value of the policy at the date of the so-called policy loan. In other words, it is a mere incident and modification of the original contract of insurance on the life of the policy holder. The insurance company acquires no credit under this arrangement, other than the maker of a promissory note would acquire if he made a partial payment upon that note before its maturity. I therefore hold that the policy loan arrangements do not establish any "credits" in favor of the insurance company on which the insurance company can be taxed, either by the laws of Louisiana or by the laws of any other state.

(6) Premium Lien Note Loans. The so-called "premium lien note loan" is merely a modification of the policy loan arrangement, and is based upon the existence of the same reserve value earned by the policy through the cash premiums which have been paid upon it for a given number of years. The policy holder is permitted to make use of this reserve for paying the premiums on his policy under essentially the same conditions which apply to the policy loan contracts hereinabove considered. Mr. Mahoney, in charge of the department that issues the premium lien note loans, testifies about them as follows:

"The complainant has never taken a premium lien note, except from a policy holder in settlement in whole or in part of a renewal premium, nor has it ever taken such note, except in settlement in whole or in part of a renewal premium on a policy upon which enough premiums had theretofore been paid in cash to create a reserve on the policy equal to or greater than the amount of the premium lien note. Under certain forms of policies, and where the policy had acquired by payment of premiums in cash a reserve equal to or greater than the note, the company has sometimes accepted from the policy holder a premium lien note in settlement in whole or in part of a premium when the policy holder could not or would not pay the premium in cash. \* \* \* In acting on such application we have always considered the form of the policy holder's policy contract, the number of premiums that have been paid in cash, and ascertained and considered the reserve value of the policy, and if in view of all these things we are satisfied that the company could safely accept a premium lien note in settlement in whole or in part of the premium, and in all other respects the transaction was such that the company deemed it desirable to accept the premium lien note, we then in my division filled in the company's customary form for premium lien note with the dates, amount, and other data in the blanks left in the form for that purpose. \* \* \* If, however, on considering the application in the note division, it was ascertained that the policy holder's policy was one in respect to which the company did not care to accept a premium lien note, or the cash premiums had been insufficient to create the required reserve, or if the risk was believed to be impaired, or if, for any other reason, we concluded that it would not be advisable to accept a premium lien note, we then and there declined the application."

And again:

"Q. In accepting such notes, on what does the company place its reliance for their final payment? A. It relies for their final payment solely upon the reserve value of the policy, which, of course, is in the company's own possession and control at its home office in the city of New York. The financial responsibility of the maker thereof is never an element considered by the company in determining whether or not we will accept such note. Q. You may state whether or not the company has ever demanded payment of any of such notes? A. It never has. It never accepts such a note, unless it has in its own possession money held for the ultimate benefit of the policy holder with which to pay it."

And with regard to the interest carried by these premium lien notes (the same as the interest carried by the policy loans). Mr. Mahoney says:

"If, however, default is made in payment of interest on the note, it has always been the company's practice to, and it does, thereupon satisfy the debt evidenced by the note at the home office of the company by deducting the amount of it from the value of the policy. The amount of interest due on the anniversary of the policy is made a part of the premium notice that the company sends out before the premium becomes due, and the interest is collected with the premium. Both the premium and the interest are payable at the home office in New York City, but ordinarily the company in the premium notice authorizes the policy holder to pay either directly to the home office or at the company's local office."

The premium lien note reads as follows:

Premium Lien Note.

\$ \_\_\_\_\_, 190—. \_\_\_\_\_ after date I promise to pay to the order of the New York Life Insurance Company at the office of said company in the city of New York, with interest in advance at the rate of five per cent. per annum (for value received), being for premium due \_\_\_\_\_ on policy No. \_\_\_\_\_ issued by said company on the life of \_\_\_\_\_. It is understood and agreed:

(1) That this note may be renewed, if the interest thereon and subsequent premiums on said policy are duly paid.

(2) That if any premium on said policy, or interest on this note, is not paid when due, this note shall thereupon immediately become due and payable, with interest, and shall, without notice of any kind, be paid by deducting the amount due thereon from the sum which by the terms of said policy is applicable to the purchase of insurance in the event of nonpayment of premium or interest when due, the balance only of said sum, if any, to be available for the purchase of insurance under and pursuant to the nonforfeiture provision of said policy.

(3) That in the settlement of any claim or any benefit under said policy before this obligation shall have been fully paid the amount of this note shall be deducted from the amount otherwise payable by said company.

Signature of the person whose life is insured \_\_\_\_\_

Signature of the person or persons for whose benefit the insurance is effected. \_\_\_\_\_

It will be observed that, while the date of payment is given in the premium lien note, yet it is expressly stipulated that if the interest and subsequent premiums on the policy are paid the note shall be renewed, and that the note shall only become due if subsequent premiums or interest are not paid. And the note contains provisions for offsetting the amount of the note in the final settlement of the policy. These premium lien notes are, in all substantial respects, the same as the policy loans, merely evidencing a condition of the arrangement

for giving the policy holder the immediate use of the earned value of the policy under the obligation to allow it as a credit to the company in the eventual settlement of the policy.

Finally, the company issues a few "blue notes," as they are called, which are merely extensions of time for paying premiums when the policy holder is unable to pay them at their maturity. These notes are given simply to evidence an agreement of the company to extend the time for paying the premium, and they contain a clause that, if the note is paid in full by the extended date given on the face of the note, the policy shall continue in force; but "that, if this note is not paid on or before the day it becomes due, it shall thereupon automatically cease to be a claim against the maker," and the policy lapses. These instruments are clearly not credits, but mere agreements to extend the time for paying the premiums.

I therefore find, under the facts above stated, that the complainant company has no credits of any kind whatever in the state of Louisiana, and the injunction against the collection of the tax on the assessment of \$568,900 must therefore issue.

2. With regard to the attempt of the assessors to include in their assessment the average balances in No. 1 bank account in New Orleans, the evidence establishes conclusively that the collections for complainant in Louisiana are deposited in this account solely for transmission, and that they are not used, or drawn against, by any person in the state of Louisiana. It certainly could not be contended that if these collections were at once invested in New York exchange, without being put in bank at all, they would become subject to taxation. That money deposited in bank in one state, solely for transmission through such bank to another state, is not taxable in the state in which the bank is located, was expressly decided in *Metropolitan Life Ins. Co. v. Newark*, 62 N. J. Law, 74, 40 Atl. 573; and that decision seems to me to state the law correctly. The cases in Louisiana which have held that deposits in bank to the credit of a nonresident are taxable in this state proceeded on the admitted fact that the deposits were controlled by some agent of the depositor in Louisiana, and were used for the purposes of the depositor's business in Louisiana. *Clason v. City of New Orleans*, 46 La. Ann. 1, 14 South. 306; *Bluefields Banana Co. v. Assessors*, 49 La. Ann. 43, 21 South. 627; *Parker v. Strauss*, 49 La. Ann. 1173, 22 South. 329. In this case it is shown that the complainant's No. 1 account is not controlled by any agent of complainant in Louisiana and is not used to the slightest extent on any occasion for any purpose of complainant's business in Louisiana. I therefore hold that the increase of the assessment from \$1,000, as returned by the complainant, to \$51,700, as made by the assessors, so as to include in the assessment the average balances in No. 1 bank account, is illegal, and that the injunction should issue as prayed for by complainant, restraining the collection of taxes on this item of the assessment made by the board of assessors.

In conclusion it may be said that it would be most unfortunate for Louisiana if her laws did authorize, or attempt to authorize, the taxation sought to be imposed in this case. It would be equivalent to

exacting a tax of nearly 3 per cent. on the premiums as they were collected and remitted from the state and a similar tax on sums paid under the policy. It would deprive the policy holders of the right to obtain any advantage from their policies before maturity, unless they consented to being taxed 3 per cent. on the amounts collected before maturity; for it is not conceivable that the company will consent to bear this tax on anticipated payments to its policy holders which it makes solely for their accommodation. And it may with equal confidence be assumed that, if the state taxes the premiums paid by its citizens and remitted to the complainant, it will become necessary for the complainant to devolve the ultimate payment of this tax on the policy holder. The net result of the scheme of taxation asserted by defendants would be to compel citizens of Louisiana to pay 3 per cent. more for premiums on their life insurance, and to get 3 per cent. less from their policies than citizens of other states; for, if the state can legitimately levy a tax of 3 per cent. on partial and anticipated payments by the company under the policy, it can on the same principle levy the same tax on the entire and final payment of the policy, and that will no doubt be the next move. The final payment is a credit in the same sense as the provisional and partial payments, and one is as taxable as the other. While it is not necessary, under the view I take of this case, to decide whether the complainant would be taxable on its policy loans, even if they were loans in a legal sense, I may say that in view of the manner in which these so-called loans are negotiated, and in view of the fact that they are evidenced by written instruments held always in New York and there settled, I do not think the complainant would in any case be taxable in Louisiana with respect to them. The facts as to the arrangements are accurately as stated in the bill.

It is urged that in the case of Metropolitan Life Ins. Co. v. New Orleans, 115 La. 708, 39 South. 846, 9 L. R. A. (N. S.) 1240, 116 Am. St. Rep. 179, affirmed by the Supreme Court of the United States in 205 U. S. 395, 27 Sup. Ct. 499, 51 L. Ed. 853, it was held that a life insurance company organized and domiciled in New York was taxable in Louisiana on policy loans made in the latter state. But it does not appear from the report of the case that the arrangements described as "policy loans" in the case cited were the same arrangements as are described by that name in this case. The terms of the obligations are not recited in the opinion of either court, and it seems to have been assumed and conceded, and for aught that appears to the contrary it may have been the fact, that the "policy loans" in the Metropolitan Case may have been loans in the ordinary sense. It is certainly to be presumed that, if the "policy loans" in that case had been the arrangements which the "policy loans" of the complainant are shown to be in this case, that fact would have been called to the attention of the court. In the Metropolitan Case the court dealt with the "policy loans" before them as if they were ordinary loans, and I am bound to assume they were. But the "policy loans" in this case are not ordinary loans, nor loans in any sense.

Judgment will be for complainant as prayed for.

UNDERWOOD TYPEWRITER CO. v. FOX TYPEWRITER CO., Limited,  
et al.

(Circuit Court, S. D. New York. December 31, 1907. Supplemental Opinion,  
January 10, 1908.)

1. COURTS—UNITED STATES—DISTRICT IN WHICH SUIT MUST BE BROUGHT.

A bill for infringement of a patent filed against a foreign corporation, in order to confer jurisdiction on the court, must allege both acts of infringement in the district where filed, and that the defendant has at the time of suit a regular and established place of business there.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 814.]

2. SAME.

To confer jurisdiction in such suit it is not necessary that the defendant should have had a regular and established place of business within the district at the time the alleged acts of infringement were committed therein, but it is sufficient if it had such place at the time of bringing suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 814.]

3. EQUITY—PLEADING—PLEA TO THE PERSON.

An order of court permitting a corporation not a party to enter a special appearance and plead to the jurisdiction as the successor of the defendant sued, a copartnership alleged to have ceased to exist before suit, does not authorize a plea by the defendant "by" such corporation which is inconsistent with the claim of dissolution, but the corporation must itself enter its appearance and plead, and must allege in its pleading that it is the defendant's successor.

4. SAME—SUFFICIENCY OF PLEA.

In patent cases, pleas should not be allowed unless they reduce the controversy to a single point or issue, except in very special cases, nor should the question of infringement be tried on a plea, even though it goes to the jurisdiction in the case of a suit against a nonresident, since that question can be raised on a motion to dismiss at the close of complainant's proofs.

In Equity. Argument on plea of defendant Fox Typewriter Company, Limited, by the Fox Typewriter Company, a corporation, per W. R. Fox, president, to the bill of complaint in a suit for alleged infringement of U. S. letters patent No. 436,916 to Josiah B. Gathright, and U. S. letters patent No. 452,268 to said Gathright, both assigned to the complainant.

Briesen & Knauth, for complainant.

Fred L. Chappell and David G. McConnell, for defendant Fox Typewriter Company, Limited.

RAY, District Judge. The bill of complaint sets out the patents, their validity, utility, etc., and certain adjudications as to the validity of the claims in question, and contains the usual allegations and details of such bill, including the assignment of the patents to complainant. Also, that defendants are "corporations incorporated and existing, respectively, under the laws of the state of Michigan and of the state of New York, the said Fox Typewriter Company, Limited, having a regular and established place of business and an agent in the city of New York, Southern District of New York, the said Graves Typewriter Company having its principal place of business

in the Borough of Manhattan, City of New York, Southern District of New York." Also the following as to infringement:

"And your orator further shows unto your honors that the defendant Fox Typewriter Company, Limited, makes the typewriting machines containing the devices herein complained of under the name 'Fox Visible Typewriter,' in close imitation of the well-known typewriting machines made by complainant and known as 'Underwood Visible Typewriter'; that it consigns the same to the defendant Graves Typewriter Company, which is, as your orator is informed and believes, the agent of the said defendant Fox Typewriter Company, Limited, in the city of New York, Southern District of New York, for the purpose of selling typewriting machines containing the devices herein complained of on behalf and for account of the defendant Fox Typewriter Company, Limited; that said Graves Typewriter Company does so sell the same, and that said defendants jointly and severally commit the acts of infringement hereinafter complained of for their mutual profit and advantage. Yet the defendants, well knowing the premises and the rights accruing to your orator as aforesaid, but contriving to injure your orator and deprive it of the benefits and advantages which might and otherwise would accrue unto it from said inventions, after the issuing of the said two letters patent as aforesaid, and within six years before the commencement of this suit, did, as your orator is informed and believes, and therefore avers, without the license or allowance and against the will of your orator and in violation of your orator's rights and in infringement of the aforesaid letters patent, and particularly claims 4 and 5 of said letters patent No. 436,916, and claims 6 and 8 of said letters patent No. 452,268, at New York, in the Southern District of New York and elsewhere, unlawfully and wrongfully and in defiance of the rights of your orator, make, construct, use and vend to others to be used the said inventions, and did make, construct, use and vend to others to be used, typewriting machines and attachments for the same, made according to and employing and containing the said inventions, and your orator charges it to be a fact that the defendants and their confederates still continue so to do, and that they are threatening to make the aforesaid machines in large quantities, and to supply the market therewith and to sell the same. And your orator further shows unto your honors that the inventions of the aforesaid two letters patent are capable of conjoint use in one and the same typewriting machine, and that all of the several inventions of said two letters patent are so conjointly used by the defendant in each of a large number of typewriting machines made and sold by them and herein complained of. All in defiance of the rights acquired by and secured to your orator as aforesaid and to your orator's great and irreparable loss and injury, and for which your orator has been and still is being deprived of great gains and profits which it otherwise might and would have obtained, but which have been received and enjoyed and are being received and enjoyed by the said defendants by and through their aforesaid unlawful acts and doings. And your orator further shows unto your honors that said defendants have made and sold and caused to be made and sold large quantities of said typewriting machines and have a large quantity on hand which they are offering for sale, and have made and realized large profits and advantages therefrom, but to what extent and how much exactly your orator does not know and prays the discovery thereof; and your orator says that the use of the said inventions by said defendants, and their preparations therefor and avowed determination to continue the same, and their other aforesaid unlawful acts in disregard and defiance of the rights of your orator, have the effect to and do encourage and induce others to venture to infringe said patents in disregard of your orator's rights."

It appears from the record before me that the Fox Typewriter Company, a Michigan corporation, not the Fox Typewriter Company, Limited, appeared in this suit and filed a plea to the jurisdiction of this court. One William R. Fox made an affidavit April 10, 1907, that he was "president of the Fox Typewriter Company, successor to the Fox Typewriter Company, Limited, alleged defendant



in the above-entitled cause," etc. An affidavit was made by one Eugene Eble May 6, 1907, that defendant Fox Typewriter Company, Limited, was the defendant served, and made and intended to be made defendant. On an order to show cause, the bill of complaint and the affidavits and plea Judge Lacombe made an order May 23, 1907, "that the aforesaid plea be, and the same hereby is, stricken from the records of this court and expurged, because filed by the Fox Typewriter Company which is not a party to this suit." This order of Judge Lacombe also provided "that the Fox Typewriter Company, a Michigan corporation, may enter its special appearance and plead to the jurisdiction of this court as the successor of the Fox Typewriter Company, Limited, signing itself the Fox Typewriter Company, Limited, by the Fox Typewriter Company, a corporation." Also, that complainant "have leave to amend its bill of complaint by changing the expression 'corporation' as applied to the Fox Typewriter Company, Limited, to 'a limited copartnership association.'" Thereupon the following plea was filed, and complainant set same down for argument, viz.,

"United States Circuit Court, Southern District of New York.

"In Equity.

"Underwood Typewriter Company, Complainant, v. Fox Typewriter Company, Ltd., and Graves Typewriter Company, Defendants.

"Plea of the Fox Typewriter Company, Ltd., to the Bill of Complaint of the Underwood Typewriter Company, Complainant, by the Fox Typewriter Company, a Corporation.

"The Fox Typewriter Company, Limited, by the Fox Typewriter Company, a corporation, especially appearing under protest by permission of the court first had and obtained for the purposes of this plea, and for no other purpose, says: That this court has no jurisdiction for the reason that the said Fox Typewriter Company terminated its existence a long time prior to the bringing of this suit, viz.: November 9, 1904; that during its existence it had its principal place of business in the city of Grand Rapids, in the state of Michigan, and that during the existence of the said Fox Typewriter Company, Limited, it had no regular or established place of business in the state of New York, or in the Southern District of New York as alleged in the bill of complaint. That neither the said Graves Typewriter Company nor Edwin J. Graves, the president of the Graves Typewriter Company, was an officer, agent or in any way connected with the Fox Typewriter Company, Limited, during its existence, except that the said Edwin J. Graves and the Graves Typewriter Company purchased typewriters manufactured by the said Fox Typewriter Company, Limited; that neither the Fox Typewriter Company, Limited, nor Edwin J. Graves, nor the Graves Typewriter Company ever manufactured, used or sold in the Southern District of New York any tabulator or tabulator device or devices whatsoever during the existence of the said Fox Typewriter Company, Limited. All of which matters and things the said Fox Typewriter Company, by its successor, the Fox Typewriter Company, avers to be true, and pleads to the jurisdiction of this honorable court and prays the judgment of this honorable court, whether it shall be compelled or ought to be required to make any other or further answer to the said bill of complaint, and prays to be hence dismissed, with its costs and charges in this behalf most wrongfully sustained.

"The Fox Typewriter Company, Limited.

"By the Fox Typewriter Company, a corporation.

"Per W. R. Fox, President.

"I hereby certify that the foregoing plea is in my opinion well founded in point of law and is not interposed for the purposes of delay.

"David G. McConnell,

"Fred L. Chappell.

"United States Circuit Court, Southern District of New York.

"In Equity.

"Underwood Typewriter Company, Complainant, v. Fox Typewriter Company, Ltd., and Graves Typewriter Company, Defendants.

"State of Michigan, County of Kent, ss.:

"William R. Fox, being first duly sworn, makes solemn oath and says: That he is the president of the Fox Typewriter Company, a corporation, which is the successor of the Fox Typewriter Company, Limited, and that he was chairman of said Fox Typewriter Company, Limited. That he makes this affidavit on behalf of the said Fox Typewriter Company, Limited, and its successor, the Fox Typewriter Company, a corporation. That the foregoing plea is true in point of fact. That the Fox Typewriter Company, a corporation, is the successor of the Fox Typewriter Company, Limited, and has acquired all of its assets and rights and assumed all its debts and obligations, and that the foregoing plea is not interposed for the purpose of delay.

"William R. Fox.

"Subscribed and sworn to before me this 25th day of May, 1907.

"Earl Stopoe,

"[Seal.] Notary Public in and for Said County and State.

"My commission expires October 21, 1909."

The complainant says this plea, if true, does not show want of jurisdiction in this court, and that it is bad for multifariousness, and that there has been an adjudication in this case, as shown by the records of this court, that this court has jurisdiction, inasmuch as Judge Lacombe on a motion herein for a preliminary injunction, in accordance with the prayer of the bill of complaint, granted such injunction against the defendant Fox Typewriter Company, Limited, and that such order is in full force and has not been appealed from; that the granting of such order necessarily adjudged and determined that the defendant Fox Typewriter Company, Limited, had done business in this state substantially as alleged in the bill of complaint, and has infringed the patents by some of the acts alleged; also, that the plea is not to the jurisdiction alone, but also denies infringement, and does not reduce the case or issues to a single point, or issue but presents two issues, that of jurisdiction and that of infringement, and hence should be overruled. It will be noted that the bill of complaint alleges, in substance, that the Fox Typewriter Company, Limited, a Michigan corporation, or limited copartnership association, makes the infringing machines presumably in Michigan, and consigns them to the defendant Graves Typewriter Company, presumably in New York, and that the last-named company is the agent of the first-named company for the purpose of selling in New York such infringing machines made by the first-named company on behalf and for the account of the said first-named company, and that such agent company does so sell same, and that the two companies jointly and severally commit the acts of infringement complained of for their mutual profit and advantage; that the defendants have not only made and constructed in New York, but have used and vended to others to use the said infringing machines in New York, all in defiance of the rights of complainant. The infringement by both defendants is set out with great and all necessary detail in the bill of complaint.

The allegations of the plea interposed by and purporting to be made by the Fox Typewriter Company, Limited, in its own behalf,

and which is not in accordance or compliance with the order of Judge Lacombe, are (1) that the defendant Fox Typewriter Company, not the Fox Typewriter Company, Limited, terminated its existence long before the commencement of this suit; (2) that during its existence it had its principal place of business in Michigan, and that during the existence of the Fox Typewriter Company, Limited, it had no regular or established place of business in the Southern District of the state of New York as alleged in the bill of complaint; (3) that neither the defendant Graves Typewriter Company, nor its president, Edwin J. Graves, was an officer or agent or in any way connected with the Fox Typewriter Company, Limited, during its existence, except that they purchased typewriters manufactured by said company (not alleging that they did not do this in New York, Southern District, from the Fox Typewriter Company, Limited, or that such typewriters so purchased were not the alleged infringing devices or machines); and (4) that neither the Fox Typewriter Company, Limited, nor Edwin J. Graves, nor the Graves Typewriter Company ever manufactured, used, or sold in the Southern District of New York any tabulator or tabulator device or devices whatsoever during the existence of the Fox Typewriter Company, Limited. This plea fails to allege that the Fox Typewriter Company, Limited, did not during its existence engage in, or that it is not now engaged in, making the alleged infringing machines, consigning them to the Graves Typewriter Company in New York, Southern District, for the purpose of having them sold there by it, and does not allege that the Fox Typewriter Company, Limited, did not sell in New York, in said district, to the Graves Typewriter Company to be sold by it such alleged infringing machines. Tabulators and tabulator devices are or may be very different from the machines described and complained of as infringing machines.

To give this court jurisdiction of the defendant Fox Typewriter Company, Limited (or of this Fox Typewriter Company, a corporation), if it has existence, which is a question of fact, it is necessary (1) that it be an inhabitant of the district in which the suit is brought, the Southern District of New York, which, confessedly, it is not; or (2) that it "shall have committed acts of infringement and have a regular and established place of business" in such district. Of course, in a patent case to enjoin alleged infringement, this is equivalent to saying that, when a party is sued outside the district of his residence, the action must be based on acts of infringement committed in the district where the suit is brought, and that the defendant must also have (or have had at the time such acts were committed, as to which there is question) "a regular and established place of business" in such district. Should the bill filed against a foreign corporation, and showing that fact, fail to allege both acts of infringement in the district where filed, and that the defendant has a regular and established place of business there, it would be demurrable. *Bowers v. Atlantic, etc., Company* (C. C.) 104 Fed. 887; *Feder v. Fiedler* (C. C.) 116 Fed. 378; *U. S. Gramophone Company v. Columbia Phonograph Company* (C. C.) 106 Fed. 220. If the allegation of infringement in the district be a jurisdictional fact which must be alleged, and the existence of such

place of business in the district be also a further jurisdictional fact which must be also alleged, it seems that permission to the Fox Typewriter Company, a Michigan corporation, to "enter its special appearance and plead to the jurisdiction of this court as the successor of the Fox Typewriter Company, Limited, signing itself as the Fox Typewriter Company, Limited, by the Fox Typewriter Company, a corporation," was express permission to the Fox Typewriter Company, a corporation, to enter its plea stating that the Fox Typewriter Company, Limited, ceased to exist long prior to the commencement of the action; that during its existence it had its principal place of business in Michigan, the state of its incorporation and legal residence; that during its existence it never had a regular or established place of business in the Southern District of the state of New York; that, during its existence or since, it did not commit the alleged acts of infringement or any acts of infringement, and that the Fox Typewriter Company, a corporation, interposing the plea was and is the successor of the Fox Typewriter Company, Limited, that it has no regular and established place of business in the Southern District of the state of New York, and had none when the suit was brought. This, however, is not the plea interposed. It expressly states, "Plea of the Fox Typewriter Company, Ltd., to the Bill of Complaint of the Underwood Typewriter Company, Complainant, by the Fox Typewriter Company, a Corporation." Then, "the Fox Typewriter Company, Limited, by the Fox Typewriter Company, a corporation \* \* \* says, that this court has no jurisdiction, for the reason that the said Fox Typewriter Company terminated its existence a long time prior to the bringing of this suit, viz., November 9, 1904," etc. There is not a word or suggestion in this plea that the Fox Typewriter Company, a corporation, is the successor of the Fox Typewriter Company, Limited, or that such Fox Typewriter Company, a corporation, appears or pleads. By the express terms of the order of Judge Lacombe the Fox Typewriter Company, a corporation, was to put in the plea if any as the successor of the Fox Typewriter Company, Limited, signing itself Fox Typewriter Company, Limited, because it claimed to be the successor of that company. This it has not done. It is not done in substance or effect. The dead appears and pleads saying I am dead, I cannot appear, I cannot plead, I never had a place of business in New York city as alleged in the bill of complaint. I do not think there was any purpose on the part of the Fox Typewriter Company, a corporation, the successor, if it be such, of the Fox Typewriter Company, Limited, to comply with the order, or to commit itself. It could do all it has done, sign the plea interposed in the form it did, and its president could make the affidavit he made, without committing or compromising the corporation. The Fox Typewriter Company, a corporation, the successor, has not said and does not say, or purport to say, even in the plea filed, that its predecessor the Fox Typewriter Company, Limited, did not do the acts constituting the alleged infringement charged in the bill of complaint. The allegations in the plea do not cover the acts of infringement charged. Nor does the plea to the jurisdiction quoted allege that the said Fox Typewriter Company, Limited, did not have and does not have a regular and established place of business

in the Southern District of New York, which district is much more extensive than the city of New York—embraces several counties of the state of New York not embraced in the city of New York—but does say it “had no regular or established place of business in the state of New York, or in the Southern District of New York as alleged in the bill of complaint.” The bill of complaint contains no allegation of a place of business in the state of New York outside of the Southern District, hence the allegation as to no place of business in the state of New York qualified by “as alleged in the bill of complaint” denies nothing, controverts nothing, raises no issue. The bill of complaint alleges that the Fox Typewriter Company, Limited, had a regular and established place of business and an agent in the city of New York, Southern District of New York. The plea states that said company had no regular or established place of business in the Southern District of New York “as alleged in the bill of complaint.” Here, again, this allegation as to no place of business is qualified by the words “as alleged in the bill of complaint” so that it does not allege that the Fox Typewriter Company, Limited, did not have a regular and established place of business within the Southern District of New York. All this goes to the essence of this plea, and coupled with the facts that there has been a contest on the motion for the preliminary injunction, which was granted, on a motion to suspend the taking of testimony, on a motion to dissolve or suspend such preliminary injunction, to dismiss the bill as against the Fox Typewriter Company, Limited, all denied, all made by the Fox Typewriter Company, Limited, and the papers in which proceedings are on file as a part of the record in this case and were before me on the argument by consent, although not printed, leads me to the conclusion that the plea is without merit. Again, the plea does not allege or state that the Fox Typewriter Company, a corporation, the successor of the Fox Typewriter Company, Limited, does not have or did not have when suit was brought a regular and established place of business in the Southern District of the state of New York.

Again, should the complainant be compelled to go to a trial of the issues raised by this plea in a patent case? Evidence would have to be taken on the issue of the place of business of the Fox Typewriter Company, Limited, and of the Fox Typewriter Company, a corporation, the successor, and on the question of infringement, which would necessarily include the question of the validity of the patent, for if invalid there could be no infringement, and would probably lead into a consideration of the question of priority of invention and the state of the prior art, for there might not be infringement even if the patent is valid, giving it its proper construction, in view of the prior art. Infringement is a necessary allegation to make a cause of action, and it may be said that it is not an allegation going to the jurisdiction, and hence would not or should not be considered in determining the question of jurisdiction. If we construe the statute referred to as demanding only that, where a defendant, corporation, copartnership, association, or individual is sued for acts of infringement alleged to have been committed in the district where the suit is brought, and so alleged, the jurisdictional question involved is, did

such party defendant, at the time of bringing the suit, have a regular and established place of business in such district, then this plea is clearly multifarious. But I do not think the statute is to be so construed. I think that in such a case as this the plea to the jurisdiction of the court may include both an allegation that there was no act of infringement by the defendant in the district where the suit is brought, and that the defendant has no regular and established place of business in such district, or did not have when suit was commenced, both or either. Should it be shown on such an issue as to jurisdiction that the defendant had not committed any act of infringement in the district where suit was brought, then jurisdiction would be defeated, and it seems to be immaterial that the determination of that question also goes to and defeats the action on the merits in case it is found there was no such infringement. If it be determined on the question or issue of jurisdiction that the acts of infringement were committed in the district, still there is no jurisdiction in the circuit court of the district if it is shown that defendant has no regular and established place of business in such district—that is, did not have such a place of business when the suit was commenced. The acts of infringement charged in this bill are alleged to have been committed in the city of New York entirely independent of the allegation as to jurisdiction, viz., “the said Fox Typewriter Company, Limited, having a regular and established place of business and an agent in the city of New York, Southern District of New York,” and which allegation relates to the time when the suit was brought and no other. I do not think it necessary to allege and show under the statute referred to (Act March 3, 1897, c. 395, 29 Stat. 695 [U. S. Comp. St. 1901, p. 589]), in order to confer jurisdiction on this court, that the defendant Fox Typewriter Company, Limited, or its successor the Fox Typewriter Company, a corporation, had a regular and established place of business in the Southern District of New York at the time when the acts of infringement were committed in such district. Jurisdiction is conferred and obtained if the defendant committed the acts of infringement in such district before suit brought, and if when suit was brought the defendant liable for the infringement had a regular and established place of business in the district. This is the plain reading of the statute, and its plain purpose. The language is:

“That in suits brought for the infringement of letters patent the Circuit Courts of the United States shall have jurisdiction in law, or in equity, in the district in which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business. If such suit is brought in a district of which the defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service \* \* \* may be made. \* \* \*

The words “shall have committed” and “have a regular,” etc., are significant. The first relates to the past—to a time prior to bringing the suit—the last, to the time of bringing the suit. The existence of a place of business in the district where suit is brought at the time of the commission of the acts of infringement is entirely immaterial. If a resident and inhabitant of one district goes into another and com-

mits acts of infringement therein, having no regular and established place of business there, and thereafter establishes a regular place of business in such district, and has it when sued, jurisdiction exists and is obtained if the service of process be regular and made in accordance with the statute. Congress did not intend to exempt infringers living in one district from suit in another where they commit their unlawful acts on the ground that when so committing the acts they had not established and did not maintain a regular place of business in such district. It was not intended to offer an exemption from suit in the district where infringement was practiced if the wrongdoer would not establish and maintain a regular place of business there while doing the acts. It did intend such infringers might be sued in such district provided they had, at the time of suit brought, "a regular and established place of business" in such district, so that lawful service could be made in the district on the defendant, or on his agent engaged in conducting such business there. Walker on Patents (4th Ed.) 330, § 389; *Feder v. A. B. Fiedler & Sons* (C. C.) 116 Fed. 378; *Bowers v. Atlantic G. & P. Co.* (C. C.) 104 Fed. 887, 888; *Westinghouse E. & Mfg. Co. v. Stanley E. Mfg. Co. et al.* (C. C.) 121 Fed. 101; *Chicago P. T. Co. v. Philadelphia P. T. Co.* (C. C.) 118 Fed. 852. If the defendant Fox Typewriter Company, Limited, has no existence, and had none when suit was brought and no successor liable for its acts, I do not comprehend how it is in court, or how any service could have been obtained, and a proper course would have been a motion by the person served to set aside the service of the process. *E. Waterman Co. v. Parker Pen Co.* (C. C.) 100 Fed. 544; *U. S. C. S. R. Co. v. Phoenix R. S. & P. Co.* (C. C.) 124 Fed. 234, 236; Walker on Patents (4th Ed.) p. 331, where it is said:

"Where a defendant intends to deny habitation, or the existence of a regular and established place of business, in the district in which a suit has been begun, the proper practice is a special appearance for the purpose, and a motion to set aside whatever service of process may have been made, upon any person as assumed representative of the defendant. Where a defendant intends to deny any infringement within the district in which a suit has been begun, that denial may be made by demurrer, unless such infringement is asserted in the bill. And where such infringement is asserted in the bill, that denial may be made by a plea or by an answer."

The record in this case shows that defendant has been enjoined in this very action, that it has moved to vacate or suspend, and that the motion has been denied. Other motions have also been denied. The alleged successor, Fox Typewriter Company, a corporation, a stranger so far as then appeared, without permission of the court, put in a plea to the bill of complaint. Judge Lacombe struck it out because that company was not a party. On the representation that it was the successor to the defendant and therefore the real party in interest, Judge Lacombe made an order that it, the Fox Typewriter Company, a corporation, might put in its special appearance and plead to the jurisdiction of this court "as the successor of the Fox Typewriter Company, Limited, signing itself the Fox Typewriter Company, Limited, by the Fox Typewriter Company, a corporation." Should it do so it must assert that it is the successor, stands in its place, not conceding liability, however; and, that its plea to the jurisdiction

be good, it is necessary for it to allege, either that the Fox Typewriter Company, Limited, was not guilty of the acts of infringement complained of, or that the Fox Typewriter Company, a corporation, the successor, did not have, at the time the suit was commenced, "a regular and established place of business" in the Southern District of New York, or both such facts.

The corporation allowed to plead, the alleged successor, has not pleaded at all. The company pleading says it had ceased to exist long before suit brought. This allegation, if true, shows it has no standing in court and cannot plead. If it can plead, being dead, and has a successor, then the plea must show that the alleged infringing company did not infringe, which it does not do, as shown, or that its successor, the Fox Typewriter Company, a corporation, had no regular and established place of business in the Southern District of New York when the suit was brought, which the plea does not do. But I do not think that a limited copartnership association which had ceased to exist and which has a successor can put in such a plea as this under the circumstances of this case, and in view of what has occurred in the case as shown by the records. Fox Typewriter Company, a corporation, the successor, does not plead or pretend to. If the Fox Typewriter Company, Limited, was a limited copartnership association, and it ceased to exist long before suit was brought, and some one of the surviving partners has been sued herein, he can appear and successfully defend himself or set aside the service, or he could have done so by moving in time. All these facts are matters of defense, and do not go to the question of jurisdiction over the defendant Fox Typewriter Company, Limited.

In patent cases, the question of infringement in the district where suit is brought against a foreign corporation or resident of another state, even though it goes to the jurisdiction, may be properly raised on a motion to dismiss made at the close of complainant's proofs. *Streat v. American Rubber Co.* (C. C.) 115 Fed. 634. And in patent cases pleas should not be allowed unless they reduce the controversy to a single point or issue, except in very special cases, and the question of infringement should not be determined or tried on a plea. *Thresher v. General Electric Company* (C. C.) 143 Fed. 337, 340, 341. See cases there cited at page 341.

Conceding that setting this plea down for argument by the complainant admits, for the purposes of the argument, the truth of all the facts stated in the plea, it denies their sufficiency to bar recovery. I do not think they are sufficient and hence the plea is overruled.

Defendant may have 20 days in which to answer. The said Fox Typewriter Company, a corporation, may come in if it desires, and answer as the successor of the Fox Typewriter Company, Limited.

#### Supplemental Opinion.

RAY, District Judge. The opinion filed was based on the record submitted to the court on the hearing. In that record as printed and submitted to the court the statement is "the Fox Typewriter Company, Limited, by the Fox Typewriter Company, a corporation, especially appearing under protest by permission of the court first had and obtain-



ed for the purposes of this plea, and for no other purpose says: That this court has no jurisdiction for the reason that the said Fox Typewriter Company terminated its existence a long time prior to the bringing of this suit, viz., November 9, 1904. That during its existence it had its principal place of business in the city of Grand Rapids, in the state of Michigan, and that during the existence of the said Fox Typewriter Company, Limited, it had no regular or established place of business in the state of New York or in the Southern District of New York as alleged in the bill of complaint." My attention is now called to the fact that in the record or plea on file the reading is: "This court has no jurisdiction for the reason that the said Fox Typewriter Company, Limited, terminated its existence a long time prior," etc., the word "Limited" after "Fox Typewriter Company" having been omitted by error of printer, and the error not having been corrected in the printed copy handed the court. Admitting this to be true I am asked to reconsider my decision. I do not regard this as very material or at all material on the efficiency of the plea.

Judge Lacombe in his order of May 23, 1907, striking from the records the former plea, that of the Fox Typewriter Company, a corporation, successor to the Fox Typewriter Company, Limited, a Michigan copartnership, etc., for the reason that the Fox Typewriter Company, a corporation, was not a party defendant, gave permission to the Fox Typewriter Company, a Michigan corporation, to enter its special appearance and plead to the jurisdiction of the court as the successor of the Fox Typewriter Company, Limited, signing itself the Fox Typewriter Company, Limited, by the Fox Typewriter Company, a corporation. The language of that order is plain and explicit. It was permission to the Fox Typewriter Company, a Michigan corporation, to enter its special appearance and plead to the jurisdiction as the successor, etc. It was not permission to the Fox Typewriter Company, Limited, alleged to be dead—out of existence—to specially appear and plead. It was permission to the alleged successor to appear and plead in behalf of itself as the alleged successor, etc.

The plea thereafter interposed and set down for argument does not even purport to be the plea of the Fox Typewriter Company, a Michigan corporation, pleading as the successor of the Fox Typewriter Company, Limited. It starts in by saying, "Plea of the Fox Typewriter Company, Limited, to the Bill of Complaint of the Underwood Typewriter Company, Complainant, by the Fox Typewriter Company, a Corporation." Then with this preliminary statement as to what the plea is, and whose plea it is, and in whose behalf it is made, and as to who presents it in behalf of the Fox Typewriter Company, Limited, it starts off as follows:

"The Fox Typewriter Company, Limited, by the Fox Typewriter Company, a corporation, especially appearing," etc., "says," etc.

This is not the plea of nor a plea by the Fox Typewriter Company, a corporation, as successor, etc., nor does it purport so to be. It expressly asserts the contrary. It is not in compliance with Judge Lacombe's order, and it does not purport to be. There is not an allegation or statement in this plea that the Fox Typewriter Company, a

corporation, has succeeded to the Fox Typewriter Company, Limited, or that it has authority to represent it. If the Fox Typewriter Company, Limited, is in existence it can appear and plead to the jurisdiction. If it is not in existence, and was not at the time of the commencement of this action, I fail to see how it could have been served or how it can now either appear or plead. If some surviving partner was served as representing that company he should have moved to set aside the service. If some one connected with the Fox Typewriter Company, a corporation, has been served, and that corporation is fearful it will be bound as the successor of the Fox Typewriter Company, Limited, for the reason it has succeeded to its rights, etc., and is liable for all its acts, and desires as such successor to specially appear and plead to the jurisdiction, it should have availed itself of Judge Lacombe's order. It should have appeared specially and interposed its plea, a plea as its own and in behalf of itself as the successor. Had it done so it could have pleaded: (1) The termination of the existence of the Fox Typewriter Company, Limited, November 9, 1904, long before the commencement of this action; (2) that it had succeeded to said company, as its successor, etc.; (3) that during its existence the Fox Typewriter Company, Limited, had no regular and established place of business in the Southern District of New York, and had none when the action was commenced; (4) that during its existence the Fox Typewriter Company, Limited, was not guilty of the infringements charged. This would have raised a question of jurisdiction. Then, in addition, if true, it could have alleged in the plea that the Fox Typewriter Company, a corporation, had no regular and established place of business in the Southern District of New York at the time this action was commenced or at the time of the alleged infringements, or both, and that it is not guilty of the infringement charged. Nothing of this kind has been done.

I fail to see how the Fox Typewriter Company, Limited, if nonexistent, as alleged, can appear or plead. Its successor might, by permission of the court, but it has not. This plea is, to my mind, purposely confused and evasive and dilatory. There is no allegation in the plea that the persons constituting the Fox Typewriter Company, Limited, have not, since it ceased to exist, infringed, using that name, or that they, acting in that name, did not have a regular and established place of business in the Southern District of the state of New York when the action was commenced. There is no allegation in the plea that the Fox Typewriter Company, a corporation, the alleged successor of the Fox Typewriter Company, Limited, did not commit the alleged infringing acts and all of them in the Southern District of the state of New York after it became such successor, or that it did not have a regular and established place of business in such district when this suit was commenced.

The application to open the case and reconsider on the actual record is denied, but the opinion rendered is amended hereby, and it will be considered that the true record was before this court on the argument.

## UNITED STATES v. RAMSEY et al.

(Circuit Court, D. Idaho, C. D. December 10, 1907.)

**1. JURY—WAIVER OF RIGHT TO JURY TRIAL—REFERENCE—FINDINGS OF REFEREE—POWER OF COURT TO FIND FACTS.**

An agreement in open court by the parties to an action at law in a federal court that the cause may be referred to a referee to make findings of fact is a waiver of the right to a jury trial only on condition that the facts be found by a referee, and confers no power upon the judge to ignore such findings, and himself determine the issues of fact, and the judge has no such power unless by consent, but can only confirm or reject the findings of the referee, and in case they are set aside the cause stands for trial precisely the same as though it had never been referred.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, §§ 194, 195.]

**2. REFERENCE—REVIEW BY COURT—IDAHO STATUTE.**

Under Rev. St. Idaho 1887, §§ 4414, 4419-4421, authorizing a reference by consent in actions at law, which, by virtue of the federal conformity statute (Rev. St. § 914 [U. S. Comp. St. 1901, p. 684]), are applicable in actions in the federal courts, or at least may be made so by consent of the parties, and which provide that in case of such reference the referee shall try all the issues whether of fact or law, and "report a finding and judgment thereon," which must stand as the finding of the court, and "may be excepted to and reviewed in like manner as if made by the court," the court has no power on exceptions filed to a referee's findings of fact to review the evidence, but can only do so on a motion for a new trial, as in case of a finding by the court or the verdict of a jury; the office of the exceptions provided for being merely to bring in question the conduct of the referee, the regularity of the proceedings, or the sufficiency of the findings under the order of reference or to meet the issues.

[Ed. Note.—Following state practice, see note to *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 392.]

**3. SAME—COMMON-LAW REFERENCE.**

In case of a common-law reference, if it appears that the referee has exercised his honest and incorrupt judgment in finding the facts, after a full and fair hearing of the parties, the court cannot decline to accept the report upon the ground that the referee has erred in his judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Reference, § 167.]

**On Exceptions to Referee's Report.**

N. M. Ruick, U. S. Dict. Atty.

Morrison & Pence, for defendants.

**DIETRICH**, District Judge. The defendant Ramsey was marshal for the district of Idaho during the period from January 14, 1899, to June 30, 1902. The defendant Fidelity & Guaranty Company was surety upon his official bond as such marshal. During Ramsey's term of office there were placed to his credit by the plaintiff divers sums of money aggregating a large amount. From time to time, in connection with the performance of his official duties, Ramsey paid expenses and claims out of the moneys thus placed to his credit, and reported such expenditures, and accounted for and repaid to the plaintiff the balance. Exceptions were taken by the officers of the Auditing Department to a large number of the items of expenditure thus reported by Ramsey, varying in amount from 5 cents to over \$100, and aggregating \$688.11, to recover which sum this action was brought. The cause being at issue, and it appearing that its trial would require the ex-

amination of numerous items of account, by agreement of counsel it was referred, the order of reference being as follows:

"By agreement of counsel for the respective parties herein, it is ordered that this cause be and the same is hereby referred to C. C. Cavanah, Esq., to take the testimony herein, and report findings of fact and conclusions of law to the court in said cause, with all convenient speed."

Thereafter the referee, having taken the evidence, reported to the court his findings of fact and conclusions of law based thereon, awarding to the plaintiff \$88.34, and disallowing the balance of the claim. In form, the findings are separately stated, and they respond to all of the issues. Upon the coming in of the referee's report, counsel for the plaintiff filed what is denominated an "Exception to Findings of Referee," by which objection is made to the sixth and seventh findings of fact (which cover the vital issues presented by the pleadings), "upon the ground that said findings and each of them, and each and every item allowed to the defendants therein as a proper charge, are unsupported by the evidence and are contrary to law." At the same time counsel for plaintiff filed what is denominated a "Notice of Motion for Judgment," by which the plaintiff gave to the defendant notice that upon a certain day the plaintiff would move the court to enter judgment "in favor of the plaintiff, in accordance with the prayer of its complaint, upon the evidence heretofore taken before C. C. Cavanah, Esq., referee in said cause, anything in the report of said referee to the contrary notwithstanding." The exceptions and the motion for judgment have been argued and submitted together.

The simple question presented by the motion is whether or not, when, upon agreement of the parties, a rule has been made by the court in an action at law, referring a cause, with instructions and authority to the referee to make and report findings of fact and conclusions of law, his findings may be disregarded, and the judge of the court may, upon the evidence taken by the referee, make findings and enter judgment accordingly. By the Constitution (amendment 7) it is provided that:

"In suits at common law, where the value in controversy shall exceed \$20.00, the right of trial by jury shall be preserved."

Section 648, Rev. St. U. S. [U. S. Comp. St. 1901, p. 525], provides that:

"The trial of issues of fact in the circuit court shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy and by the next section."

In the next section (649) it is provided that:

"Issues of fact in civil cases in any circuit court may be tried and determined by the court without the intervention of a jury whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury."

In such case the finding of the court upon the facts shall have the same effect as the verdict of a jury. The trial of issues of fact by the court without a jury was unknown to the common law. Such questions were exclusively for the jury, and in case questions of fact were submitted to the judge without a jury, by agreement of the parties,

it was held that, in determining such issues, the judge was not acting in any official capacity, but as an arbitrator. *Campbell v. Boyreau*, 21 How. 223, 16 L. Ed. 96. Manifestly, therefore, the judge has no power, without the consent of the parties, to determine issues of fact, and only by virtue of the provisions of section 649 does the judge's decision upon a question of fact become a judicial act. This action, therefore, being one at law, the parties were entitled to have the issues of fact submitted to a jury. This right they might waive, and they might agree that such questions be determined by the judge of the court, or by a referee. The record discloses a waiver of jury, upon the condition, however, that the facts be found by a referee. There was no consent that such issues be submitted to the determination of the judge of the court, and the court is powerless to impose upon the parties, against their will such mode of trial.

In *Dundee Mortgage Company v. Hughes*, 124 U. S. 157, 8 Sup. Ct. 377, 31 L. Ed. 357, the court says:

"It is undoubtedly true that under a common-law reference the court has no power to modify or to vary the report of a referee as to matters of fact. Its only authority is to confirm or reject, and if the report be set aside the cause stands for trial precisely the same as if it had never been referred."

In that case, as in this, there was no written stipulation filed waiving a jury and consenting to the reference, but there, as here, an order of reference was made by consent of counsel in open court. The referee filed findings of fact and conclusions of law, to which both parties excepted. The findings of the referee were set aside and new findings were made by the court, upon which judgment was entered. It is true that the judgment of the Circuit Court was affirmed, but the Supreme Court declined to review its action in substituting findings of its own in place of those of the referee, for the reason that no objection was made in the trial court, and that no exception was seasonably taken. The court says:

"Had the attention of the court been called to the exact condition of the record, the error would probably have been avoided by the filing of the necessary stipulation in writing, or in some other way."

It is impliedly held that if a proper stipulation in writing had been made and filed, waiving a jury and consenting to a reference under the Oregon Code, it would have been competent for the Circuit Court not only to set aside the referee's report for good cause, but to make findings of its own, and enter judgment accordingly; but section 229 of the Oregon Code was, in part, as follows:

"The court may affirm or set aside the report, either in whole or in part. If it affirm the report it shall give judgment accordingly. If the report shall be set aside either in whole or in part the court may make another order of reference as to all or so much of the report as may be set aside, to the original referees, or others; or it may find the facts and determine the law itself and give judgment accordingly."

If, therefore, the parties had filed such a stipulation there would have been a consent upon their part that the judge of the court, upon certain contingencies, might determine the issues of fact as well as de-

cide the questions of law. After adverting to the fact that no objection was made in the court below, the Supreme Court says:

"The court proceeded, evidently in accordance with the understanding of the parties, to make new findings precisely as it would if the order of reference had been actually under the Code upon a consent in writing."

If it be assumed that the consent of the parties and the order of the court now under consideration were made with reference to the Idaho statutes relative to trial by referees, it is to be observed that they do not contain any provision similar to that of the Oregon Code above quoted. Nor do I think that even in the Idaho state courts, when such a reference as is now under consideration is made, can the judge, upon the rejection of the findings of a referee, in an action at law, make findings of his own, and enter judgment thereon, over the objection of one of the parties to the proceeding. *Pratalongo v. Larco*, 47 Cal. 378; *Walker v. Campbell*, 3 Hasb. (Idaho) 13, 26 Pac. 123; *Robinson v. Nelson*, 4 Idaho, 567, 43 Pac. 64. My conclusion is that, without the consent of the parties to an action at law, the judge of the court has no authority to determine the issues of fact, and that neither under the statutes of the United States nor the statutes of Idaho is such consent implied in a mere agreement that the cause be referred to a referee to report findings of fact and conclusions of law.

The other question is whether, under the order of reference, the court may, upon the plaintiff's "exception" to the findings of the referee, review the evidence for the purpose of determining whether the findings of fact are supported by the evidence. The question is not, whether the court may in any manner review the evidence for that purpose, but whether such a review may be had upon exceptions to the referee's report. It is contended by counsel for the defendants that, the parties having consented, with the approval of the court, the cause be tried by a referee, the court is without power to inquire into the sufficiency of the evidence to support the findings of fact upon an exception to the referee's report, and that the aggrieved party must resort to some other mode of procedure to call in question the propriety of the referee's findings. There is no express provision in the federal statutes prescribing the practice in case of reference. Section 914, U. S. Rev. St. [U. S. Comp. St. 1901, p. 684], provides that:

"The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

Section 4414 of the Revised Statutes of Idaho 1887 provides that:

"A reference may be ordered upon the agreement of the parties, filed with the clerk or entered in the minutes:

"1. To try any or all the issues in an action or proceeding, whether of fact or of law, and to report a finding and judgment thereon."

Section 4419 provides that:

"The facts found and conclusions of law (of the referee) must be separately stated."

Section 4420 is as follows:

"The finding of the referee upon the whole issue must stand as the finding of the court, and upon filing the finding with the clerk of the court judgment may be entered thereon in the same manner as if the action had been tried by the court."

Section 4421 is as follows:

"The findings of the referee may be excepted to and reviewed in like manner as if made by the court. When the reference is to report the facts the finding reported has the effect of a special verdict."

If the cause were pending in the Idaho state courts, and it had been referred in the manner indicated in the order of reference under consideration, there could, in my judgment, be no escape from the conclusion that the court would be powerless to review the evidence upon the exceptions filed. The Idaho statutes appear to be too clear to be open to construction. The provisions above quoted contemplate that when the parties agree, and the court, upon such stipulation, directs that all of the issues of fact and of law be tried by a referee, and the referee, in conformity with such order and the statutes, hears the evidence and makes and reports to the court his findings of fact and conclusions of law, the court has power only to enter a proper judgment thereon. The clause above quoted, "and to report \* \* \* judgment thereon," is substantially complied with by the referee when he reports his conclusions of law, for the conclusions of law should and do, if properly stated, indicate the substance and define the scope of a proper judgment. "The findings of the referee may be excepted to and reviewed in like manner as if made by the court." The statute so prescribes; and *expressio unius est exclusio alterius*. Hence, if the evidence is insufficient to support the referee's findings they may be set aside and a new trial granted, upon proper motion, seasonably made, for a new trial in the District Court, or, by the Supreme Court, upon appeal. The findings of a referee become a part of the judgment roll. Subdivision 2, § 4456, Rev. St. Idaho 1887. The referee settles bills of exceptions (Rev. St. 1887, & 4430) and statements on motion for new trial (Rev. St. 1887, § 4441). In short, it is too clear for argument that the statutory modes of reviewing verdicts of juries and the findings of a court are applicable to the findings of fact of a referee upon the whole issue, and are exclusive.

I do not wish to be understood as intimating that under no circumstances can exceptions to a referee's report be properly taken. To a certain extent the court has a supervisory control over the referee and his conduct, and, if it should appear upon the face of the record that the referee's findings of fact were not in conformity with the order of reference, or that they were uncertain in material respects, or were conflicting, or that they did not respond to all of the material issues presented by the pleadings, or that the conclusions were not deducible from the findings of fact, it would not be incumbent upon the court to enter the judgment reported by the referee. In cases where the findings of fact are defective upon their face, the court doubtless has power to refer the matter back to the referee, with instructions to remedy the defects, and to make the findings certain and complete; that is, to comply with the original order of reference. If, in some appro-

priate manner, it were made to appear to the court that the referee had acted fraudulently or had been guilty of gross misconduct, the court might decline to accept or confirm his report, but where the referee has acted in good faith, and has reported findings of fact which are certain and consistent, and which respond to all of the issues, and the errors complained of are at most but the mistakes of an honest judgment, the Idaho statutes clearly contemplate that they can be reviewed only upon motion for a new trial or upon appeal. These statutes were adopted from the California Code, and such, as I understand it, has been the uniform construction placed thereon by the Supreme Court of that state. *Russell v. Elliott*, 2 Cal. 246; *Headley v. Reed*, 2 Cal. 322; *Goodrich v. Mayor*, 5 Cal. 430; *Harris v. S. F. S. R. Co.*, 41 Cal. 393; *Thompson v. Patterson*, 54 Cal. 542. And while in no case called to my attention has the precise question been passed upon by the Idaho Supreme Court, the decisions in *Walker v. Campbell*, 3 Hasb. (Idaho) 13, 26 Pac. 123, and *Robinson v. Nelson*, 4 Idaho, 567, 43 Pac. 64, are, to say the least, not out of harmony with this view.

Section 4420 apparently authorizes the entry of judgment by the clerk without awaiting any action upon the part of the judge of the court, but this it is unnecessary to decide at this time. In view of the fact that there is no provision prescribing that notice of the filing of the report shall be given to the parties, or prescribing the length of time after the report is filed in which either party may file objections or exceptions to the report, it would appear to be the better practice for the successful party, upon the coming in of the report, to move, after giving notice, that it be accepted, and that judgment be entered accordingly. It may not infrequently happen that the conclusions of law are not proper deductions from the findings of fact, and I can see no valid reason why the trial court should not direct the entry of such a judgment as is required by the facts found, even though not in harmony with the conclusions of law reported, and so modify the conclusions of law as to make the record consistent. Such seems to be the construction by the Supreme Court of California of similar statutes. *Calderwood v. Pyser*, 31 Cal. 333; *Prince v. Lynch*, 38 Cal. 528, 99 Am. Dec. 427. It is undoubtedly true that references were not infrequent at common law, and I am not aware of any provision of the federal statutes to which such a practice can be considered repugnant. In *Hecker v. Fowler*, 69 U. S. 123, 17 L. Ed. 759 (decided in 1864, prior to the enactment of section 914, Rev. St), notwithstanding the reference was by consent, the losing party made the contention that the award of the referee was invalid because, as was contended, a United States Circuit Court has no power to authorize such procedure. Among other things the court says:

"Practice of referring pending actions under a rule of court, by consent of parties, was well known at common law, and the report of the referees appointed, when regularly made to the court, pursuant to the rule of reference and duly accepted, is now universally regarded in the state courts as a proper foundation of judgment."

No decision has been called to my attention, and I am aware of none, expressly holding that where such reference has been had by



consent of the parties, according to the course of the common law, the judge of the trial court may, upon exceptions, in the absence of a general rule to that effect, review the evidence for the purpose of determining whether or not the referee's findings are supported thereby. It seems to be true that, as a rule, the report of the referee must be accepted or confirmed by the court before the entry of judgment thereon, but I do not understand this rule to involve an inquiry by the court into the sufficiency of the evidence; the scope of the inquiry at such time is limited to the question as to whether or not the referee has, in good faith, fully complied with the order of reference. If he has performed his duty only in part, as appears from the record, or his report is so uncertain as to be unintelligible, or if he has acted fraudulently, or, as it is sometimes put, if he has made "gross mistakes," the court will withhold confirmation or acceptance of the report. Doubt is imported into the question as to the scope of the court's inquiry by the not infrequent use of the phrase "gross mistake," or "gross error," in the conduct of the referee. It is sometimes difficult to determine just what the expression is intended to mean. The function of a referee is very frequently likened to that of an arbitrator. In *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764, the court says:

"A reference by consent of parties of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection," etc.

In *Burchell v. Marsh*, 58 U. S. 344, 15 L. Ed. 96, the court, in speaking of the effect of an award by arbitrators, quotes from *Knox v. Symmons*, 1 Ves. 369, as follows:

"To induce the court to interfere there must be something more than an error of judgment, such as corruption in the arbitrator, or gross mistake, either apparent on the face of the award or to be made out by the evidence; but in case of mistake it must be made out to the satisfaction of the arbitrator, and that if it had not happened he should have made a different award."

And then the court says:

"Courts should be careful to avoid a wrong use of the word mistake, and by making it synonymous with mere error of judgment assume to themselves an arbitrary power over awards."

And again the court says:

"If they (the arbitrators) have given their honest incorrupt judgment on the subject-matters submitted to them, after a full and fair hearing of the parties, they are bound by it."

Likewise, I think that in case of a common-law reference, if it appears that the referee has exercised his honest and incorrupt judgment in finding the facts, after a full and fair hearing of the parties, the court cannot decline to accept the report upon the ground that the referee has erred in his judgment.

In *Sicard v. Buffalo Railway Company*, 15 Blatch. 525, Fed. Cas. No. 12,831 the court says:

"The only question on the record is whether the report of the referee ought to be sustained as against the exceptions filed? The findings of fact made by the referee are conclusive."

The rule as thus stated is not expressly made to apply to the District Court, but, upon the other hand, it is not limited to the appellate court.

In *Tyler v. Angevine*, 15 Blatch. 536, Fed. Cas. No. 14,306, the court says:

"The referee as to the finding of facts stood in the place of a jury."

The case of *Boogher v. Insurance Company*, 103 U. S. 90, 26 L. Ed. 310, cited by counsel for the plaintiff, is not to the contrary. The reference involved was made under the statutes of Missouri, in which state the action originated, and the Missouri statutes were materially different from the Idaho statutes, and the order of reference made upon consent of the parties contained the express provision that the report of the referee should be "subject, however, to exceptions"; and aside from these material considerations the question now under consideration was not involved, and only by inference could some of the general expressions used be considered as in support of the plaintiff's contention. *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764, is also cited as being in support of the government's contention. That was a suit in equity. By consent and request of all the parties a special master was appointed by the court "to hear the evidence and decide the issues between the parties and make his report to the court, separately stating his findings of law and fact, together with all the evidence introduced before him, which evidence shall thereby become part of the report, which report shall be subject to like exceptions as other reports of masters." It is obvious that the case is quite dissimilar from that at bar.

In speaking of the functions of a master in chancery the court says that, in ordinary cases—

"the information which he may communicate by his findings in such cases upon the evidence presented to him is merely advisory to the court, which it may accept and act upon, or disregard in whole or in part, according to its own judgment as to the weight of the evidence."

Again, the court says:

"It is not within the general province of a master to pass upon all the issues in an equity case, nor is it competent for the court to refer the entire decision of a case to him without the consent of the parties."

It is manifest, therefore, that it was not without some show of reason that the party to whose claims the findings of the master were adverse should have contended that, under the clause of the order of reference which provides that the master's report "shall be subject to like exceptions as other reports of masters," the findings of the master were to be considered as merely advisory, and that upon exceptions thereto by the losing party the court might, at its discretion, adopt or reject them. The court declined to accede to this contention, holding that, by the stipulation submitting the entire case for the determination of the master, the parties had submitted their "controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules appli-

cable to the administration of justice in tribunals established by law. Its findings, like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence or in the application of the law, but not otherwise." In considering the opinion of the court it must be borne in mind that the case was a suit in equity, and in the consent and order of the court there was a provision that the master's report be reviewed upon "like exceptions as other reports of masters."

However, it is perhaps unnecessary to more fully elaborate a discussion of what the rule would be if the reference under consideration were a reference at common law, for the reason that while it does not conclusively appear from the record whether the parties, when they consented to the reference, and the court, when it made the order, contemplated the practice prescribed by the Idaho statutes, still, it is expressly declared in the written brief upon behalf of the plaintiff that it "was not a common-law reference, but a reference under the statute, 'by agreement of the parties \* \* \* entered in the minutes,'" as provided by section 4414 of the Idaho Revised Statutes, and this contention seems to be acquiesced in by counsel for the defendants. It is wholly probable that counsel for both parties, being familiar with the state practice and with section 914, Rev. St. U. S. [U. S. Comp. St. 1901, p. 684], assimilating the practice in the federal courts in actions at law to that of the state courts, had reference to the state practice when they assented that the referee should make and report findings of fact and conclusions of law. Where similar records have been involved, the courts have almost uniformly held that the consent of the parties and the order of court were made with reference to the state practice. *Newcomb v. Wood*, 97 U. S. 581, 24 L. Ed. 1085; *Boogher v. Insurance Co.*, 103 U. S. 90, 26 L. Ed. 310; *Dundee Mortgage Co. v. Hughes*, 124 U. S. 157, 8 Sup. Ct. 377, 31 L. Ed. 357; *Robinson v. Life Ins. Co.*, 16 Blatchf. 194, Fed. Cas. No. 11,961; *Parker v. Railroad Co.*, 79 Fed. 817, 25 C. C. A. 205. If, then, the contention of the government be adopted, that by its consent the cause was referred with reference to the state practice, little more need be said, and a discussion of the extent to which the state statutes in cases of reference are made binding upon the federal courts by section 914 is needless, for it was competent for the parties, with the consent of the court, to submit their controversy in the manner and upon such conditions as they saw fit to agree upon. In legal effect the statutes of Idaho are to be read into and considered as a part of the agreement and order of reference, and the report of the referee, regardless of section 914, has such virtue and effect as are given to such reports by the statutes of Idaho. This, as I understand it, is the clear import of the decisions in *Dundee Mortgage Company v. Hughes*, and *Newcomb v. Wood*, *supra*. In the latter case the court says:

"The power of a court of justice, with the consent of the parties, to appoint arbitrators and refer a case pending before it, is incident to all judicial administration where the right exists to ascertain the facts as well as to pro-

nounce the law. *Conventio facit legem*. In such an agreement there is nothing contrary to law or public policy. The Code of Ohio provides (section 281) expressly 'that all or any of the issues in the action, whether of fact or law, may be referred upon the written consent of the parties or upon their oral consent in court entered upon the journal.' 2 Swan & C. Rev. St. p. 1027, c. 87. The reference here in question was made in the latter mode and by virtue of this authority."

The plaintiff was not compelled to consent to the reference, nor was it incumbent upon the court to order a reference, but if such course was consented to by the parties and the order was thereupon made by the court, all in contemplation of the procedure prescribed by the Idaho statutes, no reason is apparent why the court should now deviate from the course deliberately selected and entered upon for the determination of the controversy. If either party was not content with the status of a decision by the referee, as the same is defined by the Idaho statutes, it being their right, it was their duty to decline to give their consent to an unconditional reference under such statutes. Having sought the advantage accruing to it from favorable findings by the referee under the Idaho statutes, the plaintiff should not be relieved from the disadvantage of adverse findings. In adopting this view no unfairness results to either party, for, at the outset, they voluntarily selected their tribunal, namely, a referee "learned in the law," and by reference to the Idaho statutes they agreed upon their course of procedure, and assented to the force and effect to be given to the referee's report. Moreover, while I do not regard it necessary to discuss the extent to which, under section 914, the Idaho state practice in cases of reference should furnish the rules of procedure in this court, I am unable to see any valid reason why, in the main, the state practice should be rejected. True it is that in the matter of new trials and bills of exception and review upon writ of error the federal courts proceed independently. Such fact alone does not make it impracticable to assimilate the state practice in trials before referees. So far as I have been able to discover there is no controlling case defining the extent to which the state procedure in such cases is made binding upon the federal courts by section 914. That this section does not require that in all respects the practice and procedure in federal courts shall conform to the practice and procedure in the state courts in actions at law appears upon the face of the statute, and the courts have frequently so held. The general principle seems to be that federal courts will not follow the state practice where such a course "would unwisely incur the administration of the law, or tend to defeat the ends of justice." *Railroad Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898. It is not apparent to me how the administration of the law would be unwisely incumbered or justice would be imperiled by adopting the state rule relative to the subject matter under consideration. Upon the other hand, if, upon exceptions like those under consideration, the court may be required to examine the evidence for the purpose of determining whether the findings of fact are supported thereby, the labor of the referee in preparing such findings would be futile, for it is to be assumed that in every case the unsuccessful party before the referee would file with the court exceptions, which may, without much thought or much labor, be prepared, and thus require the court to do

exactly what it would be compelled to do if the evidence were taken by an examiner and submitted to the court for original findings of fact and conclusions of law. In this case the referee was not even directed to report the evidence to the court. The court must follow some rule; it cannot act arbitrarily. In the brief filed by the Government, referring to section 914, it is said:

"The section last above quoted is not intended to deprive the court of power or authority to deal with the report of a referee as it may choose, and the statutes of Idaho cannot be held to limit such power in the absence of an express provision in the federal statutes."

But it is not my view that a court has the inherent "power or authority" to deal with a referee's report in an arbitrary manner. In matters of such common procedure the courts should act in accordance with some general rule, prescribed by statute, founded on precedent, or formally adopted and made public by the courts. There is no pertinent federal statute, nor has this court adopted any general rule. In the absence, therefore, of a federal statute, and a rule of court, the court should follow either the rule of the common law or the procedure prescribed by the state statute. It is not contended that the rule at common law is more liberal to the plaintiff than that found in the state procedure. Indeed, it is a grave question whether the rights of the plaintiff to a review of the findings of the referee are not more circumscribed by the common law than by the Idaho statutes; for, if this case should be considered as having been referred without regard to the Idaho statutes but with reference to the common law, it might, with much show of reason, be contended that the decision of the referee, in the absence of fraud or gross misconduct, is final and conclusive.

In *Newcomb v. Wood*, *supra*, it was held that "the agreement to submit the controversy to referees selected or approved by the parties implied clearly that they intended the award should be final and conclusive." In *Hecker v. Fowler*, cited *supra*, it is said that under the common law "such a report of referees is in many respects a substitute for the verdict of a jury." In *Campbell v. Equitable Life* (C. C.) 130 Fed. 786, where, in the stipulation of reference, it was provided that the referee's findings of fact should "have the same force and effect as the verdict of a jury," the court declined to review the findings. Apparently, therefore, the Idaho practice is, to say the least, quite as liberal as that at common law, and there is no basis for the contention that its adoption in the main by the federal courts would "unwisely incur the administration of the law, or tend to defeat the ends of justice."

*Parker v. Ogdensburgh* (C. C. A., N. Y.) 79 Fed. 817, is a case very much in point. The action was one at law for damages on breach of contract. The parties stipulated that "a jury trial be, and is, waived herein, and the whole issues referred" to an attorney who is named "as sole referee to hear, try, and determine," etc. Upon this stipulation an order of reference was made. The court held that the state statutes of New York were applicable, and defined the power and authority of the referee. After quoting section 914, the court says:

"Inasmuch as this statute does not provide for like conformity in proceedings to review judgments of those courts, great embarrassment results to the

defeated party where a referee appointed by consent, in conformity to the state Code of Procedure, has made his report, and the court has entered judgment thereon; nor has the existing difficulty been substantially overcome by the rule adopted by the three federal districts of this state providing for motion for a new trial. In view of the decisions, it is rather surprising that parties to common-law actions in the circuit court consent to such references. But none of the authorities intimate that under section 914 a reference in conformity with the state practice may not be had when they do consent. It cannot be said that a reference would (in the language of the Supreme Court when discussing a state statute prescribing the manner in which a jury should be charged) 'unwisely incumber the administration of the law, or tend to defeat the ends of justice.' *Railroad v. Horst*, 93 U. S. 301, 23 L. Ed. 898; *Newcomb v. Wood*, 97 U. S. 583, 24 L. Ed. 1085; *Lamaster v. Keeler*, 123 U. S. 390, 8 Sup. Ct. 197, 31 L. Ed. 238; *Amy v. Watertown*, 130 U. S. 301, 9 Sup. Ct. 530, 32 L. Ed. 946. And, if a reference in conformity to the practice prescribed by state statute may be entered upon as such practice prescribes, there is no reason why it may not also be terminated in conformity with such practice."

Since writing the foregoing the case of *Kilduff v. Roebbling's Sons Co.* (C. C.) 150 Fed. 240, has come under my observation. The views therein expressed by Judge Lacombe, who writes the opinion, are perhaps less favorable to the plaintiff's contentions than the conclusions which I have reached. It is there held that the order of the court directing the entry of judgment is pro forma only, and that the court will not undertake to review the referee's conclusions of law, much less his findings of fact. In the course of the opinion this language is used:

"Indeed, the very object of a reference is to relieve the judge at circuit from considering or passing upon any of the questions which have to be determined in arriving at the final conclusion which is to be embodied in the judgment."

It follows from the views expressed that both the motion and the exceptions must be denied.

The plaintiff is given exceptions, and is granted 30 days from the filing of this opinion in which to present for settlement a bill of exceptions, if it desires to incorporate the exceptions into a bill.

The clerk is directed to enter judgment in favor of the plaintiff and against the defendants for \$117.10, the same being the amount (with interest) found due by the referee, also for costs of suit.

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### RUSHMORE v. SAXON.

(Circuit Court, S. D. New York. January 4, 1908.)

#### 1. TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—FRAUDULENT IMITATION IN FORM OF ARTICLE.

Complainant was a manufacturer of search light lamps for automobiles, known generally by his name as the "Rushmore" lamps. He also designed a new and distinctive ornamental shell to distinguish his lamps from those of other makers, such peculiar design being nonfunctional. Defendant, who was also a maker of lamps, copied complainant's shell in all particulars even to defects, although, as shown, the shape of such shell rendered his own lamps less effective for use, the result being that in appearance there was nothing to distinguish his lamps from those of complainant except the reading matter on a small and inconspicuous name

plate which was also needlessly put in the same place on the shell as that of complainant. Defendant also sold and billed his lamps to purchasers as "Rushmore" lamps. His lamps were however of lighter and inferior material and cheaper construction and could be and were sold at a smaller price than complainants. *Held*, that he was chargeable with unfair competition, and that complainant was entitled to an injunction to restrain the same; the imitation being clearly by design, and for the purpose of misleading purchasers to complainant's injury and defendant's advantage.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 81.]

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

2. SAME—TRADE-NAME—ARBITRARY COMBINATION OF WORDS.

When one has designedly and arbitrarily taken an unusual and ungrammatical combination of two words, even if they do suggest an idea, and a correct one, of the construction or utility of the article, as his designating and distinctive name for his article of manufacture, and by long use it has come to be so understood by the purchasers and users thereof, a competitor has no right to use it for the purposes of deceit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 84.]

3. SAME—INFRINGEMENT—DECEPTION OF PUBLIC.

Where complainant arbitrarily selected the name "Flare Front," and used it to designate and distinguish an automobile lamp made by him from all others for so long a time that it became associated by purchasers with his lamps, defendant had no right to appropriate and use such name to aid him in palming off on purchasers as complainant's lamps of his own make which were in appearance exact duplicates of complainant's lamps, and such use by him will be enjoined.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 84.]

In Equity. Suit to restrain unfair competition in trade, and for an account.

See 154 Fed. 213.

Alfred Wilkinson, for complainant.

Grafton L. McGill, for defendant.

RAY, District Judge. The bill of complaint herein was filed about January 18, 1907, and alleges unfair competition in trade by defendant in that the defendant has exactly copied the new, original, and characteristic search light shell of the complainant, and has made a painstaking and wholly unnecessary and exact imitation of the complainant's shell in shape, size, weight, decoration, form, and other details, so that the search light lamps of the defendant were, in appearance, substantially or exactly the same as the complainant's, and that defendant has put out and sold large numbers of his said search light lamps, and is proposing to sell others of the same make in large quantities. Also, that the defendant has knowingly, studiously, and exactly so imitated complainant's lamp for the purpose of misleading and deceiving the public, and securing the fraudulent sale and substitution of the defendant's search light lamps, so imitating complainant's, as and for the lamps of the complainant, and for the purpose of diverting profits from the complainant, and securing the advantages of the reputation of complainant's lamps and the existing demand therefor. The complaint

also alleges that many persons have been misled and deceived by such acts and imitation all to the great damage of complainant.

The bill of complaint also alleges that the peculiar design, form, and construction of his said search light lamp were new with him, and that in his trade with his customers and in his intercourse with the trade he gave to his said lamps and used, as applied thereto, the name "Flare Front," in connection with and to indicate his said lamp; and that said name "Flare Front" was originally adopted by complainant and used by him as the first one in connection with and as an indicating name for automobile lamps; and that said words were arbitrarily chosen by the complainant to distinguish his said lamps, and that the defendant has copied said name "Flare Front," and is using it in his catalogues and advertisements and with the trade in connection with his said lamps for the purposes of deceiving purchasers and palming off said imitation lamps as those of complainant, and to assist defendant in the fraudulent sale and substitution of defendant's lamps as those of complainant. Also, that defendant has sold his imitation lamp as and for the Rushmore lamp, and has represented that his lamps were the Rushmore lamps, and has so billed them to purchasers. All this is denied by the defendant except he admits, in substance, in his evidence and proofs at least, that since complainant commenced manufacturing and selling his lamps defendant has adopted the same style and form of manufacture, descending to detail, and has sold same. The defendant claims however that before he commenced making lamps in the same form and style of complainant's lamp that others had done the same thing, and that he, therefore, was only copying a lamp in general use and made and sold by many different parties. Defendant denies any purpose to defraud or injure the complainant or to palm off his lamps as to complainant's manufacture. The defendant also insists that he has sufficiently distinguished his lamp from the "Rushmore" in that he has placed a plate thereon, showing to the trade and all purchasers and users that it is of his manufacture, and not the Rushmore lamp.

The defendant was called as a witness, subpoenaed by the complainant, and he testified, among other things, that he is the proprietor and the manager of the Manhattan Lamp Works in New York City, and that he manufactures and sells the lamp marked "Exhibit B, Saxon Lamp," and that he commenced their manufacture about October, 1906. On cross-examination the defendant was asked by his counsel the following question: "The lamp made and sold by you is, to all external appearances exactly like the lamp made and sold by the complainant, Rushmore. Please explain how you came to make a lamp of this construction?" The answer was: "My idea was to make a lamp exactly the same as the Rushmore, so that some of my customers could have a Saxon lamp as well as a Rushmore." The next question was: "Did you have in mind that your customers would suppose your lamp was a Rushmore lamp?" The answer is: "I do not believe they could for my name was on the lamp. Q. Did you ever intend that they should so suppose? A. No." He then stated that he put his name plate on the lamp at a point exactly corresponding to that at which complainant's name plate is exhibited on his own lamp. This witness also testified



that on these lamps he put different name plates or different names, but he could not, or at least did not, give but one or two of these names.

The lamp in question designed and made by the complainant, as the evidence shows, is a superior and popular search light or acetylene gas lamp for automobiles. While automobiles in the large cities are coming into use for general purposes, they are largely an article of luxury so to speak. On account of their cost, they are used largely by persons of wealth who look much to the style and appearance as well as to the solidity, strength, and durability of the machine. Few purchasers or owners know anything about the mechanism, and as a rule they know less as to the quality of the materials used in their construction. The search light lamp is always prominent and attractive upon an automobile, and in the daytime should be of attractive and pleasing design, thus making it ornamental. The result is that the design and appearance of the shell of this lamp are of great importance, and, if pleasing to the trade, to purchasers, and users a particular style or form of construction may be of great value, very popular, and meet with large sales, even if it be no better or of no greater practical utility, than one of much cheaper construction. Knowing all this from experience, and much more, in December, 1905, Rushmore deemed it wise to design an ornamental and distinctive inclosing shell for his lamps for automobiles, which would give notice and a guarantee to his customers that they were securing the Rushmore lamp. The evidence shows, and it is practically conceded, that this was a superior lamp. In January, 1906, Rushmore exhibited this structure of his at the automobile show in Madison Square Garden, New York City, and it was there seen by many thousands of people, particularly by those interested in automobiles and automobile construction, fixtures, and attachments. The evidence tends to show, and establishes to my satisfaction, that the complainant, Rushmore, was the first to design this shell for search light lamps, known as the "Rushmore Lamp," Exhibit A in the proofs. It is distinctive in its type, form, ornamentation, and peculiarities. The particular form and appearance of these external parts are, almost without exception, nonfunctional. Rushmore's lamp has a new and arbitrary form of front door, rear cover, and ventilator. These he combines in one lamp, and then dressed up or ornamented the shell with arbitrary curves, beads, etc., and thus had a shell which was characteristic, novel, and attractive in appearance. All this the defendant copied to the minutest detail.

In November, 1906, the complainant was first informed that defendant was making and putting his imitation lamps on the market. He found no way to get certain proof until during an automobile exhibition at Madison Square Garden held in January, 1907, the complainant, through one J. E. Kelly, then and there purchased "Exhibit B, Saxon Lamp," at defendant's booth where he was exhibiting lamps and taking orders. Kelly told the persons in charge he had a customer who wanted a pair of Rushmore lights; that as the price was high he wanted something he could put in as a Rushmore light at a lower cost. The persons in charge told him they had a light they called the "Rushmore" light, and told Kelly they were an exact copy of the "Rushmore," if not better, and that all the parts were

the same, and sold him a pair of the 8-inch size. Kelly asked for a receipt, and received one reading:

"Saxon Motor Lamps.  
"Manhattan Lamp Works.  
530 West 28th Street,  
New York.

"Mr. J. E. Kelly.	1/17, 1907.
1 p. No. 8 in. 1 Rushmore lamps.....	35 25
2% for cash.....	70
	<hr/> 34 55

"To be called for at 10 A. M.

"Paid. S. Sklare."

Kelly called at defendant's factory and obtained the lamps the next day. As this lamp is in evidence, a comparison shows that it is identical with Rushmore's, even to errors in construction and immaterial and unnecessary details, so far as external appearance is concerned. Rushmore thus describes the resemblance between his lamp and defendant's lamp:

"It resembles it particularly in the use of screws upon parts that are soldered together where we use screws solely to hold the parts together; in the use of the needlessly large side socket with two set screws; in the use of very large rivets in the lower ventilator; in our 1906 lamps of this size I made a mistake in the punches and dies which compelled me to use rivets much larger than required for strength or appearances. These large rivets are copied in the Exhibit B lamp. Likewise the castings of the hinges and catch on the front door are so exact in every detail and reproduce every minor defect in similar parts in my lamp as to indicate to my satisfaction that the defendant simply removed these parts from one of my lights and used them in the foundry instead of making patterns of his own. Likewise the burner in the Exhibit B lamp is placed at a point very close to the rear of the lamp, so that it closely resembles my lamp, although when so placed the flame cannot be at the exact focal point of the cheaper and longer focal lens mirror which he employs. Q. 32. Compare said Exhibits A and B as to weight. A. The Exhibit B lamp weighs approximately 8½ pounds; whereas the Exhibit A lamp weighs approximately 11½ pounds. Q. 33. What does this difference in weight indicate? A. That the brass sheets from which Exhibit B lamp was made are very much lighter and cheaper; that the lens mirror is very much smaller of thinner section, and of glass of much less density. Q. 34. Does this difference in weight make any difference in your opinion of the comparative cost of the two lamps? A. It makes a very great difference, because of the lower first cost of the material, reduced loss in waste material, and in the much lower cost of the class of workmanship required to make up the lighter material. Q. 35. Will you briefly point out any features of structural superiority or inferiority in these two lamps? A. In the first place the lens mirror is of very much smaller diameter in the Exhibit B lamp. It is a much flatter curvature, very inferior glass, with the result that its focal point is so far in front of same that it is not possible to move the burner in the Exhibit B lamp far enough forward so that the inferior lens mirror may even operate at its best efficiency. In placing this burner so far back in order to copy my lamp the lamp is so made that it cannot give as good satisfaction and service as if there was no such a deliberate effort at imitation. In lights of my manufacture customers have learned that a distinctive feature is the location of our burner very close to the rear end of the lamp. As to other details of mechanical construction, whereas in my lamp I employ heavy endless brass rings on the front and back of the cylinder which are secured by rivets, the Exhibit B lamp has cheaper noncontinuous rings joined together only by soft solder. Whereas the hinges in my lamp are accurately finished in the milling machine; in the Exhibit B lamp

the parts are put together without such finishing. In my lamp the front glass is held in place between rings of asbestos; in the Exhibit B lamp there is no such packing. In my light, the parts are all made of sufficient strength that they are held together solely by the screws and rivets; in the Exhibit B lamp I notice that various parts, namely, the top ventilator, side socket hinges, bottom ventilator, are secured largely with solder."

This, if true, and I find that it is, substantially, shows more than a purpose to make and sell a lamp like or similar to the Rushmore lamp. Evidently the purpose was to copy in design and appearance to the smallest detail the Rushmore lamp, and induce users and purchasers and the trade, so far as possible, to think this was a Rushmore lamp and purchase and use it as such. The name plate was small and put, unnecessarily, in the very place where Rushmore placed his. There was nothing to attract attention to this plate, and even had attention been called to it, but few users or purchasers would have understood or would understand it was not a genuine Rushmore lamp, unless familiar with the fact that Rushmore put his own name on all lamps of his own make. It was inferior in construction and material and utility to Rushmore's and could be sold for far less at a profit. To the inexperienced these facts were not apparent, however. Rushmore had sold between 8,000 and 9,000 of these "Flare Front" lamps in 1906, but after these imitations came on the market Rushmore's sales fell off and he was compelled to reduce prices to hold his trade. That this was due to these acts of defendant cannot be doubted. They were the natural and probable results. They must have been foreseen and intended by the defendant, assuming him to be an intelligent man, which, evidently, he is. The complainant also produced the testimony of other witnesses tending to show, and showing to my satisfaction, that persons were confused and misled and deceived, and that they naturally would be, and could not at a short distance tell the one lamp from the other. That defendant was sending out to the trade these imitation lamps as Rushmore lamps is further shown by a bill made out in the handwriting of a Mr. Barron, the bookkeeper of defendant, whose first name he did not remember, so he could not be traced and found, to J. W. Leavitt & Co. of San Francisco, Cal., December 10, 1906, for lamps, among which are billed—

"2-7" Imitation Rushmore, 6.50.....	13 00
2-8" Reg. Rushmore, 9.50.....	19 00
1-8" Reg. Rushmore.....	12 53"

The defendant admitted this bill was on his letter head, and was sent from his place of business, but said "the names 'Imitation Rushmore' and 'Regular Rushmore' have been inserted without my knowledge or consent." He could not remember whether or not he sent Leavitt & Co. letters stating he could supply them Rushmore lamps, or lamps in imitation of Rushmore, but admitted the entries in the bill were regular, made in regular order, and that the whole bill, except the printed part, was in the handwriting of that bookkeeper. I cannot credit the statement that this bookkeeper inserted those charges without the knowledge or consent, express or implied, of defendant. He would not have assumed to do such a thing without

authority from his employer. Evidently this bookkeeper understood the purpose of the imitation, and was carrying out the purpose of his employer, if not his express instructions. Rushmore testified that the name plates he saw on the imitation lamps sold by defendant had "a small and almost indistinguishable name plate." It seems to me that when the defendant copied Rushmore in every detail except functions, and quality of material, and weight of material, etc., in short, as to appearances, he had a purpose. This purpose is made evident when we look at what he did in putting the imitation on the market. That he did defraud and injure the complainant and, to some extent, the public, cannot be questioned. That his acts led to confusion in the trade and among purchasers and users is self-evident. The results could not be otherwise. A person must be held to intend the known and reasonably to be apprehended consequences or results of his own acts when such acts are knowingly and intentionally done. *Agnew v. United States*, 165 U. S. 53, 17 Sup. Ct. 242, 41 L. Ed. 624, where the following charge was said by the Supreme Court to be unexceptional as matter of law, viz.:

"The law presumes that every man intends the legitimate consequence of his own acts. Wrongful acts knowingly or intentionally committed can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intent. The intent to injure or defraud is presumed when the unlawful act, which results in loss or injury, is proved to have been knowingly committed. It is a well-settled rule, which the law applies in both criminal and civil cases, that the intent is presumed and inferred from the result of the action."

This rule is inexorably applied in criminal cases, and is clearly applicable in such a case as this. The rule applicable in ascertaining intent is admirably stated in vol. 4, *Wigmore on Evidence*, pp. 3388, 3389, 3390, § 2413, as follows:

"The elements of an act, in themselves considered, being its subject, its terms, and its final utterance (ante, § 2404, par. 1), it is obvious that these must all be preceded and brought into being by some sort of volition or intent. The result, however, that is thus brought into outward being does not always correspond with the inward intent; and the problem thus arises (ante, § 2404, par. 2) how far either the expression or the intent shall be treated as legally paramount the one to the other. \* \* \* In order to solve the problem, it is indispensable that the different possible meanings of the words 'intent' or 'intention' be kept apart, and that the distinction between 'volition' and 'intention,' in the proper sense of the words, be established. \* \* \* It may be assumed, then, that there must at least be a volition of some sort preceding every legal act. But it is also apparent that the act, as expressed and apprehensible to the world at large, or to the other party in particular, may not be such an act as was intended. In those cases, then, where a volition was exercised, but the outward consequences were not produced according to intention, are we to say that because there was a volition, the person is necessarily to be fixed with all the consequences, of whatever sort they be? Or are we to say that, because there was no intention of certain consequences, the person is necessarily not to be fixed with them? We are to accept neither solution in this absolute form. The latter solution is not fair to the community dealing with the person. The former solution is not fair to the person himself. No practical system of law could be content with either, applied in rigid uniformity. The established doctrine of tortious responsibility suggests an analogy and provides a solution. We are to fix the person with such expressed consequences as are the reasonable result of his volition. In other words, the act as legally effective will be determined in respect to

the three elements of subject, terms, and finality, by that expression of it which results, to the other person in the transaction, as the consequence, reasonably to have been anticipated under all the circumstances, of the volition of the actor. This avoids on the one hand the impracticality of the merely external standard, so far as it would have held the person liable for an apparent act which was not the reasonable consequence of his conduct; and, on the other hand, it avoids the impracticality of the merely internal standard, so far as it would have exonerated the person from an unintended consequence which he ought to have foreseen and might have avoided. In short, it adapts, to the general doctrine of legal acts, the test of negligence, i. e., responsibility resting on a volition having consequences which ought reasonably to have been foreseen."

It is always difficult to obtain evidence in such cases. Those who knowingly participate in the wrongdoing are loth to divulge, and those in the trade who have been deceived and who, in turn, have innocently misled others by selling them the imitation article when they supposed they were selling the genuine, and the purchaser supposed he was getting the genuine, are slow to confess or admit the imposition. In short, it is not usual for a dealer to admit, unless necessary, that he has been imposed upon, and even the owner of a machine who discovers that he has purchased and is using an inferior lamp, when he supposed he had the genuine, is slow to announce the fact. This is the common experience of mankind. Rushmore was under no obligation to await further developments—further deceit, further injury. He was under the necessity, would he protect himself, of acting promptly. "Wrongs which are the probable result of given means should be prevented, not awaited." *Lanahan v. John Kissel & Son* (C. C.) 135 Fed. 899-903.

In the judgment of this court the complainant has established his case on this branch of it by such a preponderance of credible evidence, much of which has not been referred to, that it is made out beyond a reasonable doubt. Even if the evidence is not sufficient to establish that persons have been actually deceived, it is all-sufficient that "the resemblance is such as would be likely to cause the one mark to be mistaken for the other." *Amoskeag Mfg. Co. v. Trainer*, 101 U. S. 51-63, 25 L. Ed. 993; *National Biscuit Co. v. Baker* (C. C.) 95 Fed. 135. The user, not the dealers, are the ones to consider. Same cases. I think this case is squarely within *Enterprise Manufacturing Company v. Landers, Frary & Clark* (C. C. A., Second Circuit) 131 Fed. 240, 65 C. C. A. 587, where the facts were quite similar. In that case, among other things, Judge Lacombe, in giving the opinion of the court, said:

"But defendants overlooked the fact that a court of equity will not allow a man to palm off his goods as those of another, whether his representations are made by word of mouth, or, more subtly, by simulating the collocation of details of appearance by which the consuming public has come to recognize the product of his competitor."

And as to what constitutes unfair trading, and as to the proof necessary, he also said:

"This is a most aggravated case of unfair trading. Usually, in these cases, the defendants so dress their goods as to present a number of points of difference, on which they rely when charged with intent to deceive; insisting that, although there may be resemblances, the differences are so great as to

preclude any idea that they had sought to produce confusion. Here, on the contrary, they have not only conformed their goods to complainant's in size and general shape, which was to be expected, but also in all minor details of structure—every line and curve being reproduced, and superfluous metal put into the driving wheels to produce a striking characteristic effect—while the goods are so dressed with combinations of color, with decorations reproduced or closely simulated, with style of lettering and details of ornamentation, that, except for the fact that on the one mill is found the complainant's name, and on the other the defendant's, it would be very difficult to tell them apart. It is elementary law that, when the simulation of well-known and distinctive features is so close, the court will assume that defendants intended the result they have accomplished, and will find an intent to appropriate the trade of their competitor, even though in their instructions to their own selling agents they may caution against oral misrepresentations as to the manufacture of the goods. There is evidence to show that purchasers have been deceived as to the identity of these mills, but, in the case of a Chinese copy, such as defendants offer to the public, such proof is hardly needed."

See, also, *Marvel Co. v. Pearl*, 133 Fed. 160, 66 C. C. A. 226, where the court points out the distinction between imitating the functional and mechanical construction essential to the proper operation or making of the device and imitating the general form and appearance or ornamentation essential to commercial success from the standpoint of taste and attractiveness. Here, defendant was not striving to make as good a lamp as complainant's, but one he could sell as and for it.

Coming to the other branch of the case, the alleged unlawful appropriation and use of the name "Flare Front," we find more difficulty. That name, in no grammatical sense, is descriptive. But a descriptive name, or a name which to some extent is descriptive, if this be such, may come to have a secondary meaning, one which when heard or seen indicates to the trade, and to purchasers and users of a certain article, the goods or manufacture of a certain maker; those of the one using the name, and no other. It then becomes the trade-name of that particular manufacturer using it to designate his goods, and as such is entitled to protection, provided he solely and arbitrarily selected and appropriated it. This is true when another making the same article in close imitation applies to such imitation the same name, and also applies it to the same article not made in close imitation, if it be done to defraud and palm off such goods or article as the manufacture of the one first arbitrarily selecting and using the name as a distinguishing one for his goods. Of course it must be so used to deceive the consumer. There can be no question that the complainant, Rushmore, arbitrarily selected the name "Flare Front," and used it to designate and distinguish his lamp from all others. "Flaring Front" and "Flared Front" had been used by others, in connection with other words, in giving a description of their lamps. For instance in defendant's Exhibit "Solar Catalogue of 1904," put out by the Badger Brass Manufacturing Company to advertise and illustrate their lamps, and on which defendant relies, we find, "Generator Lamps," Illustration—"Model 64A and 66A are high grade lamps of rakish design and foreign style, giving a long effect to car. Made of brass, except front, lens, rim, and back are of copper; doors open only in back which holds mirror reflector. Flared fronts are aluminum lined." This is clearly descriptive of a class of lamps; certain ones of which have "flared

fronts," and the term "flared fronts" is not a distinguishing name given to those lamps which have a flaring front. It is not a name given to the lamp at all for any purpose. It means simply, that the flared fronts of lamps having such fronts are aluminum lined. The words "flared fronts" are not used to indicate the lamps of the Badger Brass Manufacturing Company. Not so with Rushmore's novel selection of the name "Flare Front." "Flare" is a verb and also a noun. "Front" is a noun. The words "Flare Front" are simply the novel and unusual use of two nouns and either a compound word not used by anyone before, so far as appears, or the meaningless combination of a verb with a noun or an arbitrary, ungrammatical, meaningless (grammatically speaking) combination of two words, nouns, for a purpose—the purpose of giving an unusual and a distinguishing and distinctive name to this article of manufacture. The participles of the verb "flare" are, past "flared" present "flaring." Participles are properly used as adjectives. Verbs alone are not. Nouns may be used as adjective modifiers. But they are of two kinds, possessive and explanatory, as Solomon's temple, and, Hughes, the Governor. Here "front" is not used to explain "flare," and "flare" is not properly used to explain "front." It should be "flared front" or "flaring front." We would hardly say "robin bird," but "the bird, a robin," etc. Hand is a noun; saw is a noun. We say or write handsaw as one word or hand-saw as a compound word. Hence in the Badger Catalogue, Exhibit "Solar Catalogue of 1904," we have the word "flared" properly used as an adjective to indicate a certain kind of fronts. Those spread out or one which will cause the light to wave or flutter or burn with a flaring flame. All this is usual and clearly and properly and grammatically descriptive. Rushmore did not select or make a compound word, as it is not hyphenated and could not be, grammatically, if he used the verb. Clearly, in using the word "front," he intended the mechanical front of his lamps, not the light it would give or the function it would perform. He used the word "flare" as an adjective probably, but, if so, he used it improperly, and ungrammatically, strictly speaking, and arbitrarily, and intended so to do in order to coin a new and a distinguishing name for his lamp. It might indicate that his front was one that would cause a glaring, wavering light to emanate therefrom, or that the front spread outward, or that it was an "ostentatious" showy lamp or front. See Century Dictionary. It became his trade-name after long use as surely as would have the use of any name absolutely unknown to the English language. It was a new coinage and a coinage for a legitimate purpose, and was so appropriated by complainant. Defendant had no right to appropriate it to aid him in palming off on purchasers and users the lamp of defendant as that of complainant's manufacture. This is what the defendant did, and in the Saxon Catalogue of Automobile Lamps we find him illustrating and advertising the "Flare Front, all brass search light," one of which, to all external appearance, is an exact duplicate of complainant's "Flare Front search light lamp." Rushmore describes his as "the new flare front search light" and specifies that this has "a large flaring front."

My attention is called to patents to Miller, to Gray, and to Williams as showing the use of bicycle and vehicle lamps with flaring fronts,

and described by Miller as "a large flaring lens-holding collar D, extends forward from the front portion A," etc., and by Williams as follows: "The opening at the front is surrounded by an outwardly-flaring reflector," etc. These are natural and grammatical descriptions, but have no tendency to show that any one ever used the distinguishing words "Flare Front" prior to their arbitrary adoption by the complainant. Complainant does not contend that "Flare Front" had come to be the sole distinguishing name by which his lamps were demanded, sought, sold, and purchased by dealers or users. Usually they knew the name of the maker, and frequently asked for the Rushmore lamp. However, this fact does not defeat complainant's remedy.

Unfair competition in trade, when found to exist, should be discouraged, not encouraged or sanctioned, and the restraining power of the court extends to the use of all the means and devices resorted to by the offending party to consummate it. Some particular act, which, standing alone, would not constitute unfair trade, may be restrained with others, all together constituting the unfair trade process resorted to. Hopkins, *Unfair Trade*, pages 87 and 88, § 40; *Lever v. Goodwin*, 4 R. P. C. 492-506; 36 Ch. Div. 1; 57 L. T. 583; 36 W. R. 177. In the case first cited Lord Justice Cotton said:

"There may be no monopoly at all in the individual things separated, but if the whole are so joined together as to attempt to pass off, and to have the effect of passing off, the defendants' soap as the plaintiffs', then, although the plaintiffs have no monopoly either in 'Self-Washing' or 'Self-Washer' or in the parchment paper or in the spaced printing, yet if those things in which they have no sole right are so combined by the defendants as to pass off the defendants' goods as the plaintiffs', then the defendants have brought themselves within the old common-law doctrine in respect of which equity will give to the aggrieved party an injunction in order to restrain the defendant from passing off his goods as those of the plaintiff."

Hopkins further says, page 88:

"The doctrine of unfair competition, by which the use of descriptive words has sometimes been restrained, has engrafted upon it this important qualification—that in no case will the use of a merely descriptive word be restrained as deceptive, unless in circumstances which show fraud on the part of the user."

Such is this case as to the words in question.

It is settled by scores of decisions that one may not use "his own name, or that of another, in a manner willfully calculated to deceive the public into a belief that his goods are the goods of the plaintiff who bears the same name. This presents a state of facts that warrants the invocation of the injunctive power of equity; the decisions being practically unanimous." Hopkins, *Unfair Trade*, page 106, § 53 (b). See cases there cited. "Where the name is one which has previously thereto come to indicate the source of manufacture of particular devices, the use of such name by another, unaccompanied by any precaution or indication, in itself amounts to an artifice calculated to produce the deception alluded to," etc. Hopkins, *Unfair Trade*, p. 107, § 53 (b). See cases there cited.

In *California Fig Syrup Company v. Improved Fig Syrup Co.* (C. C.) 51 Fed. 296, 297, Mr. Justice McKenna, then Circuit Judge, now of the Supreme Court, U. S., said:



"Respondent urges that the words 'Syrup of Figs' are descriptive, and that complainant deceives when it uses them to designate its compound. The deceit does not appear on the face of the bill, and it is unimportant if they are descriptive. The question is now, not whether complainant has the exclusive right to use the words 'Syrup of Figs' or 'Fig Syrup,' but it is whether respondent has, by use of them and other words, and by the other imitations alleged and exhibited, so far imitated the form of complainant's device and description to represent its goods as its goods, and appropriate its reputation and trade. The gravamen of the action is the simulation of complainant's devices and the deception of purchasers. This is the principle of the best-considered cases, uniting them, notwithstanding their diverse facts."

These "syrup of fig" cases were up in *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed. 175, 178, 4 C. C. A. 264; *California Fig Syrup Co. v. Stearns* (C. C.) 67 Fed. 1008; *California Fig Syrup Co. v. Frederick Stearns & Co.*, 73 Fed. 812, 814, 20 C. C. A. 22, 33 L. R. A. 56; *California Fig Syrup Co. v. Warden* (C. C.) 95 Fed. 132; *Clinton E. Worden & Co. v. California Fig Syrup Co.*, 102 Fed. 334, 42 C. C. A. 383. The Warden Case was reversed by the Supreme Court of the United States (*Warden v. California Fig Syrup Co.*, 187 U. S. 516, 23 Sup. Ct. 161, 47 L. Ed. 282), but on the point that plaintiff had misrepresented its goods, and was not entitled to the protection of a court of equity. The Supreme Court, however, took pains to affirm the lower court on the point under discussion in the case at bar, and said, page 527 of 187 U. S., page 163 of 23 Sup. Ct. (47 L. Ed. 282):

"The courts below concluded, upon the evidence, that the defendants sold a medical preparation named, marked, and packed, in imitation of complainants' medicine, with the design and intent of deceiving purchasers and inducing them to buy defendants' preparation instead of the complainants'. We see no reason to dissent from that conclusion, and, if there were no other questions in the case, we should be ready to affirm the decree, awarding a perpetual injunction, and an account of the profits and gains derived from such unfair and dishonest practices."

It is of course true that every one is at liberty to use the ordinary descriptive words of the English language to describe goods of his own manufacture. But when one has designedly and arbitrarily taken an unusual and an ungrammatical combination of two words, even if they do suggest an idea and a correct one of the construction or utility of the article, as his designating and distinctive name for his article of manufacture, and by long use it has come to be so understood by the purchasers and users thereof, a competitor has no right to use it for the purpose of deceit. This is especially true even in cases when the combination is of letters merely. And, even if the letters used in the combination are not the same and the sound, when pronounced, is not the same, if the idea conveyed be the same, and fraud or confusion results, or is likely to result, there is unfair competition in trade. Thus, in *National Biscuit Co. v. Baker et al.* (C. C.) 95 Fed. 135, the word "Uneeda" read "You need a biscuit." The defendant used the word "Iwanta." This read "I want a biscuit." Judge Lacombe held "both name and dress," referring to the package, "are clearly calculated to mislead." As the dress or package and the word were together used to defraud, Judge Lacombe en-

joined the use of both. Quite likely he would not have enjoined the use of "Iwanta" alone, if that had been all defendant did.

Here, defendant takes the precise combination of words, violating the prevailing rules of dictionary and grammar as well as complainant's rights, all for the purpose of defrauding him and the purchasers and users of the lamp. I think it a clear case for an injunction. An extensive collection of pertinent cases will be found in Hesseltine, *The Law of Trade-Marks and Unfair Trade*, pages 272 to 279, inclusive.

There will be a decree for the complainant, covering both the making and selling of the shell and the use of the words, with costs.

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BILLINGER v. CLYDE S. S. CO.

FISHBURN v. SAME.

(Circuit Court. S. D. New York. January 2, 1908.)

CARRIERS—REFUSAL TO PERFORM CONTRACT OF CARRIAGE—RIGHTS OF PASSENGERS.

Plaintiffs bought tickets which entitled them to transportation as second-class passengers on defendant's steamships from Jacksonville, Fla., to New York, with the privilege of a stop-over at Charleston, S. C., the remainder of the voyage to be made on any of defendant's vessels which stopped at Charleston. Plaintiffs, after stopping over, boarded a vessel of defendant at Charleston, which was about to sail for New York. As found by the jury they showed their tickets to the purser and the captain who told them that because they were colored men they would only be taken in the steerage, and that unless they were willing to go as steerage passengers they could get off. The vessel in fact carried second-class passengers, and had accommodations for the same. *Held*, that plaintiffs were not bound to accept either alternative so offered, but were within their rights in staying on the vessel and insisting on the accommodations to which their contracts entitled them; that such accommodations being persistently refused they were not obliged to surrender their tickets when demanded, and their refusal to do so did not prejudice their right to recover damages for breach of contract, or for mistreatment by the officers of the company while on the vessel.

Motion by defendant to set aside the verdicts in this case in favor of the plaintiffs, and for new trials on exceptions to the charge of the court.

Robinson, Biddle & Benedict, for the motion.  
Franklin Pierce, opposed.

RAY, District Judge. The evidence in these cases, tried together with a separate verdict in each, was substantially undisputed that the defendant is a corporation engaged in running steamers carrying passengers between the state of Florida and the state of New York. It is a common carrier of passengers. That in the month of March, 1903, it sold to each of the plaintiffs a ticket for a second-class passage from Jacksonville, Fla., to the city of New York, with the right and privilege to stop off at the port of Charleston, S. C., and go on to New York by some other steamer on that line at a later date. Each plaintiff availed himself of the stop-over privilege, and took

from the proper officer of the Comanche on which steamer they first took passage another voucher or ticket directed to the proper officers of the company directing and requesting them to give to the plaintiffs, respectively, passage from Charleston to the city of New York. In legal effect these tickets gave to these plaintiffs the right to be carried from Charleston to New York on any vessel of the defendant which carried second-class passengers within the time limited—which was April 30, 1903. This was not questioned on the trial. The court, referring to these substituted tickets, charged the jury "It," referring to the ticket, "did not specify what steamer or vessel he was to come upon, and under these tickets he had a right—the plaintiff had the right—to come on to New York on any vessel of the defendant which carried second-class passengers, whether it had second-class accommodations in point of fact or not, if it actually carried second-class passengers, and was not limited to certain specified individuals, then, of course, he would have the right to come on any one of defendant's vessels which was actually engaged in carrying second-class passengers." This was not excepted to.

Within the time limited the plaintiffs went to a vessel of the defendant at Charleston—the Arapahoe—which was running on this line from Florida to New York, and was about to leave Charleston for New York on a regular trip, and entered the vessel. The claim of each of the plaintiffs is that as they entered the vessel they were met by the purser who stated to them, in substance, when they produced and showed their tickets, which they did, that they would have to go in the steerage; that they did not carry any colored people only in the steerage on that vessel. One of the plaintiffs testified, "I said, 'Is that so?' I objected, and he went for the captain of the vessel, and he came up and said, 'You have got to go in the steerage. I do not carry any colored people only in the steerage.' He said, 'Are you going to get off?' He said, 'Go in the steerage; that is all I can give you; if you do not want that get off.' These are the words to me of the purser and the captain. I remained on the steamer—me and my friend—until they sailed away. I did not get off." By "his friend" this plaintiff referred to the other plaintiff. There was sufficient evidence in the case to justify the finding of the jury that this vessel, the Arapahoe, was then fitted for and was actually engaged in carrying second-class passengers on that voyage, and had second-class accommodations for such passengers and for the plaintiffs. In fact, one of the officers of the defendant then on the vessel testified that he was directed subsequently to offer the plaintiffs such accommodations outside the steerage on surrender of their tickets, and that they refused them. The plaintiffs claimed and gave evidence tending to show that having showed their tickets to the purser and captain, and having declined to go in the steerage, that they were refused second-class accommodations or any accommodations outside the steerage, and were denied food, and were driven out upon the deck and insulted and abused by the captain, and that one of them was forced outside and assaulted by the captain. All this was denied by the defendant, and the defendant's claim was that the purser noticing the men there, and having been informed

that they had such tickets, told them that they could not have second-class accommodations on that vessel, and advised them or told them to get off, and that plaintiffs declined. The defendant says the plaintiffs did not exhibit or produce their tickets at any time. This witness on behalf of the defendant first stated, in substance, that the vessel started within a few seconds.

It was a rule and regulation of the company, and of course a reasonable one, that passengers, when called upon to produce their tickets and surrender them, as they were then given a meal ticket, the possession of which was evidence of their right to be there and receive accommodations, should do so. The court so charged the jury. The contention raised by the defendant on the trial, and now raised here, is that inasmuch as these plaintiffs were told, as their own testimony showed, that they could not have accommodations on that vessel as second-class passengers, for the reason they were colored men, and had time to get off, and were told this when they first entered the vessel, that they had no right to remain on board. The defendant says that, even if the defendant then and there violated its contract and refused to carry the plaintiffs elsewhere than in the steerage of that vessel on the sole ground that they were colored men, the plaintiffs, by remaining on board and insisting on their rights to go on that vessel and receive second-class accommodations, in legal effect accepted the situation and assented to the conditions imposed. The defendant says it was then their duty to get off and sue for breach of the contract; that if they remained on board, as they did, the defendant had the right to treat them as wrongdoers, as stowaways, as interlopers, as having no rights there except as steerage passengers and to steerage accommodations. Also, as it is claimed they did not surrender their tickets when demanded at a later time, it was error for the court to charge in substance that they were not bound to do so if notified in advance that their tickets would not be honored, and that they would be carried in the steerage only, for the sole reason that they were colored men. These are the questions raised by the exceptions to the charge.

The court charged the jury:

"Now, then, gentlemen, I charge you as a matter of law, that if you find those to be the facts, if they showed their tickets, if the captain and the purser knew, or the purser knew, that they had those tickets, if he or they saw them, and if thereafter plaintiffs were told that they must go in the steerage because they were colored, that they only carried colored people there; if that was the reason and the sole reason why defendant's officers refused to give them the passage above the steerage, and they had second-class accommodations—why, then, plaintiffs had the right to hold on to those tickets; they had the right to keep them as an evidence of their rights. In short, if they were notified in advance that their tickets would not be honored, that they would not have accorded to them the rights which their tickets called for, why, then, they were not obliged to surrender into the hands of these officers of the defendant their evidence of that right—not obliged, under such circumstances, to deprive themselves of that evidence; they were under no obligations to acquiesce in such a demand. If, however, gentlemen, that vessel only carried at that time first-class and steerage passengers, if all the accommodations for first-class passengers were filled and occupied, and they had no room above the steerage for any second-class passengers, and could not accommodate them anywhere else, and these plaintiffs knew it or

were informed of it and entered on that voyage under that information, why, then, of course, there would be on the vessel only first-class accommodations and the steerage, and the steerage would be the only second-class accommodations they had, and if the other rooms were all occupied, if that was true, so that they could not give them any second-class accommodations there, why, then, they would be forced, and it would have been their duty, to take the only second-class accommodations they had—if you should find those to be the facts. But the plaintiffs say they were relegated to the steerage, and told that they could not have second-class accommodations, because they were colored people. They say that defendant did carry second-class passengers in that vessel. You have heard the evidence here as to when that vessel commenced carrying second-class passengers. Defendant's witnesses say it was built to carry first-class passengers only; it was built in 1901, and about two years after that they commenced carrying second-class passengers also. This transaction occurred in 1903. A man who had been in the employ of this defendant and who was on the vessel says he knows about it, and you have seen him; you have heard his testimony. He says at that time and on that voyage this vessel was actually carrying, and did carry, second-class passengers, so you, gentlemen, under this evidence are to ascertain and determine what the facts were. Under the evidence of the captain and the other officers, if their statements are correct and true, it was the duty of these plaintiffs on demand to have presented and surrendered up their tickets, because the presumption would be that the officers of the defendant company would give them the proper accommodations, such as their tickets called for. If, however, on the other hand, the plaintiffs are correct in their statement, and their tickets were exhibited, their evidence of a right to a second-class passage was exhibited, and they were told, in substance, that they would not be honored, that because they were colored they would have to go into the steerage, then they were justified in not surrendering them, and it was not their duty to abrogate their contract or forfeit their rights to the accommodations their tickets called for."

This was excepted to. The court was requested to charge:

"Twenty-First. If the jury find that the plaintiffs were notified upon boarding the steamer that they would be carried only in steerage, and having then an opportunity to leave the steamer and did not do so, they can in no event recover more than the cost of obtaining transportation to New York by rail or other means of transportation."

In response the court said:

"That I decline to charge. I reiterate my charge. I decline to charge on that subject other than I have, because if defendant had second-class accommodations there, and was carrying second-class passengers on that vessel; if they were refused what their tickets called for solely because they were colored men, and were told they had to go into the steerage for that reason—then they had the right to stand on their rights and demand them."

The court had been requested to charge, "If the jury believe that plaintiff refused to show his ticket on the purser's demand they must find for the defendant." To that request the court charged:

"That I have already told you, and I tell you again—that is, to show his ticket—if they refused to show their right to a ride and did not do it, why, then, of course, the officers of the ship had the right to treat them, and would be expected to treat them, as persons without a right to be on the vessel at all, and without a right to be given accommodations."

The court was also requested to charge:

"Fourth. Hence, plaintiff having testified that he was asked by both purser and captain to surrender his ticket, and having refused to do so, the jury must find a verdict for the defendant."

To that request the court said and charged:

"That I refuse to charge in this case. If that was all there was to this case, if they had without just reason refused to give up their tickets on request, why, that would be true; but if you should find that they were told they must go into the steerage because they were colored people, that their tickets would not be honored because they were colored people, then, of course, the case is entirely different. So I refuse to charge on that subject different than I have, and I decline for that reason."

The court repeatedly charged that it was the duty of the plaintiffs to show their tickets; that unless they did so they could not recover; but that if they did show their tickets, and if that vessel carried second-class passengers and had accommodations for second-class passengers and for the plaintiffs, and plaintiffs were notified in advance that their tickets would not be honored; and that they must go in the steerage solely because they were colored men—that then they were not, as matter of law, bound to surrender their tickets, and might retain them as evidence of their rights. The court repeatedly charged that the rules and regulations testified to were reasonable, but that if plaintiffs were notified in advance that their tickets would not be honored, having exhibited them, then the jury might say they were not required under such circumstances, and with such a notification, to surrender the tickets. To support this contention the defendant cites the opinion of Cockrell, C. J., in *St. Louis Railway Company v. Leigh*, 45 Ark. 368, 55 Am. Rep. 558, viz.:

"When the carrier proffers transportation without a seat, and the passenger refuses to surrender his ticket, what is then the attitude of the parties under the contract? It is simply this: The carrier has offered the passenger less than his contract calls for, and the passenger has refused it in satisfaction. This he had the unquestioned right to do. If he is not accommodated in a manner which may be deemed a fair compliance with the duty of the carrier, he may decline any compromise, and resort to his action against the company for refusing to carry him as their contract or their duty requires. But he cannot accept the part that is offered him in lieu of the whole—that is, the transportation without the seat—and at the same time refuse to comply with his own undertaking in this any more than in any other contract. Upon the carrier's neglect or refusal to comply with the terms of the contract of carriage without a just excuse, the passenger is at liberty to treat the contract as violated by the company, and he may leave the train and sue for a breach of the contract."

I do not agree with this contention if it is meant this is the only course and remedy. If a person purchases a ticket entitling him to ride on any second-class passenger train or in any second-class passenger coach from New York to Albany, and he enters such train or coach which has ample accommodations, and is about to leave the station on its regular trip, and is then told by the conductor that he will not be permitted to ride on that train except in the baggage car or the smoking car because he is a colored man, and he sees fit to remain and does remain, asserting his rights, and he is then ordered to the smoking car, and told to surrender his ticket, which he produces, or which he has produced and exhibited, but refuses to surrender it unless he is allowed to take his seat in the second-class coach, there being an abundance of seats, and he is forbidden to seat

himself, such person is justified in refusing to surrender his ticket, and may retain it as his evidence of a right to be there, and to insist upon the accommodations which he demands, and to which his ticket entitles him. If he then, under such circumstances, is by force taken to the smoker or baggage car, and is insulted and abused by the use of vile language, he may recover damages for the assault and indignity even if he did refuse under such circumstances to surrender his ticket. Having been notified in advance, being on the train and in a place where he had the right to be, that his contract would not be honored, he has the right to retain it until a willingness is expressed to comply with the obligations imposed by it. In refusing to surrender his ticket, he does not forfeit his right to be there, or forfeit his right to decent treatment and usage. Nor is it a bar to his recovery for any outrage committed upon him by the company that he has not surrendered his evidence of his right to demand what he did demand, to claim what he did claim, and which the company was able to furnish, he having been notified that his ticket would not be honored, and that his rights would not be respected. The rule that a passenger having entered the train shall surrender his ticket on demand is subject to the qualification that he shall surrender it only when the company shows a willingness to comply with its obligations so far as it can. If told on entering the train and showing his ticket that he must get off because he is colored, and is also told that if he remains he must go in the baggage car and he declines, and he is then told to surrender his ticket and there is no retraction of the assertion that he must go in the baggage car, he is released from his obligation to surrender his ticket. So his refusal to leave the train under such circumstances is justified, and he may retain his ticket and demand his rights so long as the attitude of the railroad company is that it will not recognize it or accord him the rights which he demands, because he is colored.

It is a universal rule of law in all civilized communities that, where the obligations of a contract are mutual, if the one party having a duty to perform notifies the other that he will not perform that other may treat the contract as rescinded, and refuse to proceed under it, and sue for damages, or he may treat it as in force, and insist on performance and demand of the other that he perform on his part, and if the performance by that other be a condition precedent the demanding party is under no obligation to do anything on his part until such other party has performed the condition precedent, or at least evinced a willingness so to do. When a common carrier, having entered into a contract of carriage, announces its purpose and determination to break the contract, it being a public corporation and obligated to carry all comers, when it has accommodations and the ability to perform its duty to the public, refuses so to do, and announces its purpose, the passenger with his contract in hand is under no obligation to surrender it, but may remain in the place where he has the right to be, and demand his rights, and insist upon them if they are violated. The common carrier, knowing he holds the evidence of contract, cannot escape responsibility on the ground that such passenger refused to surrender the evidence of contract of car-

riage, inasmuch as it has not made such surrender a condition of performance on its part, but has announced its determination to disregard and violate the obligations of the contract when surrendered and after surrendered. But it is said that when told they must go in the steerage because they were colored, if they went on that vessel which carried second-class passengers and had accommodations for them, as the claim of the plaintiff was and as the jury found, that, by remaining, the plaintiffs waived their rights to second-class accommodations, and that on their refusal, later, to surrender their tickets and go to the steerage they forfeited their rights to be treated as second-class passengers. This amounts to the claim that the plaintiffs could be compelled to accept steerage passage or remain in Charleston. The plaintiffs never accepted steerage accommodations. They steadfastly refused so to do. They stood upon their rights and asserted them, and refused to surrender their tickets until accorded. This they had a perfect right to do. Moore on Carriers, p. 695.

"A railroad company must furnish to its passengers seats as well as mere transportation, and cannot require the payment of fare or the surrender of a ticket until it has furnished both." *Hardenbergh v. St. Paul, etc., R. Co.*, 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610.

He may of course leave the train and sue, but if he shows his ticket, and is told it will not be honored because he is colored, and then remains, demanding his rights, he waives nothing. A passenger forfeits no rights by remaining on board the vessel of a common carrier—a corporation—whose duty it is to carry him, demanding his rights, and, if he remains, is not ejected, and his rights are not accorded him he is under no obligation to surrender his ticket. If he refuses, can he be maltreated? The duties of carrier and passenger in such a case are concurrent, and, quoting the language of the Court of Appeals, "It is as much his duty, as the agent of the company, to see that each passenger is furnished with a proper seat, as it is to require him to pay his fare." *Willis v. Long Island R. Co.*, 34 N. Y. 682. "A passenger who refuses to pay fare unless a seat is provided does not thereby become a trespasser on the train." *Hardenbergh v. St. Paul, etc., R. Co.*, 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610. A common carrier cannot lawfully make a rule that will forfeit the rights of passengers who exhibit their tickets, and demand the accommodations to which they are entitled under it and are refused, on the whim or caprice of the carrier that they shall not ride because they are colored, unless they will accept inferior accommodations, and thus compel them to surrender their rights or leave the conveyance, and sue for damages. Such a rule of law would enable every common carrier in the Union to compel colored men to accept accommodations inferior to those their tickets called for or not ride at all. So, any class of persons, at the will or caprice of a common carrier, even though its members provided themselves with tickets, could be relegated to inferior quarters, or compelled to remain at home and bring lawsuits for damages. The rights of the public are not thus, as yet, made subservient to the whims and caprices of common carriers.



In *Lynch v. Met. El. R. Co.*, 90 N. Y. 77, 83, 43 Am. Rep. 141, the court said, referring to rules:

"But it had no regulation, and could legally have none, that a passenger, before leaving its cars or its premises, should produce a ticket or pay his fare, and if he did not, that he shall then and there be detained and imprisoned until he did so."

In that case plaintiff had lost his ticket.

In the case at bar it was a reasonable rule that passengers should produce and surrender their tickets, when rooms were assigned and meal tickets distributed, as the court charged, but it was not a reasonable rule, and the defendant could not lawfully make one, that passengers with a ticket should, on being told in advance that it would not be honored or respected unless they accepted steerage passage, second-class passage being available, surrender their tickets, and thus consent to accept steerage passage. "The carrier is bound to furnish seats to passengers entitled to transportation, if practicable, and the passenger may refuse to give up his ticket or pay fare if a seat is not furnished." 6 Cyc. 582. *Hardenbergh v. St. Paul, etc., R. Co.*, 39 Minn. 3, 38 N. W. 625, 12 Am. St. Rep. 610. This is given as the law on the subject in 6 Cyc., *supra*. Under such circumstances, the passenger is not relegated to the remedy of leaving the train and bringing action for damages. True, he may resort to that course, but he has other remedies. He acts within his rights if he remains and insists on his rights, and ejection from the train or vessel of the carrier under such circumstances would be unlawful. If the passenger may refuse to surrender his ticket because a seat is not furnished, clearly, he may refuse to surrender it when told that the rights of which it is his evidence will not be respected, and that he must accept inferior accommodations because he is colored. The rule stated in 6 Cyc. 582, and *Hardenbergh v. St. Paul, etc., supra*, is correct. If allowed to remain, as these plaintiffs were, the passenger cannot be treated as a trespasser, or wrongdoer, and with indignity and assaulted. Even if he does break his contract to comply with reasonable rules, the common carrier still owes him a duty, and may not assault or maltreat him, and if it does, or its servants do, is liable for the consequences. *Buck v. Webb, President, etc.*, 58 Hun, 185, 11 N. Y. Supp. 617; *Penfield v. Cleveland, etc., R. Co.*, 26 App. Div. 413-415, 50 N. Y. Supp. 79, per Cullen, J.; *Smith v. Manhattan R. Co.*, 45 N. Y. St. Rep. 865, 18 N. Y. Supp. 759, affirmed 138 N. Y. 623, 33 N. E. 1083; *English v. D. & H. C. Co.*, 66 N. Y. 454, 456, 23 Am. Rep. 69; *Sanford Ad. v. Eighth Av. R. Co.*, 23 N. Y. 343, 346, 80 Am. Dec. 286.

In *Smith v. Manhattan, supra*, the court said:

"Undoubtedly the defendant has authority to enforce observance of its regulations, but by preventing not by punishing the breach of them."

In *Sanford Ad. v. Eighth Av. R. Co., supra*, the court said:

"The decision of the court below appears to have proceeded upon a rule of law which we think is inapplicable to the case. In the opinion of that court it is conceded that the conductor was guilty of negligence and improper conduct in expelling the passenger without stopping the car. But the latter was also in the wrong in occupying a seat without paying the fare, and the case was put as one of concurring negligence where the injured party is without redress, be-

cause he is himself in fault. We fail to see how this principle can be invoked. It cannot be applied to an intentional trespass, certainly not to a case like the present."

While a common carrier may, by reasonable rates and regulations, set apart particular cars or quarters for a particular class of persons, as for gentlemen accompanied by ladies and exclude gentlemen not attended by ladies therefrom (*Peck v. N. Y. C. R. R. Co.*, 70 N. Y. 587; *Bass v. Chicago, etc., R. Co.*, 36 Wis. 450, 17 Am. Rep. 495), still colored persons cannot be excluded from such a car merely on account of color. *Chicago, etc., R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641; *Brown v. Memphis, etc., R. Co. (C. C.)* 5 Fed. 499. So here, this defendant had no right to relegate these plaintiffs to the steerage, if it had second-class accommodations (and the court charged the jury that, if it did not, plaintiffs were bound to go to the steerage), and as it announced to them that they must go there if they went at all, that is, that the accommodations to which they were entitled would not be accorded for the reason they were colored persons, they were not bound to surrender their tickets so long as that attitude was maintained. The action was as for a breach of contract, and in such a case, "If no actual damages are shown, the breach of the contract will authorize the recovery of nominal damages only; but the breach of the contract may also involve a tort—that is, a breach of the carrier's common-law duty; and in such case other damages than those incident to breach of contract may be recovered." 6 Cyc. 588; *Sheldon v. Steamship Uncle Sam*, 18 Cal. 526, 79 Am. Dec. 193; *Runyan v. Central R. Co.*, 65 N. J. Law, 228, 47 Atl. 422.

The court charged the jury at defendant's request that if the plaintiffs boarded the ship, knowing she had no second-class accommodations, they were bound to accept what the ship offered. The evidence of the plaintiffs was to the effect that no demand was made for tickets or to exhibit tickets, although they exhibited theirs on going on board, until after they had got under way, and until after they had applied for breakfast at the second call, or call for second-class passengers, and been denied; that on applying for breakfast the ticket was shown, and they were informed by the steward at the dining room that he had orders from the captain not to feed them; that they could eat in the steerage, which they refused to do; that later the purser came along and called for tickets, and plaintiff said:

"Mr. Purser, you have not accommodated me, and I do not intend to give up my ticket. I intend to hold it as evidence against you. He said, 'You won't give your ticket up?' and I said 'not until you accommodate me.' He went and got the captain. Q. What did he say? A. He said, 'Why don't you give up your ticket?' I said, 'Mr. Captain, you have not accommodated me yet, and I refuse to give up my ticket, you refused to give me anything to eat,' and he swore, and he said, 'No God damned nigger is going to run my ship,' that is what he said. He says, 'You go into the steerage, or you get nothing here.' Those were his words to me, and I was sitting down at the time, and he kicked the stool from under me throwing me over. I said, 'Mr. Captain, you are taking advantage of me.' He said, 'I do not know whether I am or not. I am running this ship.' He said, 'You refuse to give up your ticket?' and I said, 'Yes, sir, until you accommodate me.' He called the first mate, and he told him to lock us up as stowaways," etc.

Also, that evening as they were in the smoking room, orderly and quiet, the captain came in and with force put one of them out in the cold. It was on this evidence, assuming the jury found it to be true, the court told them it was not the duty of the plaintiffs, as matter of law, to surrender their tickets. The court was requested to charge, and did charge, that "the plaintiff was not justified in retaining his ticket, against the demand of the purser and captain, for use as evidence in a possible lawsuit."

The court was requested to charge,

"Eighteenth. The rule of the company that meal tickets would be issued only on surrender of the passage ticket was a reasonable one, and plaintiff was bound by it. If he refused to surrender his ticket, he cannot now complain that he was refused meals."

In response the court said:

"It depends altogether, gentlemen, upon how you find the facts to be. That is true as a proposition of law generally, but, as I have already said to you, if plaintiff was notified in advance his ticket would not be honored, that they could only have meals in the steerage and accommodations in the steerage, because they were colored, when it called for second-class accommodations, and defendant had second-class accommodations, if that is true, then, of course, gentlemen, they had the right to retain it, not absolutely as a matter of law, but it would be a justification, and they would not forfeit their rights to a second-class passage and second-class accommodations because they refused to give up their ticket under such circumstances."

The jury was expressly told, at defendant's request, that plaintiffs were not entitled to second-class passage on every vessel of defendant's line, but only those which were then carrying second-class passengers. And the court had before stated only those which actually had second-class accommodations available, and also that if the *Arapahoe* was not carrying second-class passengers plaintiffs were entitled to steerage passage only. The court so charged. The court also charged the jury that the defendant was not bound to treat the plaintiffs as first or second class passengers unless they were willing to surrender their tickets for cancellation.

The court was requested to charge:

"Twenty-Sixth. From the moment that the defendant's agents demanded the surrender of the plaintiffs' tickets, and they refused to surrender them, the captain was justified as a matter of law in treating the plaintiffs as stowaways."

To that the court said:

"That I decline to charge. That would be true under the statement of the captain and purser, if you find that to be true; but under the evidence of the plaintiffs and the plaintiffs' other witness, if you find that to be true, then the law is as I have stated. It depends, gentlemen, upon how you find the facts to be. Anything further, Mr. Pierce?"

The court also said:

"What is said, gentlemen, by the court and counsel in arguing questions of law, you are to pay no attention to. I have a perfect right to tell you what I think about the case, but I forbear doing so. I will tell you what the law is; you are bound by it, and you violate your oaths if you are not bound by it, and do not follow it. But the facts are for the jury. \* \* \* Of course, what I said there, to which an exception was taken, what the court

would do—I think that if I were a colored man, I will reiterate here, if I bought a second-class ticket which called for second-class accommodations, and I was told that I had to go to the steerage simply because I was a colored man—I reiterate, if that is true, and it is a question of fact for you, I have a right to say I think I would refuse to surrender up my ticket, and I would not have much respect for any American citizen who refused to stand up for his rights and I would not have much respect for a juror who would not. But, gentlemen, that is not to affect you in the slightest degree. I express no opinion as to what the facts were. The facts are for you to determine, for you to decide, for you to settle. Was it as the captain and purser stated, or not?"

The jury was then instructed as to the burden of proof; cautioned not to be affected by sympathy for colored men or race, or prejudice against; not to be affected by any feeling or prejudice or hue and cry against corporations; and that they were sole judges of the facts.

I find no prejudicial error, and the motion to set aside the verdict and grant a new trial is denied.

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POTTER v. CALUMET ELECTRIC ST. RY. CO. et al.

CITY OF CHICAGO v. COBE.

(Circuit Court, N. D. Illinois, E. D. February 8, 1908.)

No. 24,467.

1. STREET RAILROADS—FRANCHISES—CONTRACT—MODIFICATION.

Where an ordinance granted a right to construct a street railroad on certain streets and avenues of a city, and provided that the railroad company should be liable for, and pay into the city treasury, \$50, and no more, as an annual license fee for each and every car used by the company, a contract executed by the corporation and the mayor on behalf of the city, to induce the mayor to sign the ordinance, providing that the railway company should pay \$50,000 in installments within 20 years for the right secured, constituted such a modification or amendment of the ordinance that both could not be executed as a whole.

2. MUNICIPAL CORPORATIONS—ORDINANCES—AMENDMENT—CONTRACTS.

Under Chicago City charter, providing that an ordinance must be agreed to by the concurrence of a majority of all the members of a city council elect, and that the yeas and nays must be taken, and a rule that a city ordinance can only be amended or repealed by an act of equal dignity and formality, and not by a mere resolution, a contract between a street railway company and the mayor acting on the city's behalf, by which the railway company agreed to pay the city \$50,000 to induce the mayor to sign a franchise ordinance, which contract was informally accepted by the city council and ordered filed, was ineffective as an amendment of the ordinance.

3. SAME—LICENSE TO USE STREETS—NECESSITY OF ORDINANCE.

Ill. Const. 1870, art. 11, § 4, prohibits any law granting a right to construct a street railroad within a city without requiring the consent of the local authorities. *Held* that, though the right to construct a street railroad comes from the state as a "franchise," and the consent and designation of streets to be occupied comes from the municipality as a "license" or contract right, such license must be by ordinance of the city council passed by the yeas and nays concurred in by the majority of the members elect and approved by the mayor under the city's charter, providing that ordinances must be so adopted.

4. STREET RAILROADS—GRANT OF RIGHTS IN STREETS—"LOCAL AUTHORITIES"—"CORPORATE AUTHORITIES."

Ill. Const. 1870, art. 11, § 4, prohibits the granting of a right to construct a street railroad in a street without the consent of the "local authorities" and street railway act (2 Starr & C. Ann. St. 1896, p. 2110, c. 66, par. 3) requires the consent of the "corporate authorities." *Held*, that the terms "local authorities" and "corporate authorities" were synonymous, and used to indicate those representatives either directly elected by the people or appointed in some mode to which the people had given their assent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railroads, §§ 69-76.

For other definitions, see Words and Phrases, vol. 5, p. 4205; vol. 2, pp. 1602-1603.]

5. MUNICIPAL CORPORATIONS—GOVERNMENTAL POWERS—GRANTING LICENSES.

The granting of licenses to a street railway company to construct a street railway in a street by a city is the exercise of governmental power, in which the municipality acts as the agent or representative of the state, and not in a private capacity.

6. STREET RAILROADS—GRANT OF RIGHTS IN STREETS—CONTRACTS—VALIDITY—ESTOPPEL TO DENY.

Where a street railway company, in order to induce the mayor of a city to sign a franchise ordinance, executed a contract which was void in its inception, by which the railway company agreed to pay the city \$50,000 in installments for the rights granted under the franchise, and after executing the contract the railway company proceeded to construct and operate its road on one of the streets under a permit issued by the commissioner of public works pursuant to such franchise and contract, the railway company was thereafter estopped to deny that the contract was valid.

Theodore J. Brundage, Corp. Counsel, and Charles M. Haff, Asst. Corp. Counsel, for petitioner.  
Pam & Hurd, for receiver.

SANBORN, District Judge. Petition for the payment by the receiver of the railway company of \$18,000, claimed to be due under a contract between the company and the city dated November 18, 1895.

It appears from the petition that on November 11, 1895, the common council of the city of Chicago adopted an ordinance granting the railway company a license to extend its road over certain streets, on terms common to such ordinances, as to the time of completion, manner of construction, rates, term of grant, etc. It provided that the company should pay an annual license fee of \$50 per car and no more. The mayor was unwilling to approve the ordinance without the company would pay for the franchise, and, in order to induce his approval, the company executed and filed with him a contract reciting the passage of the ordinance by the council, and that the mayor was unwilling to approve it without the same should provide for a compensation to be paid to the city for the privileges under the ordinance granted by the city to the company. It provides that in consideration that the mayor shall approve the ordinance, and not return the same without his approval, the company covenants and agrees to pay \$50,000 in certain installments, running through a period of 20 years. It is further provided that, in default of any payment continuing for 90 days, all the rights, privileges, and immunities of the ordinance granted shall at

once absolutely cease and determine, the ordinance thereafter having no further force or effect in favor of the company.

The ordinance grants the right to the company to build its roads on 24 streets and avenues, among them 103d street. It appears from the recitals of the contract that a prior license had been granted to the Englewood & Chicago Electric Street Railway Company May 2, 1893, giving that company the right to construct and lay one or more lines of railways on 103d street, between Vincennes avenue and Michigan avenue. The right to lay tracks upon 103d street between such points having been granted by the ordinance to the Calumet Company, and there being a question whether the Englewood Company had any prior right to construct a railroad on said street, it was provided in the contract that the Calumet Company would not construct or attempt to construct any tracks on 103d street without the consent and permission of the commissioner of public works, until it should first be judicially and finally ascertained and determined that the rights of said Englewood Company had lapsed and determined; but should the commissioner permit construction in said street by the Calumet Company before such adjudication, it was agreed that the company should remove its tracks upon any final judicial determination in favor of the Englewood Company; and in case said company should refuse to remove its tracks, the commissioner was authorized to do so.

The license to the Englewood and Chicago Electric Railway Company, referred to in the petition and contract, was dated May 2, 1893, and was accepted May 15, 1893. Section 3 provides that one track should be completed and in operation on 103d street (and certain other streets) within two years from the date when the ordinance should take effect; and that if the track was not so laid, and the road operated on such streets within two years, then the rights and privileges granted should, at the expiration of said time, as to any street not so built upon and the road so operated, wholly cease and determine, and revert and vest absolutely in the city. The road was not built on 103d street within the time limited. It was, however, a question of doubt whether the license to build had absolutely determined when the Calumet license was granted November 18, 1895. In *Blocki v. People*, 220 Ill. 444, 77 N. E. 172, Id., 123 Ill. App. 369, it was said that if the company fails to comply with the conditions of the ordinance as to the time of construction, without justifiable excuse, all its rights and privileges cease. In view of the question as to the prior rights of the Englewood Company in 103d street, the contract referred to was made to provide that the Calumet Company should not build in 103d street until it had been judicially and finally ascertained that the rights of the Englewood Company had lapsed and determined; but should the commissioner of public works permit construction by the Calumet Company before such adjudication, then the latter was to remove its tracks from that street upon any final judicial determination in favor of the Englewood Company.

On November 18, 1895, the same day that the ordinance in favor of the Calumet Company was finally adopted, the Englewood Company applied to the commissioner of public works for a permit to lay its tracks on a large number of streets, including 103d street, without giv-

ing any reason in the application for its delay. On December 11, 1895, the corporation counsel advised the issuance of a permit, except as to 103d street. In a communication to the commissioner, the corporation counsel stated that the Calumet Company claimed that the Englewood Company's rights as to 103d street had lapsed, and that the Calumet Company had made an agreement with the mayor that its own ordinance should not include 103d street unless the Englewood Company's rights should be found to have lapsed; and that the question must be determined by judicial proceedings. The communication further stated that it was possible that all the unexercised rights of the Englewood Company to lay tracks had lapsed, but this he regarded as not probable, because the city council had never attempted to declare any forfeiture of such rights, but, on the contrary, had on several occasions directed the Englewood Company to lay tracks on certain streets, thus clearly waiving the forfeiture. For these reasons he advised the issuance of a permit except as to 103d street. The Englewood Company thereupon executed an agreement that in consideration of the issuance of such permit it would not claim any waiver through the issuance thereof, beyond what existed prior to its issuance, and that it would promptly commence and diligently prosecute a mandamus suit, or other appropriate proceeding, to obtain a judicial determination as to its rights in 103d street; and that the city should not be estopped from asserting a forfeiture of all rights conferred on the Englewood Company by its ordinance in consequence of the issuing of the permit. Pursuant to the advice of the corporation counsel, and the contract just stated, a permit was issued as prayed for December 12, 1895, covering all streets except 103d. On November 19, 1895, the Calumet Company also requested a permit to construct its road in 103d street, under its ordinance. The corporation counsel on December 26, 1895, submitted a communication reciting the agreement of the Englewood Company to obtain a judicial decision as to its rights in 103d street, but stating that no such action had been taken by that company, and that he had reason to believe that none would be taken, at least in the near future. That there was a public demand for street car facilities in 103d street, under one of the ordinances. The communication then proceeds:

"I therefore advise that a permit be now granted to the Calumet Electric Street Railway Company to construct and maintain its tracks in the above mentioned portion of 103rd street, subject to the agreement which the Calumet Company made with the mayor November 18, 1895, and subject, also, to a further condition, to which said Calumet Company should be required to agree, that said Calumet Company shall not have, and will not at any time, nor in any way claim to have, against the city of Chicago in consequence of the issuance of the permit or of any privilege exercised or expenditure made under the permit, any new or further or increased right, privilege, exemption or waiver beyond what it may now have prior to such permit under its ordinances of November 11, 1895, and under its said agreement of November 18, 1895."

On March 10, 1896, the commissioner issued a permit, pursuant to the advice of the corporation counsel, to the Calumet Company, authorizing the construction of its road in 103d street. This permit contains the following provision:

"This permit is issued and accepted upon the condition that said work shall be done in accordance with and shall be maintained subject to all the condi-

tions, stipulations and requirements of the ordinance hereinbefore mentioned, to all orders and ordinances which have been or which may be passed by the city council pertaining to the same and to all orders of the commissioner of public works; and upon the further express condition that a certain agreement made by said company (and in consideration of the execution of which this permit is granted) shall be considered a part of this permit as fully to all intents and purposes as if the same were here copied at length."

The ordinance contained a provision that all tracks at all intersections of streets should be paved between the rails. The contract provided that this clause should be construed and made to read that all tracks at the intersection of streets should be paved between the rails and also between the tracks, wherever there should be two or more tracks at any street intersection. It will be noticed that the only provision in the contract which is directly antagonistic to the ordinance is the one in relation to 103d street. The other provisions of the contract are additional to those of the ordinance, so that both may stand together in all respects except that the rights of the company in 103d street are restricted to some extent. The company accepted the terms and conditions of the ordinance, and filed the bond required thereby in the sum of \$50,000; and the company also constructed and operated an extension of its line of street railway, in accordance with the terms of the ordinance and contract, and has continued ever since to operate the road. At the time of filing the petition, October 15, 1907, the sum of \$18,000 was due, pursuant to the contract, the company never having made any payment. A general demurrer was put in by the railway receiver. It is contended for the demurrer that the contract is void on several grounds, which may be summarized as follows: The mayor had no power to contract with the railway company. The council alone can decide the terms and conditions on which streets may be occupied, or compensation therefor provided. The council could not delegate to the mayor this discretionary power to fix the compensation. An ordinance cannot be amended by resolution, hence the mayor cannot amend an ordinance by agreement. The assent of the council in accepting the contract and placing it on file can operate with no greater force than a resolution, which would itself be void.

It is also contended that the provision in the ordinance, that the railway company "shall be liable for and pay into the treasury of the city of Chicago, for the use of said city, the sum of fifty dollars and no more, as an annual license fee for each and every car used by the said company," fixes the compensation for the license granted, so that the agreement to pay \$50,000 for the license is totally inconsistent with the ordinance. There is no showing that the company ever did anything to recognize the validity of the contract except to take the permit to build in 103d street subject to the condition therein expressed, that the contract should be a consideration for the issuance of the permit. After the permit was issued it built the road in that street, and is still operating it; the Englewood Company never having brought any suit to test its rights under the ordinance granted to it.

Counsel for petitioner urge that the company took the benefit of



the contract first by accepting an ordinance which would not have been passed except for the contract, and next by accepting a permit expressly making the contract a consideration for its issue, and afterwards building and operating the road. They also contend that no ordinance was necessary for the purpose of licensing the company to build and operate the road, but that a mere resolution of the council not approved by the mayor was sufficient; and they say that the approval of the contract by the council, by placing it on file and ordering it of record, was equivalent to a resolution, binding the company and city alike. It is clear that the contract so modifies or amends the ordinance that both could not be executed as a whole. The contract materially modifies the ordinance as to 103d street, at least. I am not so clear whether the agreement to pay the \$50,000 is not additional to, and consistent with, the license fee provided for in the ordinance. The latter is in the nature of a tax, based rather upon the value of the rights and privileges granted by the ordinance than a license fee, or exaction made under the police power. When the ordinance says that \$50 per car, and no more, shall be paid, it would seem to mean that no further or other sum shall be imposed by way of regulation, under the police power of the city, not that a tax might not be agreed to, based on the agreed value of the rights granted. In the same way I take it that the 55 per cent. of net earnings provided to be paid to the city in the recent ordinances affecting the Chicago City Railway Company and the Railways Company, is exacted as a tax, ad valorem, and not as an exercise of the police power to regulate street railways. As to the distinction between a license fee and a tax, see *Wisconsin Tel. Co. v. Milwaukee*, 126 Wis. 1, 104 N. W. 1009, 1 L. R. A. (N. S.) 581, 110 Am. St. Rep. 886, *Nunnemacher v. State*, 129 Wis. 190, 220, 108 N. W. 627, 9 L. R. A. (N. S.) 121, and *Partington v. Attorney General*, L. R. 4 H. L. Cas. 122. Assuming, however, that the ordinance and contract are entirely inconsistent, and cannot stand together, the question arises whether the contract can be sustained, not having been authorized in the manner required for the adoption of ordinances. The charter provides that an ordinance must be agreed to by the concurrence of a majority of all the members elect, and that the yeas and nays must be taken. Neither one of these formalities was observed, hence the informal action of the council in accepting the contract and placing it on file cannot be regarded as equivalent to the requirements in respect to ordinances. It is settled law in Illinois that an ordinance can only be amended or repealed by an act of equal dignity and formality, and not by a mere resolution. *People v. Mount*, 186 Ill. 560, 58 N. E. 360; *Hope v. City of Alton*, 214 Ill. 102, 73 N. E. 406; *People v. Latham*, 203 Ill. 9, 67 N. E. 403; *B. & N. Ry. Co. v. City of Bloomington*, 123 Ill. App. 639; *City of Paxton v. Bogardus*, 201 Ill. 628, 66 N. E. 853; *Hibbard & Co. v. City of Chicago*, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621; *City of Joliet v. Petty*, 96 Ill. App. 450.

It clearly appears, however, that the mayor and council were satisfied with the modification of the ordinance made by the contract.

The amendments were beneficial to the city, and in its interest; and the company was satisfied to contract to pay the \$50,000, and build in 103d street under the express conditions of a permit making the contract a consideration for its issuance. Under these circumstances the contract should be sustained unless it is plainly void, and also if the company has waived its invalidity, if it was at first invalid.

Coming now to the question whether the council might grant the license to build and operate the road by a resolution, it seems clear that this was one of the subjects which required an ordinance, with the concurrence of the mayor; and that, if the contract had been brought to the test before the road was built, it would have been held void. Section 4 of article 11 of the Illinois Constitution of 1870 provides that no law shall be passed by the General Assembly granting the right to construct and operate a street railroad within any city, town, or incorporated village, without requiring the consent of the local authorities having control of the street or highway proposed to be occupied by such street railroad. The right to construct comes from the state as a franchise, while the power to consent, and designate the streets to be occupied, comes from the municipality as a license or contract right. In *Chicago City Ry. Co. v. People*, 73 Ill. 541, which involved the validity of an ordinance passed in 1871, after the Constitution of 1870 took effect, it was held that the right granted by the city to construct the road was a license as distinguished from a franchise derivable from the state, and not, therefore, within the constitutional prohibition against local laws granting to any corporation, association, or individual the right to lay railway tracks, or granting any special or exclusive privilege, immunity, or franchise whatever. This case has been approved in *Metropolitan City Ry. Co. v. Chicago W. D. Ry. Co.*, 87 Ill. 317, *Belleville v. Citizens' Horse Ry. Co.*, 152 Ill. 171, 185, 38 N. E. 584, 26 L. R. A. 681, *Blocki v. People*, 220 Ill. 444, 77 N. E. 172, *Id.*, 123 Ill. App. 369, and other Illinois cases, and is followed in *Blair v. Chicago*, 201 U. S. 400, 459, 26 Sup. Ct. 427, 50 L. Ed. 801. The city being thus only authorized to consent to the laying of the tracks, and having only the power to make a license, revocable until acted upon, may not such action be evidenced by a mere resolution, without the consent or concurrence of the mayor? This question is answered by a consideration of the immense importance of the action of the city, and the very valuable, extensive, and permanent rights subject to its disposal. No better evidence could be had of the value of these rights than appears in the *Blair Case*, just cited, involving the rights of the city as to the Union Traction system, and from the fact that the city has reserved, in the recent street railway ordinances, 55 per cent. of the net earnings of its principal surface railway systems, as a remuneration for the grant of such licenses. The Supreme Court, in the *Blair Case*, calls this power of the city "The important and far-reaching authority of fixing by contract \* \* \* the term during which the occupancy shall continue." Page 462, of 201 U. S., page

441 of 26 Sup. Ct. (50 L. Ed. 801). In view of the general rule that a city must exercise its legislative powers by ordinance, and wherever a permanent rule of conduct is established, or the act is one of continuing force, no doubt exists that street railway licenses or contracts must be by ordinance, passed by the yeas called, concurred in by a majority of the members elect, and approved by the mayor. *Village of Altamont v. B. & O. S. W. R. Co.*, 184 Ill. 47, 56 N. E. 340. Force is added to this view by the act of March, 1867, referred to in the *Blair Case*, providing that in Chicago no grant to use the streets should be given, unless by vote of three-fourths of the aldermen elected, and no grant extended until within a year from its expiration, and, in case of a veto by the mayor, such grant should receive the vote of three-fourths of all the aldermen. This legislation clearly recognizes the necessity of an ordinance in such cases.

The argument requiring an ordinance, and the concurrent action of mayor and council, is strengthened by the use of the term "local authorities" in the Constitution, and "corporate authorities" in the street railway act. Chapter 66, par. 3, 2 Starr & C. Ann. St. 1896, p. 2110. These terms seem to be synonymous. The corporate authorities of a municipality are those representatives who are either directly elected by the people, or appointed in some mode to which they have given their assent. *Wilson v. Trustees*, 133 Ill. 443, 27 N. E. 203; *People v. Knopf*, 171 Ill. 191, 49 N. E. 424. Mayor and council being elective officers, both should concur in an ordinance granting a street railway license, otherwise the local authorities chosen by the people are not fully representative. And the granting of such licenses being the exercise of governmental or central power, in which the municipality acts as an agent or representative of the state, and not in its private capacity, there is all the more reason for requiring an ordinance in such cases. As to its authority over streets the city is a subordinate instrumentality of the state, and their control is a governmental function. *Simon v. Northrup*, 27 Or. 487, 40 Pac. 560, 30 L. R. A. 171; *Kaukauna El. Lt. Co. v. Kaukauna*, 114 Wis. 327, 89 N. W. 542; *Pumphrey v. Baltimore*, 47 Md. 145, 28 Am. Rep. 446; *St. Paul v. M. & St. P. R. Co.*, 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458, 34 L. R. A. 184; *Philadelphia v. Field*, 58 Pa. 320; *Woodruff v. Catlin*, 54 Conn. 277, 6 Atl. 849; *State v. Williams*, 68 Conn. 131, 35 Atl. 24, 48 L. R. A. 465; affirmed in *Williams v. Eggleston*, 170 U. S. 304, 18 Sup. Ct. 617, 42 L. Ed. 1047; *Agawam v. Hampden Co.*, 130 Mass. 528; *Prince v. Crocker*, 166 Mass. 347, 44 N. E. 446, 32 L. R. A. 610; *Hall v. Concord*, 71 N. H. 367, 52 Atl. 864, 58 L. R. A. 455; *Smart v. Johnston*, 17 R. I. 778; 24 Atl. 830; *City Ry. Co. v. Citizens' St. Ry. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; *City of Knoxville v. Africa*, 77 Fed. 501, 23 C. C. A. 252. It seems undeniable, therefore, that if the contract in question had been questioned before the road was built it must have been held invalid. But the road has been built and is in operation. The company took its permit to build in 103d street in consideration of its having made

the contract. Can it or its receiver now be heard to say that it is not bound, and that the contract is void? I think the case is governed by *City of Quincy v. C., B. & Q. R. Co.*, 92 Ill. 21. In that case a grant by resolution was made to a steam railroad to occupy a street, and pursuant to the resolution a deed of the rights secured by the resolution was made by the city to the company, followed by the building of the road and long user. The city then brought ejectment, claiming that the right could not be granted by a resolution, but the court sustained the company. This case has been regarded in subsequent ones not as authorizing the making of licenses to railroads to build in the streets by resolution, but only as sustaining the doctrine of estoppel. *C. & N. P. R. Co. v. Chicago*, 174 Ill. 439, 447, 51 N. E. 596; *Village of London Mills v. White*, 208 Ill. 289, 296, 302, 70 N. E. 313. The last case holds that a resolution granting the use of the streets to the owner of a telephone line cannot be revoked after the line has been built. In the *White Case*, commenting on the *city of Quincy Case*, the court say: "It is true that this court treated the deed as aiding a resolution, when the deed could only have been authorized by the resolution, so that in the end the legality of the grant depended upon the resolution itself, and upon acts done and permitted by the city which were in pursuance of the resolution. It is argued in the case at bar that this case should not hold that such a grant can be evidenced by resolution and made binding by acts done and permitted because then the veto power cannot be exercised. The same objection existed to the action of the city council in the *Quincy Case*. There was nothing upon which veto could operate in that instance." These decisions seem to me to be applicable and to authorize the conclusion that the contract may, at this time, be regarded as a valid one. The company offered the contract to the city in order to obtain the ordinance. The mayor fully exercised his prerogative by vigilantly guarding the interests of the public. Without objection or protest, though in an informal way, the council approved his action. Afterwards the company accepted a permit to build part of its road expressly in consideration of its having executed and delivered the contract which its receiver now seeks to avoid, and built and operated the road. In view of these facts the contract should be held valid, as was done in the *Quincy Case*. Other Illinois cases apply a liberal rule against disturbing informal municipal contracts after rights under them have become vested.

Condemnation proceedings were commenced by the city of Chicago for the purpose of widening the river to secure to the city the right of swinging a bridge over the property of the Norton Milling Company; while these proceedings were pending, an agreement was made between the mayor and commissioner of public works of the city with the milling company, giving to the city the right to swing the bridge over the premises of the milling company, and the city in consideration thereof agreed to build a vault under the street and to permit the company to put certain of its machinery therein

and store coal there. The vault was built by the city and taken possession of by the company. Subsequently, in an action brought by the company against the city for injuries to the vault, the city contended that the contract was invalid, the mayor and commissioner of public works having no authority to enter into the same on behalf of the city. Held, that the contract was not ultra vires the city, and the city having acquiesced in the arrangement made it was bound by the contract. *City of Chicago v. Norton Milling Co.*, 196 Ill. 580, 63 N. E. 1048. A like ruling was made in *Gregsten v. Chicago*, 145 Ill. 451,<sup>1</sup> where plaintiff had built a vault in a street pursuant to informal authority from a city officer. In *Rich v. Trustees*, 158 Ill. 242, 41 N. E. 934, the case of the right or interest of a school district under a transaction claimed to be unlawful was presented. The district took from one of its own directors a deed for a school site, and expended money in improving it. The district brought suit to correct a mistake in the deed, but the defense was urged that the deed was void. Held that, though the transaction may have been unlawful, and not enforceable while executory, yet, after execution, a court of equity would not treat it as void. The case of *Chicago Gen. Ry. Co. v. Chicago*, 176 Ill. 253, 52 N. E. 880, 66 L. R. A. 959, 68 Am. St. Rep. 188, is also in point. A contract by ordinance between the city and a street railroad provided that the company should pay a license fee on each car, and an annual tax on each mile of track. The court say:

"We are also of the opinion that, even though it might be held that the condition upon which the permit or license was granted to the defendant railway company was ultra vires, the city not having the power to impose it, nevertheless the ordinance having been accepted by the company with the condition attached, agreeing thereby to perform it, it became a valid contract between it and the city, the validity of which the defendant is now estopped to deny. The act of the city in imposing the condition cannot be treated as against public policy or prohibited by statute, and void, and therefore, having accepted the contract in its entirety and enjoyed the benefits for which it agreed to pay the amount prescribed, it cannot now repudiate that contract."

To same effect, *People v. Suburban R. Co.*, 178 Ill. 594, 53 N. E. 349, 49 L. R. A. 650.

The principle of these cases is that ultra vires municipal contracts bind the opposite party after benefits under them have been received by such party.

The demurrer is overruled.

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#### HILL v. WOODLAND AMUSEMENT CO.

(Circuit Court, D. Delaware. January 10, 1908.)

#### REMOVAL OF CAUSES—ACTION BETWEEN NONRESIDENTS.

An action pending in a state court of competent jurisdiction in Delaware, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, brought by a citizen of Pennsylvania against a citizen and resident of New Jersey, is not removable to the

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<sup>1</sup> 34 N. E. 426, 36 Am. St. Rep. 496.

Circuit Court of the United States for Delaware; and the doctrine of waiver is inapplicable to the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 42, Removal of Causes, § 35.]

(Syllabus by the Court.)

Motion to Remand.

Josiah O. Wolcott, for plaintiff.

Anthony Higgins and Horace Greeley Eastburn, for defendant.

BRADFORD, District Judge. James Hill, Administrator of Samuel P. Hill, deceased, and a citizen of Pennsylvania, brought an action on the case in the superior court of Delaware for Kent County, against the Woodland Amusement Company, a corporation and citizen of New Jersey, for the recovery of damages laid at \$20,000 for the death of the plaintiff's intestate through alleged negligence on the part of the defendant in the operation of certain machinery connected with a toboggan slide. The defendant, after declaration filed, having seasonably applied for the removal of the cause from the superior court to this court, an order for such removal was made by the superior court April 22, 1907. The defendant put in its pleas July 1, 1907. The plaintiff through counsel entered a general appearance in this court July 10, 1907, and on the same day replied to two of the pleas and demanded that the remaining plea be drawn out before replication to it. At this stage of the pleadings the plaintiff presented two motions to this court; one, that leave be granted him to withdraw his general appearance and his replications, and to appear specially for the purpose of moving that the case be remanded, and the other, that the case be remanded as one not properly within the jurisdiction of this court. It appears from the record, and is admitted, that the plaintiff was at the time of the commencement of the action and still is a citizen and resident of Pennsylvania, and that the defendant was at that time and still is a citizen and resident of New Jersey. Neither of the parties had or has a residence in Delaware. Section 1, art. 3, of the Constitution, provides that "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish"; and section 2 of the same article provides that such judicial power shall extend to controversies "between citizens of different States." Pursuant to this grant of power Congress, having created the circuit courts of the United States, provided, among other things, by section 1 of the act of March 3, 1887, c. 373, 24 Stat. 552, as amended by the act of August 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], as follows:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid. \* \* \*

But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

Section 2 [U. S. Comp. St. 1901, p. 509], among other things, provides as follows:

"That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that state."

Section 3 provides for the removal of a suit, where jurisdiction is founded only on the fact that the action is between citizens of different states, into "the circuit court to be held in the district where such suit is pending."

Before directly and specifically dealing with the vital question whether under the circumstances disclosed by the record this court is "the circuit court of the United States for the proper district," within the meaning of section 2 of the act, and as such has jurisdiction of this case through the removal proceedings resorted to, it may be important briefly to consider the provisions of section 1. That section contains a grant of general jurisdiction, concurrent with that of the state courts, over controversies between citizens of different states, involving the jurisdictional amount. It is true that it declares that "where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." But, notwithstanding the strength of the language of this prohibition, it is conclusively settled by the authorities that a circuit court may have and exercise full jurisdiction in an action between citizens of different states, although held in a district in which neither of the parties resides. The mere fact that a non-resident plaintiff brings his action against a non-resident defendant does not exclude the case from the jurisdiction of the court. Were it otherwise, the writ employed for the commencement of the action would be, not voidable, but void—an absolute nullity, to which no waiver or consent could impart force or vitality. But while the suit is validly brought, although neither of the parties resides in the district, it is voidable, at the instance of the defendant, on objection taken in limine by reason of such non-residence. Under judicial construction the seasonable taking of such objection by the defendant operates as a condition subsequent to and precludes the further exercise of jurisdiction which validly attached to the suit at its inception. The prohibition

is treated as a provision which, while not per se defeating or affecting the jurisdiction of the court, extends to defendants a privilege or immunity they may or may not at their election waive. If the defendant seasonably insists on such privilege or immunity the court is without power further to exercise the jurisdiction originally attaching to the case. But if the defendant does not so insist, the court rightfully proceeds in the exercise of its jurisdiction, wholly unaffected by the non-residence in the district of either of the parties to the suit. But "where the jurisdiction is founded only on the fact that the action is between citizens of different States," and where neither of the parties resides in the district where the suit was brought, has the suit been brought in the "proper district"? On principle and wholly aside from the authorities I think not. Section 1, as above stated, declares in terms that where jurisdiction is so founded "suit shall be brought only in the district of the residence of either the plaintiff or the defendant," and this prohibition against bringing suit elsewhere per se renders the action defeasible. This inherent vice in the action is wholly based upon and exclusively grows out of bringing the action in a district where by reason of the fact that neither of the parties is a resident the suit is necessarily defeasible even if not defeated. To declare that such a district is the "proper district" for the suit would involve a wide departure from the natural, common and obvious meaning of the phrase.

Section 2 provides in effect that controversies of a civil nature between citizens of different states involving the requisite jurisdictional amount, pending "in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State." The section, however, does not contain any definition, general or particular, of what constitutes "the proper district." To ascertain the true meaning of that phrase it is necessary to consider this section in connection with both sections 1 and 3. If the proper district is that where one or the other of the parties has his residence, as contemplated by section 1 with respect to suits originally brought in the circuit courts of the United States, which hypothesis I believe to be correct, one requisite to jurisdiction on removal is furnished. But compliance with that requisite alone probably or possibly would result in oppression and uncertainty. A citizen and resident of California sued in a state court of Delaware by a citizen and resident of Florida could have the action removed to the circuit court for the district of California in which the defendant resided, or to the circuit court for the district of Florida where the plaintiff resided. If the defendant could not exercise an election as between California and Florida, to which would he be restricted on a removal? To guard against any such anomalous and absurd condition of things section 3 furnishes another requisite to jurisdiction on removal by providing that where jurisdiction is founded only on the fact that the action is between citizens of different states, it shall be removed from the state court into "the circuit court to be held in the district where such suit is pending." This restriction was necessitated by the generality of the phrase "proper district" as contained in section 2, but, in my



opinion, was not intended to render the district in which a suit is pending in the state court the proper district for the purpose of removal aside from the residence therein of one or other of the parties. From an examination of sections 1, 2 and 3, considered together, two conclusions may reasonably, and, I think, must necessarily be drawn: First, that the proper district to which a suit may be removed from a state court must be a district where one of the parties resides, and, secondly, that, in view of the fact that the removal can be obtained only by "the defendant or defendants therein, being non-residents of that State," the proper district is that in which the plaintiff resides.

Indeed, the conclusions thus reached are not disputed by counsel on either side. It was admitted on behalf of the defendant during the argument that by reason of the non-residence of either of the parties in the district of Delaware the plaintiff would have been entitled to an order remanding the case to the state court had he in limine raised an objection to the exercise of jurisdiction by this court and claimed that the action had been removed to a circuit court not in the proper district. But the defendant contended with much insistence that the case, as a controversy between citizens of different states, involving the necessary jurisdictional amount, was within the general jurisdiction of this court, and in fact was before this court, and that the plaintiff by appearing generally in this court and replying to certain pleas waived his privilege or immunity of which he might otherwise have taken advantage. This contention was based, aside from the authorities, upon an analogy supposed to exist between the conduct of a defendant in an action originally brought in a circuit court in the wrong district in failing to object seasonably on that ground, and the conduct of a plaintiff in an action originally brought in a state court and removed to a circuit court in the wrong district in failing promptly to make similar objection. But there is, I think, no true analogy between the two cases. In the former case, as has been shown, the jurisdiction of the circuit court attaches to the suit, although defeasible, by virtue of section 1. In the latter case whether the jurisdiction of the circuit court attaches at all must depend upon the effect of the removal legislation as contained in sections 2 and 3; for without this legislation there would be no power to wrest from a state court a case within its admitted jurisdiction, deprive it of the exercise of its rightful powers, and commit to the circuit court the determination of the controversy. The existence of jurisdiction in the circuit court on removal must, therefore, find support in some provision in the removal legislation authorizing the removal. If the removal be unauthorized, it is void, and there is no case legally before the circuit court or subject to its jurisdiction for decision. It can only remand the case to the state court whose jurisdiction has wrongfully been interrupted. In such case the doctrine of waiver has no application. No waiver or even consent can create jurisdiction for which there is no warrant of law. Section 2 authorizes the removal of the case "into the circuit court of the United States for the proper district." This is the extent of the authority. There is no authority for removal into an improper district. The

proceedings for removal in this case were, consequently, null and void. There was, therefore, nothing before this court to which its jurisdiction could attach. Further, aside from the particular phraseology of the act there is an inherent improbability that Congress intended to interrupt the exercise by a state court of its jurisdiction in a case the decision of which is admittedly within its rightful power, by permitting its removal to a federal court under such circumstances that the very fact of its removal renders it defeasible in the latter court. Certainly any substantial doubt on this point should be resolved in favor of an uninterrupted exercise by the state court of its unquestionable jurisdiction. *Nash v. McNamara* (C. C.) 145 Fed. 541; *Groel v. United Electric Co.* (C. C.) 132 Fed. 252; *Crane Co. v. Guanica Centrale* (C. C.) 132 Fed. 713; *McKown v. Kansas & T. Coal Co.* (C. C.) 105 Fed. 657; *New Jersey v. Corrigan* (C. C.) 139 Fed. 758, 766; *Plant v. Harrison* (C. C.) 101 Fed. 307; *Fitzgerald v. Missouri Pac. Ry. Co.* (C. C.) 45 Fed. 812; *Kessinger v. Vannatta* (C. C.) 27 Fed. 890. Judge Love in the last named case well said:

"It is the constant practice of this court to remand causes brought here from the state courts in cases of doubtful jurisdiction. The reason of this practice is obvious and conclusive. In the first place, the jurisdiction of the state court is unquestionable. It is, at least, concurrent with this court. But the jurisdiction of this court depends upon special facts, and it is in the present case, to say the least, doubtful. It is the safer and wiser course to send a cause for trial to a court of unquestionable jurisdiction, rather than retain it here, and go through all the forms of trial, when the jurisdiction is doubtful."

The cases directly bearing on the jurisdiction of this court to proceed to a hearing and determination in this suit are few and conflicting. The weight of authority, however, supports the motion of the plaintiff to remand. *Yellow Aster Min. & Mill. Co. v. Crane Co.*, 150 Fed. 580, 80 C. C. A. 566; *Goldberg, Bowen & Co. v. German Ins. Co.* (C. C.) 152 Fed. 831; *Ex parte Wisner*, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264. In the last named case *Wisner*, a citizen and resident of Michigan, brought an action against *Beardsley*, a citizen and resident of Louisiana, in a state court of Missouri. On the application of *Beardsley* the case was removed into the circuit court of the United States for the eastern division of the eastern district of Missouri, on the ground of diversity of citizenship, and subsequently *Wisner* moved to remand. The motion was denied, whereupon *Wisner* applied to the Supreme Court for a writ of mandamus, which was awarded. Mr. Chief Justice Fuller in delivering the opinion of the court, after quoting from sections 1 and 2 of the act, said, among other things:

"Section 3, as amended, provided for petition and bond for 'the removal of such suit into the Circuit Court to be held in the district where such suit is pending.' As it is the non-resident defendant alone, who is authorized to remove, the Circuit Court for the proper district is evidently the Circuit Court of the district of the residence of the plaintiff. \* \* \* But it is contended that *Beardsley* was entitled to remove the case to the Circuit Court, and as by his petition for removal he waived the objection so far as he was personally concerned that he was not sued in his district, hence that the Circuit Court obtained jurisdiction over the suit. This does not follow, inas-

much as in view of the intention of Congress by the act of 1887 to contract the jurisdiction of the Circuit Courts, and of the limitations imposed thereby jurisdiction of the suit could not have obtained, even with the consent of both parties."

On the whole I am satisfied both on principle and authority that the motion to remand the case to the state court must prevail. But the motion of the plaintiff for leave to withdraw his general appearance and his replications must be denied. So far as the result is concerned it is wholly immaterial whether the appearance and replications remain on the record or not, as it was beyond the power of the plaintiff by any waiver or consent to confer jurisdiction on this court in this case. Again, the granting of the latter motion would involve an alteration and falsification of the record. A nunc pro tunc entry may properly be resorted to to correct an omission to state on the record what actually occurred, or a mis-statement thereof. But it is not the proper function of such an entry to alter the record in such manner as to deny or disregard the acts and proceedings of parties therein correctly set forth.

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UNITED STATES v. VACUUM OIL CO. (three cases). SAME v. STANDARD OIL CO. OF NEW YORK (three cases). SAME v. STANDARD OIL CO. OF NEW YORK et al.

(District Court, W. D. New York. January 4, 1908.)

Nos. 467-470, 472-474.

1. CARRIERS—VIOLATION OF INTERSTATE COMMERCE ACT—INDICTMENT OF SHIPPER FOR RECEIVING REBATES.

In the prosecution of a shipper for receiving rebates or concessions in violation of section 1 of the Elkins Act of Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880], which forbids the granting or receiving of any rebate or concession whereby property shall "by any device whatever" be transported in interstate commerce at a less rate than that named in the tariffs published and filed by the carrier, where it is averred that there was an established through rate between the terminal points of the shipment to which the carriers concerned were parties, the indictment need not aver the route over which the shipment was actually made.

2. SAME.

Such an indictment need not specifically charge the actual payment of the unlawful lower rate conceded which is not an essential element of the offense, although proof of such payment may be given on the trial.

3. COMMERCE—SUBJECTS OF REGULATION—TRANSPORTATION CHARGES.

The fact that a concession from the published and filed through rate on an interstate shipment over the lines of connecting carriers was given entirely by the initial carrier for transportation over its own line wholly within one state does not relieve the shipper receiving such concession from liability to prosecution therefor under the Elkins Act of Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880].

4. CARRIERS—VIOLATION OF INTERSTATE COMMERCE ACT—SEPARATE OFFENSES—SUCCESSIVE SHIPMENTS.

Under the Elkins Act of Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880], which makes it unlawful for a shipper to receive "any concession" from the published and filed rate for the interstate transportation of property, where the published rate relates to transpor-

tation in car load lots and the shipments are so made, concessions received and accepted on such shipments were upon the property transported, and not upon the conceded rate, and each shipment on which a concession was given constitutes a separate offense.

**5. SAME—ELKINS ACT—CONSTITUTIONALITY.**

The Elkins Act of Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880], is not unconstitutional as in violation of the fifth amendment because it subjects a shipper to criminal prosecution for accepting a concession from a rate published and filed without permitting him as a defense to show that the established rate was extortionate and unreasonable, and that the rate paid was reasonable.

On Demurrers to Indictments.

S. Wallace Dempsey, Special Ass't to Attorney General.

Kenefick, Cooke & Mitchell (James McCormick Mitchell, of counsel), for defendants.

HAZEL, District Judge. The principal grounds of demurrer to each indictment may be summarized as follows: That the indictments do not specify the route from Olean to Norwood on which the established rate applied, nor the route over which the freight was transported; nor the payment by the defendants to the carriers of the alleged unlawful rate; nor that the shipments were made at a less rate than the tariff of rates published and filed; that the Elkins act is unconstitutional, and, generally, that the indictments do not charge an offense.

Assuming that there were two separate routes from Olean to Norwood in the state of New York, on the connecting roads mentioned in the indictments, are the indictments invalid because they fail to charge the particular route over which the petroleum in fact was transported? It is not alleged that there were two routes available to the initial carrier from the point of shipment to Norwood, but defendant contends that the court will take judicial notice of the fact that there are two different routes by which freight could have been transported between the points mentioned; one via Rochester and the other via Buffalo. Upon this point it is sufficient to say that the court will take judicial notice of such established railroad routes as are generally known and used. It is not to be supposed, however, that ordinarily petroleum would be conveyed from Olean to Norwood by way of Buffalo which is geographically located farther from the point of shipment than Rochester (to which routing the rate in terms applied), and appreciably farther from the point of ultimate destination. In my estimation it is wholly immaterial with regard to the validity of the indictment that there were two routes by which the merchandise could have been conveyed. According to the indictment there existed an established rate for a through or continuous shipment, and the carriers under the common arrangement were bound to transport the petroleum at the scheduled rate irrespective of any facilities for a different routing. If the merchandise was intentionally and knowingly carried over a route other than the established route at a lower rate than the filed rate, the court may fairly suppose that the act to regulate commerce was disobeyed. The Elkins act under consideration in positive terms

forbids giving a concession in respect to property transported interstate "whereby any such property shall be transported by any device whatever" at a less rate than the rate published and filed. In *Armour Packing Co. v. United States*, 153 Fed. 1, 82 C. C. A. 135, it was not held, as I read the case, that the particular route for transportation where the carriers have facilities for shipment by different routes between two points, must be specifically alleged in the indictment. The first ground of demurrer is overruled.

The contention that actual payment of the unlawful rate is not specifically charged in the indictment was much debated at the hearing of the demurrers. I think there is a material distinction between the payment of a rebate to a shipper and the acceptance by the latter of a concession or unjust discrimination. The actual turning over of the money representing the lower tariff rate is not the important element of the offense, and a concession or unjust discrimination may be given and accepted which does not necessarily involve the payment of the fixed rate, or the forwarding of the freight at a lower rate than that published and filed. Admittedly, the transportation of the commodities in question was at a less rate than the established rate, and to knowingly accept such a concession from the carrier assumes the payment by the shipper at the lower rate for the transportation, and proof of such payment may undoubtedly be given at the trial. If the government fails to prove payment at the lower rate it would perhaps have a material bearing upon the unlawful intent, but prima facie the offense was consummated when the property was transported at the unlawful rate, and the payment of the rate, when, by whom, how or under what circumstances, is not deemed an essential allegation. *United States v. Standard Oil Co. (D. C.)* 155 Fed. 305. Although in the *Armour Case* the indictment seems not to have charged that the lower rate was paid by the defendant, yet it clearly appears from the opinion of the court that evidence was received at the trial to establish such payment. The court has carefully read the indictments and considered the argument of counsel, and it is thought that the character of the offense is described with sufficient clearness to advise the defendants of the charge which they are required to meet at the trial.

Another point urged by the defendants is that the concessions relate merely to intrastate shipments. The indictments allege that the transportation was pursuant to a common arrangement for a continuous shipment from Olean to Burlington, and it appears that the concessions given the defendants were over a route extending from Olean to Norwood, points within this state, and not from the aggregate rate for the transportation interstate. I can conceive of no sound reasoning in the claim that because all the connecting carriers from Norwood to Burlington did not join in giving the concessions that the indictments are insufficient in law. If the concessions were over a route between points in this state it would be an anomalous holding to relieve the offending carrier because all the railroad companies parties to the common arrangement have not participated in the criminal act.

The next proposition is whether the various shipments set forth in the different counts of the indictments constitute in law separate and

distinct offenses punishable by the imposition of separate penalties for each offense. Counsel have assumed this question to be properly raised by demurrer, and I have, therefore, given it such consideration as its importance demands. The rule governing the punishment in the cases at bar apparently hinges upon whether separate or distinct offenses are forbidden by the statute, or whether the offense was continuous in its character. Wharton's Cr. Law (10th Ed.) § 27, p. 36; *United States v. Standard Oil Co.*, *supra*. Turning again to the indictment, it will be observed that it is alleged in substance that the established rate of 26½ cents per hundred pounds plus \$23 for each tank car relates only to the transportation in car load lots; and the acceptance of concessions by the defendants on different days at lower rates is charged as separate and distinct offenses. The statute declares in effect that it shall be unlawful for any person or corporation to accept "any concession" in respect to the transportation of any property, and hence it will be observed that the statute contemplates as an act of violation the shipment of any property at the illegal rate. If, therefore, the merchandise was transported in car load lots, the tariff rate being fixed upon such shipments, the concessions which the defendants received and accepted were upon the property transported, and not upon the conceded rate. The cases cited by defendants are not applicable. They principally relate to actions to recover penalties, or to cases wherein continuous offenses are charged in the indictment. Nor is the decision of Judge Hough in *United States v. Great Northern Ry. Co.* (not yet reported) 157 Fed. 288, opposed to this conclusion.

The next question is that the Elkins act (Act Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880]), which provides that a shipper shall be guilty of a misdemeanor if he accepts a concession from a rate published and filed as required by the act without permitting him, when prosecuted for a violation thereof, to prove the unreasonableness of the established rate and the reasonableness of the rate paid, is unconstitutional and void. The earnest discussion of this question by counsel for defendants and the special counsel for the government has induced a careful reading of the cases cited in the briefs, and a faithful consideration of the reasoning in support of the contention. It is suggested that, because of the grave importance of this constitutional question, the court can safely and properly resolve the doubts in favor of the defendants solely to permit the United States to at once prosecute an appeal to the Supreme Court under the provisions of the recent act of Congress providing for writs of error by the government in criminal cases, to the end that the validity or invalidity of the act in question, so far as it relates to the shipper and the asserted deprivation of its constitutional rights, may be settled by the court of final resort. To this suggestion, however, I must withhold my sanction because of the firm conviction entertained that neither the Elkins act nor the feature relating to a violation thereof by shippers is fairly open to the claim that a violation of the fifth amendment to the Constitution is threatened. Even if the question submitted were a doubtful one, it would not be a sufficient ground to justify a decision in favor of the defendants. The argument proceeds upon the theory that the shipper is subjected to

punishment for accepting a concession from the lawful rate filed and published by the carrier, without permitting him to defend himself in any criminal prosecution, and excuse his participation in the offense on the ground that the rate paid was extortionate and unreasonable; that although the act of 1887 and its amendments give the shipper a civil remedy for correcting abuses, namely, by complaining to the Interstate Commerce Commission, injunction, by action at law for the recovery of excess of rates paid and damages arising from such payment, yet on the trial of an indictment charging it with receiving a rebate, concession, or unjust discrimination it is deprived of the right to prove the unreasonableness of the established rate. To state the proposition in the light of the defendants' civil remedy which is strictly preserved, for the Elkins act is not independent of the original act, but supplementary thereto, is almost to refute it. That Congress had power under the commerce clause of the Constitution to regulate commerce is conceded, and its purpose in enacting the statute forbidding unjust discrimination and preference to the end that all shippers shall secure uniform treatment is beyond question. How this object and purpose of Congress can be effectuated if a shipper receiving rebate, concession, or discrimination is permitted to question or litigate the legality of the rate as to its reasonableness or unreasonableness in a criminal prosecution charging him with having received a concession is difficult to understand. Indeed such a construction of the act would nullify its general scope, and render its strict enforcement wholly impracticable, for juries and judges in different jurisdictions would not be likely to reach a conclusion upon the subject of just or unjust tariff charges which would secure uniformity of rates. It is therefore clear that there can be no departure or deviation from the established rates except in the manner provided by the act, and such rate must be regarded as binding upon the shipper. In *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 563, this doctrine as announced in *Swift v. Philadelphia, etc., Ry. Co.* (C. C.) 64 Fed. 59 and in *Kinnavey v. Terminal R. R. Association* (C. C.) 81 Fed. 802, was distinctly approved. The shipper must obey the provisions relating to the payment of transportation charges that have been scheduled and filed, and he cannot be heard to exclaim in a criminal trial against him for violation of the act that the lawful rate fixed by the carriers was extortionate or unreasonable, and therefore the lower freight charge was lawful. True, the question of unreasonableness of the tariff rate, and whether its operation results in the taking of private property without due process of law, is judicial in its nature, and Congress in the act under consideration has not expressly given the Commission power to fix rates; and, furthermore, such power perhaps cannot be presumed simply because the established rates filed with the Commission must in the first instance be regarded as *prima facie* reasonable. *Illinois Central Ry. Co. v. I. C. C.*, 206 U. S. 444, 27 Sup. Ct. 700, 51 L. Ed. 1128. There can, therefore, be no weight given to the theoretical reasoning or remote possibility that a defendant who declines to pay to the carriers the asserted unreasonable rate, and accepts a less rate than that published and filed, must be prosecuted

criminally before he has opportunity to prove the actual unreasonableness of the filed rate. The shipper must pay the filed rate, submitting his claim of unreasonableness to later determination. *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, supra. Any other construction, as already stated, would not afford that degree of protection to all shippers that Congress designed to secure.

The demurrers are overruled on all grounds.

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DELAWARE, L. & W. R. CO. V. SWITCHMEN'S UNION OF NORTH AMERICA et al.

(Circuit Court, W. D. New York. December 13, 1907.)

No. 323.

1. INJUNCTION—RIGHT TO RELIEF—PROPERTY RIGHTS.

To justify the exercise of the injunctive powers of a court, the unlawful interference or threatened interference with complainant's property rights must be shown.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 27, Injunction, §§ 9, 10.]

2. MASTER AND SERVANT—TERMINATION OF EMPLOYMENT—RIGHT TO QUIT.

Workmen may strike or quit their employment at pleasure, either singly or in concert, even though it be in violation of their service contract.

3. TRADE UNIONS—STRIKES—ADVICE OF OFFICERS.

Workmen are not forbidden by law from seeking, taking, or following the advice of the officers of their union or labor organization, with reference to the advisability of a strike.

4. INJUNCTION—CONSPIRACY—INDUCING STRIKE.

Where the by-laws of a labor union provided that no strike could be declared on any railroad system unless two-thirds of the members on such system first voted for the same, and that members were not permitted to engage in a strike or encourage any other member to strike without the consent of two-thirds of the members employed on that system, and of the international president of the union, a poll having been taken resulting in favor of a strike, the consent of the president of the union did not constitute such an incitement or inducement to strike as would justify the continuance of a strike injunction, there being no proof of an intention on the part of defendants to conspire to inflict a wrong on complainant, nor to induce others to strike.

5. CONSPIRACY—EVIDENCE—WEIGHT.

Where a circular inducing a strike was promptly repudiated by the labor union involved, and its origin and authorship was not proved, it was not entitled to probative weight to prove a conspiracy to induce and intimidate members of the union to strike.

6. TRADE UNIONS—OFFICERS—COMMITTEES—CONFERENCE.

Members of a labor union were entitled to select a committee to request a conference with their employer and to delegate an officer of the union to represent them and advocate an adjustment of their differences with a view of effectuating an amicable arrangement.

In Equity.

Rogers, Locke & Babcock and Louis L. Babcock, for complainant.  
Henry W. Killeen and V. H. Riordan, for defendants.

HAZEL, District Judge. This motion is for an injunction pendente lite in an action brought by the Delaware, Lackawanna &



Western Railroad Company against the Switchmen's Union of North America, F. T. Hawley, its president, Buffalo Lodge No. 4 of said Switchmen's Union, and William Jordan, its president, together with several other individuals named in the bill, who it is alleged combined and conspired to interfere with and obstruct complainant's business, and to compel or induce by intimidation the switchmen employed by the complainant to break a certain subsisting service contract, dated November 20, 1906, which expires on January 1, 1908, or thereafter upon 30 days' notice of revision given by either party. The contract in behalf of the complainant is signed by its general superintendent and in behalf of the switchmen by R. W. Flynn, general chairman, S. E. Heberling, and E. M. Rine. On November 23, 1907, an ad interim injunction was granted restraining the defendants from combining and conspiring with each other to induce the complainant's switchmen to violate their service contract, and from threatening, compelling, or intimidating such employes and members of the Switchmen's Union to disregard such service contract, and quit the employ of the complainant. All the defendants have appeared herein, excepting the individual defendants, Heberling and Flynn, and filed a joint answer denying the alleged combination to induce a strike, and averring that the employes have grievances, and that the validity of the contract is denied by them. It is also specifically denied that any of the defendants have combined and conspired to interfere with, hinder, or obstruct the business of the complainant, but assert that the switchmen in the employ of the complainant themselves took the poll, and that if a strike is declared they intend to leave the employ of the complainant in a peaceable and lawful manner.

A motion to continue the injunction during the pendency of this action is now before me. I have given careful consideration to the subject-matter and affidavits read on both sides and the authorities, and am constrained to deny the application and vacate the existing restraining order. The basis for the exercise of the injunctive powers of the court must be the actual or threatened interference with the property rights of the complainant, and to invoke such powers, which imply the punishment for an infraction of the order of the court, the unlawful interference or threatened interference must be satisfactorily shown. The specific allegations of the bill alleging interference and unlawful inducement to strike or cease work is that the defendants, under the direction of said Hawley, the president of the Switchmen's Union, caused a poll of the switchmen in the employ of the complainant to be taken declaratory of a strike or no strike, and, the poll having been in favor of a strike, that the said Hawley intends to conduct the same pursuant to the constitution and by-laws of the defendant Switchmen's Union and its subordinate lodge Buffalo Lodge No. 4. The bill and affidavits of complainant reveal an absence of sufficient facts by which the court may perceive that there was or is threatened any unlawful interference with complainant's property rights by way of inducement, enticement, threats, or intimidation to cause such threatened

strike. That workmen may strike or quit their employment *ad libitum* is well recognized by all the authorities, and that they may do so singly or in concert, even though it be in violation of their service contract, has also been held. In *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 28 C. C. A. 99, the principle is thus stated:

"The courts have invariably upheld the right of individuals to form labor organizations for the protection of the interests of the laboring classes, and have denied the power to enjoin the members of such associations from withdrawing peaceably from any service, either singly or in a body, even where such withdrawal involves a breach of contract."

And in *Arthur v. Oakes*, 63 Fed. 310, 11 C. C. A. 209, 25 L. R. A. 414, an earlier case, Mr. Justice Harlan, sitting in the Circuit Court of Appeals for the Seventh Circuit, and writing the opinion of the court, says:

"Those employ es having taken service, first with the company, and afterwards with the receivers, under a general contract of employment, which did not limit the exercise of the right to quit the service, their peaceable co-operation as the result of friendly argument, persuasion, or conference among themselves, in asserting the right of each and all to refuse further service under a schedule of reduced wages, would not have been illegal and criminal, although they may have so acted in the firm belief and expectation that a simultaneous quitting without notice would temporarily inconvenience the receivers and the public."

The court broadly held that the employ es in good faith and peaceably had the right to leave the service of their employer, but without injuring or interfering with the free action of others. It follows, therefore, whenever a conspiracy is alleged that it must be shown that the intention of the conspirators was to inflict wrong upon the complainant, and if the defendants herein acting together tried to have the employ es break their contract, or urged them to leave the employ of the complainant, the court has power to interfere. But if it appear that the workmen upon their individual responsibility desire to breach the contract, and quit their employment because of alleged grievances or any other reason, a court of equity will not interfere. Such being the law, how stands this case?

The only justification for the preliminary injunction is the allegation that the defendants incited or coerced the members of the union employed by complainant to violate their contract and incited them to stop work in a body. The rule is conceded by counsel for complainant that the switchmen can strike singly or collectively as the result of their individual action, though such action may have been induced by co-operation and lawful persuasion. The law does not prohibit workmen from holding conferences, and discussing their grievances with the object and purpose of striking or ceasing work at a preconcerted time, and it is only when such action by employ es is accompanied by acts of violence, threats, undue persuasion, or intimidation, or such wrongful method as will irreparably injure the aggrieved party that resort may be had to a court of equity for redress. The workmen are not forbidden by law from seeking, taking, or following the advice of the officers of their union or labor organization. As bearing upon this point, the

case of *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.* (C. C.) 62 Fed. 803, is instructive. In that case Judge Taft, at page 817 of 62 Fed., enunciated the doctrine that the employes have labor to sell, and accordingly have the right to accumulate a fund for the support of those who engage in a legal strike. He says:

"They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employers. They may unite with other unions. The officers they appoint, or any other person to whom they may choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of the employment are unsatisfactory."

According to the constitution and by-laws of the defendant Switchmen's Union and of the subordinate lodge no strike can be declared on any system unless two-thirds of the members on such system shall first have voted for the same and then it shall be conducted by the international president. Members of the union are not permitted to engage in a strike or encourage any other member to engage in one without the consent of two-thirds of the members employed on that system and that of the international president. The affidavits read on this motion disclose that the poll of the members has already been taken in favor of a strike, and that the sanction of the defendant Hawley is required to effectuate the same. Is the consent of the president in connection with the asserted direction by him to take the poll such an incitement or inducement to strike as to justify a continuance of the injunction? I think not, for, as already mentioned, a peaceable strike is not per se illegal, and the defendant Hawley acting under the constitution and by-laws of the union could at the request of the members advise the employes as to their proper and lawful action. *Wabash R. Co. v. Hannahan* (C. C.) 121 Fed. 563. Under the by-laws of the union his consent to strike must follow the poll to strike, and, seemingly, is necessary before the striking members can require its officers to levy assessments upon the members to pay the expenses and benefits provided for. Reference was made by complainant to a printed circular letter purporting to have been issued by the Switchmen's Union and mailed to switchmen throughout the United States soliciting membership in said union and practically inciting a strike. Such circular, however, is not entitled to probative weight, its origin and authorship not being proven, and it appearing to have been promptly and seasonably repudiated by the union. In the absence, therefore, of satisfactory evidence that the defendants have unlawfully combined and conspired to induce, incite, or intimidate the members of the said Union to strike and maliciously interfere with the carrying out of the contract between the complainant and its employes, I am not inclined to continue the restraining order.

Stress is laid by the complainant upon the decision recently made by Judge Thompson, in *Barnes v. Berry* (C. C.) 156 Fed. 72, but in that action the contract was between two associations, the United Typothetae of America and the International Printing Pressmen and Assistants' Union of North America. It appeared that the officers of the union

felt aggrieved because their predecessors had not strongly resisted certain provisions of the contract which excluded the recognition of an eight-day clause until 1909 and a proposed closed-shop clause, and, therefore, when a change in the contract was proposed by the Typothetæ, they incited strikes and threatened strikes against different members of the Typothetæ residing in various parts of the country unless their demands for a modification of the contract were consented to. This, manifestly, was a case where the employés were being urged and induced to strike by the officers of their union to satisfy their desire to have the eight-hour day clause inserted, they having been elected officers on such an issue. The court properly held that the officers of the defendant organization could not exercise their power unlawfully over its members for the purpose of repudiating the contract, and compel the inauguration of "closed shop" which was contrary to public policy, and restrained the incitement, inducement, or coercion of the men to resort to a strike in different parts of the country to compel a change in the contract. In the case at bar, it may be conceded that the defendants have influence over the switchmen employed on complainant's road, yet that such influence has been improperly exercised in view of the rule of law permitting employés to strike even though they have entered into a service contract is not clear. If I were satisfied that the men were unlawfully instigated, incited, or urged by the defendants to sever their service contract of employment, which is claimed to remain in force until January 1, 1908, or thereafter until either party gives 30 days' notice of a desired revision, I would not hesitate to grant the injunction. But even assuming that the poll of the employés was directed by the defendants, as claimed in the bill, it cannot be held as a matter of law, in the absence of satisfactory proof of a combination or conspiracy to break a valid contract, that such acts on their part, standing alone, presume unlawful incitement, persuasion, or coercion of the members of the union, to engage in an illegal strike.

It is further claimed by the complainant that the correspondence in evidence passing between it and various officers of the union, on the subject of a conference to discuss the grievances of the switchmen and the request for increased wages, should be considered as showing that the defendants initiated the alleged dissatisfaction among the employés with a wrongful intention to injure the complainant in its business. But upon this point I am inclined to think that the defendants had the right to select a committee to request a conference and to represent them, and, moreover, they could, if they chose to do so, delegate an officer of the Switchmen's Union to represent them and to advocate an adjustment of their grievances and difficulties, with a view of effectuating an amicable arrangement.

The motion is denied.

## PERHAM et al. v. RICHMAN et al.

(Circuit Court, E. D. Pennsylvania. December 31, 1907.)

No. 41.

**BENEFICIAL ASSOCIATIONS—NAMES—RIGHT TO ENJOIN USE OF SIMILAR NAME.**

Certain divisions of complainant, the Order of Railroad Telegraphers, seceded therefrom and subsequently united in a new organization, adopting the name, the "Order of Railroad Telegraphers, Dispatchers, Agents, and Signalmen," of which respondents are members. Both orders are fraternal and benevolent, and not commercial, associations, and are composed of practically the same classes of railroad employes. Respondents adopted the name to distinguish their order from that of complainant, rather than to identify themselves with it, and it did not appear that any confusion or injury to complainant had resulted. *Held*, that the name adopted by respondents was properly expressive of the membership of their order, and that, in the absence of any showing of injury to complainant, or of probability of such injury, it was not entitled to a preliminary injunction to restrain respondents from using such name.

In Equity. Sur motion for preliminary injunction.

Robert J. Byron, for complainants.

J. S. Baird and M. M. Dolphin, for respondents.

HOLLAND, District Judge. This bill in equity is filed for the purpose of restraining the respondents from using the name they have adopted for their order. It was argued on bill and answer for a preliminary injunction, and in determining the rights of the parties the facts as stated in the answer must be assumed to be true, from which, together with the allegations in the bill not denied, we gather the following:

The complainants are members and the executive officers of the "Order of Railroad Telegraphers," which was organized and instituted at Cedar Rapids, in Iowa, on June 9, 1886. The Grand Division of this order is now located at St. Louis, Mo. "Any white person of good moral character \* \* \* actually employed on a railroad as a telegrapher, train dispatcher, line repairer, leverman, or interlocker, tower or train director, agent located at railroad station, telephone operator, staffman, and of one year's experience as such," is eligible for membership. The purposes and objects of the order are protecting and developing the interests and elevating the social, moral, and intellectual condition of its members, by uniting them in a common and general body, bettering their working condition, and promoting their general welfare and happiness. The order also maintains a "Mutual Benefit Department" for aid and comfort of beneficiaries of deceased members. Its membership is very large, extending its influence throughout the United States, Canada, and Mexico.

Henry B. Perham, the president of the complainant organization, came to Philadelphia some time in the early part of 1907, and shortly afterwards quarreled with the officers of the respondent company, who are employes principally of the Pennsylvania Railroad. Shortly after, on May 18, 1907, the respondents organized the "Order of Railroad Telegraphers, Dispatchers, Agents, and Signalmen," and by its constitution made any white person of good moral character eligible to

membership who is 18 years of age and over, and is actually employed on a railroad as a telegrapher, dispatcher, agent, signalman, leverman, or lineman, and had one year's experience as such. (The word "agent" means agent telegraphers and agents who are not telegraphers.) It also permitted men with three years' experience to become members, although not at the time employed on a railroad. The purposes and objects of the respondent organization are to unite railroad employes mentioned, and to promote their social condition and elevate them morally and intellectually, and for the further purpose of maintaining a "Mutual Benefit Department" for the aid and comfort of beneficiaries of deceased members.

Prior to the adoption of the eligibility clause in the respondents' constitution, the complainants did not permit dispatchers or agents to join their order, and only those signalmen employed as levermen and interlockers were eligible. The complainants' eligibility law, shortly after the organization of the respondents' order, was changed to enable these workmen to become members.

The respondents deny there is such similarity in name as to cause confusion between the two orders, or that confusion has or will result. They further deny that the creation of local lodges will confuse the two orders, or deceive or mislead the public or persons who might desire to join either order, and that it has been customary for years to designate association of railroad men and other employes by the term "order," their sick and death funds by the term "mutual benefit department," and local lodges as "divisions." The name "order" and the term "mutual benefit department" now used by the complainants and respondents were taken and copied from the Order of Railroad Conductors and similar associations. The respondents also deny that their mutual benefit certificate or their form of application tends to deceive persons who may desire to become members of complainants' order.

The bill prays for a preliminary injunction to restrain respondents from using the name or circulating any of their printed matters or circulars containing the name.

Some time in the spring of 1906, by reason of some differences, the local divisions of the complainant order in and about Philadelphia re-organized independently under the Order of Railroad Telegraphers and continued to do business, each for itself, under that name until May 18, 1907, when all these local divisions were organized under the name of the "Railroad Telegraphers, Dispatchers, Agents, and Signalmen," adopted their constitution and by-laws, and fixed their principal office in the city of Philadelphia. Neither the complainants nor respondents form a business organization engaged in the manufacture or sale of any commodity whatever, but are both rather beneficiary organizations engaged in the high purpose of promoting the material, the moral, and intellectual welfare of its members. Their objects are personal and social, as distinguished from commercial purposes.

Both orders are fraternal and benevolent, and are organized apparently for the same identical purposes. The respondent order had broadened the scope of its law regulating the eligibility of railroad employes for membership, and subsequently the complainants

adopted the same qualifications, and included railroad employes theretofore ineligible to membership in their order. So that, at the present time, both are engaged in the same laudable purpose of endeavoring to better the condition of certain railroad employes. The respondent order is composed of local divisions which were formerly connected with complainant order. When these local divisions first withdrew from the complainant order, they held the same name until May 18, 1907, when they changed it by adding to the old name, the "Order of Railroad Telegraphers," the additional words "Dispatchers, Agents, and Signalmen."

We here have a clear and convincing bit of evidence to show that the respondents adopted the name now used by it with no intention of deceiving railroad employes who are eligible and might desire to attach themselves to one or the other order, but rather for the purpose of giving notice of the separate existence of the respondent order. It is entirely patent that there was no intention to deceive. The names are entirely different, and no one, who is of sufficient intelligence to perform the duties of a railroad employe such as are mentioned in the eligibility clause of the respondent order or the complainant order, could be for a moment deceived as to which of the two orders he was about to join. The respondent order, being an offshoot of the parent order and composed of members engaged in similar occupations, for whose welfare both are working, could not appropriately avoid using the words "Order of Railroad Telegraphers" as part of their name. In fact, they would almost be bound to do so in order that they might properly describe the order.

The contention of the complainants that it is damaged by reason of the similarity of these names we do not think is established by the record. Of course, it is true the respondent order has not been in existence for any very great length of time, and it might be contended that there has not been sufficient opportunity to show the confusion which the complainants allege will result in the future. But even in the short time which has elapsed since the organization of the respondent order, if the anticipated confusion and misunderstanding is to occur which is so strongly urged by the complainants will take place in the future, there could have been proof of some instances occurring already. None has been brought to the attention of the court, and the alleged damage which the complainants will suffer as a result of the similarity of names is a matter of conjecture. We do not believe it will occur. The action of respondent in changing from the old name to that which it now has, indicated an intention of adopting a name for the new branch of the order so far dissimilar as to enable applicants for membership to easily distinguish the orders apart, and we are of the opinion that the respondents have succeeded in their purpose. There being no intention to deceive, and no such similarity of names of the two orders as could be said to mislead the ordinary citizen of average intelligence, the bill should be dismissed. *Supreme Lodge K. of P. v. Improved Order K. of P.*, 113 Mich. 133, 71 N. W. 470, 38 L. R. A. 658; *American Order of Scottish Clans v. Merrill*, 151 Mass. 558, 24 N. E. 918, 8 L. R. A. 320; *McVey v. Brendel*, 144 Pa. 246, 22 Atl. 912, 13 L. R. A. 377, 27 Am. St. Rep. 625.

The motion for preliminary injunction is refused.

## COCHRAN v. PITTSBURG, S. &amp; N. R. CO. et al.

(Circuit Court, W. D. New York. November 2, 1907.)

No. 282.

## COURTS—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.

A federal court cannot entertain and proceed with a suit to foreclose a mortgage on the property of a railroad company while it is in the actual custody of a state court through its receiver, appointed in a prior suit to foreclose a junior mortgage, nor has the federal court power to remove the state receiver or to interfere in any manner with his management of the property.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 1408.

Conflict of jurisdiction with state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

In Equity. On motion by defendant to stay further proceedings, and motion by complainant to enjoin prosecution of a suit in a state court.

See 150 Fed. 682.

Bushnell & Metcalf, J. H. Metcalf, Robert B. Honeyman, for complainant.

Kenefick, Cooke & Mitchell and James McCormick Mitchell, for defendant Pittsburg, S. & N. R. Co.

Joline, Larkin & Rathbone and Arthur H. Van Brunt, for defendant Central Trust Co. of New York.

HAZEL, District Judge. This is a motion by the defendant the Pittsburg, Shawmut & Northern Railroad Company (hereinafter called the railroad company) to enjoin the taking of testimony in this action until after the sales under foreclosure decrees in two prior and one subsequent actions brought in the Supreme Court of the state of New York. Since the hearing, a motion has been heard on behalf of the orator to enjoin the defendant Hamilton Trust Company from further prosecuting the suit brought by it in the state court against the railroad company upon a second mortgage until this action to foreclose the same mortgage shall have been decided by this court. The material facts are as follows: Three separate default judgments of foreclosure and sale of the railroad company's property located in this state were entered on May 9, 1907, in the state court clerk's office. Prior thereto, on August 1, 1905, the defendant Frank Sullivan Smith was appointed receiver pendente lite by the Supreme Court in the foreclosure action first brought, which was to foreclose the third trust mortgage. The receiver duly qualified, and concededly the res of the railroad company came into the possession of the state court. On November 10, 1905, a second foreclosure action was brought in the state court by the Pacific Improvement Company, a holder of outstanding bonds which were issued by the Central New York & Western Railroad Company, one of the constituent companies of the defendant railroad company, secured by a first mortgage dated December 15, 1902, and covering all the property of the railroad company in this state except about 2½ miles of railroad extending from Olean, N. Y., to the Pennsylvania



state line. In June, 1906, the Hamilton Trust Company, as trustee for bondholders under a second mortgage, dated February 1, 1899, and covering all the property of the railroad company situated in this state, brought another foreclosure suit in the state court against the defendant railroad company and others, which, as already stated, proceeded to default judgment. Prior to the last-mentioned action, however, and on May 9, 1906, the complainant, suing for herself and such other bondholders as chose to join with her, instituted this action to foreclose such second mortgage. The bill charges default in the payment of interest, and, after alleging the facts attending the execution and delivery of the said mortgages, avers that the interests of the Hamilton Trust Company were antagonistic to the rights of the complainant; that the receiver appointed by the state court, whose removal is demanded, has wasted and mismanaged the property of the railroad company; and that said receiver and the Pacific Improvement Company are guilty of fraudulent and collusive acts, their object being to impair the lien of the outstanding 5 per cent. bonds issued under the second trust mortgage, of which bonds the complainant owns a portion.

Complainant contends, first, that as this court obtained constructive possession of the res prior to the action in the state court instituted by the Hamilton Trust Company the latter action must be enjoined; and, secondly, that the prosecution to judgment of this action would not operate as an interference with the res already in the possession of the state court receiver. The latter proposition manifestly should be first considered. The argument proceeds upon the theory that even though jurisdiction of the res or property of the railroad company located in this state was first acquired by the state court in the action to foreclose the junior mortgage lien, still, as the complainant is a citizen of a foreign state, she has the unquestionable right to establish her claim arising out of another mortgage in this forum. It is well settled that the federal courts will not exercise jurisdiction in an action where the subject-matter—the property—is held by a receiver appointed by a state court in an action pending therein. Concededly, the property mentioned and described in the bill could not be sold by virtue of the process of this court while such property is either actively or constructively under the control of the state court, even though the judgment here had been recovered upon a prior lien. *Wiswall v. Sampson*, 14 How. 52, 14 L. Ed. 322; *Peale v. Phipps*, 14 How. 375, 14 L. Ed. 459. Authorities abound firmly upholding this principle. The record shows that, not only was all the property of the railroad company situated in this state in the actual possession of an officer of the state court under foreclosure of the junior mortgage, but subsequently and before this action was begun a large portion of such railroad property came constructively under its control by virtue of the action to foreclose the first trust mortgage. The rule is succinctly stated in the syllabus of *Harkrader v. Wadley*, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399, as follows:

"When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the jurisdiction involved is exhausted."

In *Merritt v. American Steel Barge Company*, 79 Fed. 228, 24 C. C. A. 530, cited in complainant's brief, is found a comprehensive statement of the principle governing the exclusive right of the court which first acquires jurisdiction of the case to proceed to special judgment. The doctrine, the opinion of the court states, is firmly established that when the court takes into its possession property under writ of replevin or attachment, or by other mesne or final process, or by an assignee or receiver, its jurisdiction over it becomes exclusive, and in such a situation no other court of concurrent jurisdiction can rightfully interfere with the possession so acquired. The language of the opinion upon this point may be quoted:

"While property is so held, it cannot be sold under a judgment, sentence, or decree of any other tribunal. Moreover, so long as the property remains in custodia legis, no other court, unless by special leave of the court which first acquired jurisdiction, can lawfully proceed with the trial and determination of a suit, the object of which is to establish a lien against the property, or to subject the specific property to the payment of debts, or which may result in creating conflicting rights or titles thereto."

This principle has received emphatic approval by the Supreme Court in *Farmers' Loan & Trust Company v. Lake Street Elevated Railroad Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667. In that case the court said:

"The possession of the res vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons."

Concededly, there are exceptions to the rule, as, for instance, in cases in which by a prosecution of the action the court in possession of the res is enabled to exercise its power without suffering a withdrawal of such possession or interference therewith. *Farmers' Loan, etc., Co. v. St. R. Co.*, supra; *Moran v. Sturges*, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815. In this action it is obvious that its further prosecution may affect the title of the property decreed to be sold by the state court, and it doubtless would tend to obstruct or embarrass such tribunal in proceeding to final determination. I am persuaded, in view of the facts, that this court ought not to proceed herein until the litigation in the state court is ended and the receiver discharged, or until leave to continue is granted by the state court. A different disposition of the questions involved would tend to bewilderment and confusion between courts of co-ordinate jurisdiction deriving their powers from widely differing sources. That the first trust mortgage does not include the entire property of the railroad company is not of material importance. The relief sought by the complainant unquestionably can be granted by the state court, either by original action or intervention. The relief demanded in the bill by complainant is not simply to establish a mortgage lien or to liquidate her claim. The fraud charged, the alleged invalidity of the first trust mortgage, the demand for injunction to restrain the receiver from issuing receiver's certificates under the order

of the state court, together with demand for the removal of the receiver, indicates something more than a mere adjudication of the orator's rights under the mortgage of the Hamilton Trust Company. For the foregoing reasons, the motion of the defendant to temporarily stay the taking of testimony herein must be granted, and the motion of the complainant denied.

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**DR. A. REED CUSHION SHOE CO., Limited, v. FREW et al.**

(Circuit Court, W. D. New York. January 6, 1908. On Settlement of Decree, February 14, 1908.)

No. 291.

**1. TRADE-MARKS AND TRADE-NAMES—RIGHT TO PROTECTION—NAME OF PERSON.**

A prior right to a trade-name under which a business is conducted and good will established, even if it be the name of an individual, will be protected against another of the same name who uses it to pass off a fraudulent imitation as the goods of the one first acquiring a right to its use.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 78-88.]

**2. SAME—UNFAIR COMPETITION.**

One Adam Reed invented and patented a cushion sole for shoes, and the patents and a registered trade-mark of a cushion shoe in connection with the name "Dr. A. Reed's" were assigned to complainant, which established a number of stores for the sale of such shoes, and expended large sums in advertising and building up a trade in the same under such name. Subsequently, Reed obtained other patents for cushion soles, under which defendant corporation, of which he became president, began to make shoes, which it sold, using upon its cards, labels, shoe straps, and advertisements the words "Dr. A. Reed, Patentee," also printing upon its labels and boxes notices that such shoes were not the "Dr. Reed Cushion Shoe" made under former patents, but were covered by later improved patents. It was shown that complainant's shoes were ordinarily known and distinguished by retail purchasers merely as the "Dr. Reed" shoe. *Held*, that defendant, by using such name, was chargeable with unfair competition and a fraudulent invasion of complainant's prior acquired rights, there being no business reason for such use unless to obtain the advantage of the reputation of complainant's shoe by confusing or misleading purchasers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 78-88.

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

**3. SAME—INFRINGEMENT—RIGHT TO ACCOUNTING FOR PROFITS.**

A defendant will not be required to account for the gains and profits made by an unfair competition where, under a prior decision between the parties, it was justified in believing that with certain changes, which it made, it would not be chargeable with an unlawful invasion of complainant's rights, nor where there is grave doubt whether such proof could be made as to entitle complainant to a substantiated recovery.

In Equity. On final hearing.

Archibald Cox, for complainant.

George C. Miller, for defendants.

HAZEL, District Judge. This bill is to restrain unfair competition in trade. The principal question involved is whether the defendants may lawfully use the name "Dr. A. Reed," or equivalent designations, upon their cards, shoes or shoe straps, boxes and advertisements, or whether such use, as hereinafter described, is in unfair trade competition with the complainant's vendible goods. The material facts are as follows: In 1893, Dr. Adam Reed and George J. Winter, who were joint owners of the Reed invention for a cushion sole for a shoe, granted licenses to several firms or corporations to manufacture the shoe embodying the said invention. It was understood between the licensors and their licensees that the shoe should be called "Dr. A. Reed's Cushion Shoe." In the years 1895, 1896, and 1900, letters patent for a cushion shoe were issued to Reed and Winter. On January 26, 1897, a certificate of registration of a trade-mark was granted by the Patent Office to said Reed, consisting of the representation of a shoe resting on a cushion, and having printed over such emblem the words "Doctor A. Reed's" and thereunder the word "Trademark." The patents and trade-mark rights were assigned by the owners for value to the Metropolitan Bank and by the latter to the defendant Frew, who, in 1901, transferred the same to the complainant's predecessor. The complainant thereupon granted licenses to manufacture the shoes to different companies, one located in Chicago and the other in Buffalo, and expended a large sum of money in advertising and popularizing the shoe under and by the name of Dr. Reed's Cushion Shoe. The business became valuable, and stores were opened by the complainant in different parts of the country under the name of Dr. A. Reed's Cushion Shoe Company, and in various ways the attention of the public was attracted to the distinctive trade-name and trade-mark of the complainant. From the time of acquiring title to the patents and trade-mark and the right to use the name of Dr. A. Reed in connection with the sale of its cushion shoes to the spring of 1905, the only cushion shoes in the market known by said name or designation were the high grade shoes manufactured by complainant's licensees, and which retailed at \$5 per pair. The title to the original patents and trade-mark and complainant's right to use the name of Dr. Reed in the manner stated is not seriously controverted by the defendants. Indeed, it is alleged and shown that in an action in the Supreme Court of the state of Michigan, brought by complainant against Goldberg Bros. (unreported), a licensee of the E-Z Shoe Company for unfair dealing in trade, an action wherein such company was concededly the actual defendant, that the title of the patents and trade-mark, and the exclusive right to use the name "Dr. A. Reed's Cushion Soled Shoes" or "Dr. Reed's Cushion Soled Shoes," was held to be lawfully in the complainant. The defendant E-Z Shoe Company also represents the individual and firm defendants in this action, all of whom had knowledge of the decision of the Supreme Court of Michigan, and, accordingly, the question of title is *res adjudicata*. *Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.*, 121 Fed. 313, 57 C. C. A. 9.

The proofs show that the defendant's shoe is styled "The Improved Easy Cushion Sole Shoe," and upon the cards, labels, shoe straps, and

advertisements are printed the words "Dr. A. Reed, Patentee." Upon the labels and boxes is printed the following:

"Do not confuse this shoe with the shoes made under the former set of patents taken out by Dr. Reed, and which have been called the 'Dr. Reed Cushion Shoe.' Our shoes are decidedly an improvement over those made under these old patents"—

and on the inside of some of the defendant's shoes appear the following:

"This shoe is m'd under my new improved patents. Do not confuse with my old patents. Dr. A. Reed, Patentee."

No claim is made of similarity of labels or style of boxes or dress but complainant's position is that the fraudulent use by the defendants of Dr. Reed's name upon their shoes and advertising medium had the effect of simulating complainant's cushion shoes, and misleading the intending buyer. The defendants contend that they manufacture and vend an improved cushion shoe under a later patent issued to Dr. Reed, and under a registered trade-mark owned by the E-Z Shoe Company, of which Dr. Reed is the president and a stockholder, and that they have differentiated their shoes and advertisements, as above stated, to negative any deception or intention to palm off their goods for those of complainant. Evidence was given by the complainant to show, on the contrary, that the appropriation by the defendants of the trade-name confused the buyer, and misled him into buying the defendant's shoe, which sold for \$3.50 per pair, when he in fact intended buying that of complainant's make. It was proven that not infrequently customers inquire at shoe stores for the Dr. Reed shoe or the Reed Cushion shoe without any other designation, intending to buy the genuine Reed shoe, and such name or designation either singly or in connection with the word "patentee," being visible upon defendant's labels, trade-mark, and shoe strap, sales were liable to be made, and in fact were made, of the spurious article.

In these circumstances, is the appropriation and use of the name "Dr. A. Reed" or its equivalent designations by the defendants an invasion of the complainant's prior acquired right? It is quite true that an individual may use his name in a business conducted by him, though some other person or firm engaged in similar business has a prior right to such use, and this rule obtains even if confusion results from such dual use, provided it is not done in unfair competition. But an individual using his surname to carry on his business where a similar name has been appropriated by another engaged in the same business must do so in absolute good faith. He must use his name honestly, and without intending to deceive or induce the public to buy his goods for those of another. Concededly there can be no valid trade-mark of a personal name. *Howe Scale Co. v. Wyckoff, Seamans, etc., Co.*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972. But, unquestionably, a prior right to a trade-name under which a business is conducted and good will established, even if it be the name of an individual, will be protected against another of the same name who uses it to pass off a fraudulent imitation as the goods of the one first acquiring a right to its use. *R. W. Rogers Co. v. Wm. Rogers Mfg. Co.*, 70 Fed. 1017,

17 C. C. A. 576. The case of *Howe Scale Co.*, *supra*, upon which reliance is placed by the defendants, is thought distinguishable. There, the defendant Remington in good faith used his surname to promote the sale of a typewriter manufactured by the firm of which he was a member. He used it in connection with the name of Sholes, calling the machine the Remington-Sholes typewriter. He did nothing to create confusion or palm off his machine as that of the Remington manufacture, nor did an assignment by him of the right to use the trade-name "Remington" enter into the case. The Supreme Court held there could be no exclusive appropriation by any one of a surname as against others having the right to use it. Such, however, is not this case. Dr. Reed has never been personally engaged in the manufacture and sale of his patented shoes. True, his name is used as an officer in connection with the business of the defendant, the E-Z Shoe Company, but I think in view of the evidence that the position of the defendants cannot be regarded in any other light than if Dr. Reed were totally unconnected with the defendant corporation. He cannot assign or transfer the use of a trade-name, which he had previously assigned to complainant, in connection with the manufacture and sale of cushion shoes, to enable the defendants to fraudulently divert the trade of the complainant. It is, however, insisted that they have marked their shoes to avoid the possibility of any one, buying with ordinary care, being deceived, but this claimed precaution does not remove the difficulty. That, ordinarily, an intending purchaser is attracted by the name "Dr. Reed," under which the shoes were sold by the defendants, rather than by its emblem which appeals to the eye, is shown by the record. Admittedly, Dr. Reed had the right to patent his later invention, and there were no restrictions upon his right to personally or in association with others to engage in the business of manufacturing and vending his improved sole or shoe, but having previously parted with his right to use his name in connection with the manufacture and sale of cushion shoes under his original patents, and which, as we have seen, was thereafter used in the business of another, and popularized by the expenditure of a large sum of money, he cannot invade the trade of the latter. Why use the words "Dr. Reed, Patentee"? Is it to take advantage of what the complainant has done in the way of popularizing its product? The answer that the name is used because Dr. Reed is the patentee of the so-called improved cushion sole is specious. To print such words on the cards, labels, and shoe straps of the defendants is manifestly unfair to the complainant, and fraudulently misleads the public. I have examined the authorities cited in defendants' brief, but am left unpersuaded to a different conclusion. The equitable principles relating to unfair dealing in trade are well settled, but a proper application requires that each case must be determined upon its own facts. As said in *Dennison Mfg. Co. v. Scharf Tag, Label & Box Co.*, *supra*, "Slight difference in the facts of two such cases may result in very different decisions."

Nor is the *Goldberg Bros.* Case *res adjudicata* upon the point that the defendants, in accordance with the decree of the court, have sufficiently differentiated their product to negative the asserted fraudulent purpose. The character of the wrongful acts in that case were dif-

ferent, and, except upon the question of complainant's prior right to use the trade-name the precise facts here presented were not before the court. So far as the decision holds that the defendants may avoid the acts complained of by the cautionary labels and statements, namely, "This is not the Dr. A. Reed's original Cushion Shoe," I am constrained to a different conclusion. It is true that apt notices to the public in circulars or explanatory words prominently displayed on labels, boxes, etc., may be a sufficient warning to the purchasing public, but the question here, despite such notice, is whether the use of the name in question is a reasonable and proper use, or whether its use by the defendants was induced by a purpose to deceive. The case of *Pillsbury v. Pillsbury-Washburn Flour Mills Co., Ltd.*, 64 Fed. 841, 12 C. C. A. 432 is instructive upon this point. My conclusion is that the defendants, or each of them, are using the designation which is the subject of this controversy illegitimately and in unfair competition. The relief prayed for in the bill should be granted, with costs. Decree may be entered accordingly.

#### On Settlement of Decree.

In an ordinary situation a defendant who has been found guilty of fraudulently using the trade-mark of a rival dealer or dressing his goods in simulation of another trader, and by so doing practices a deceit or fraud upon the public, may be required to account for the gains and profits made by such wrongful use, or for damages resulting therefrom to the owner of such trade-mark. This principle, however, rests entirely upon an intentional fraud by a defendant and the loss of business by the complainant through his wrongful acts, which intentional wrongdoing may be ascertained directly from the facts, or may be presumed from the evidence and circumstances. The question is, can such culpable inference be drawn from the facts of this case?

Under the decision of the Supreme Court of Michigan in an action brought by this complainant against Goldberg Bros., in which action the defendant the E-Z Shoe Company was the actual defendant, the asserted wrongful acts of the defendants were held not to be an invasion of complainant's rights. The decree in that case pointed out that the defendants might indicate that the shoes manufactured and sold by them were covered by Dr. A. Reed's or Dr. Adam Reed's patents upon the condition that, in connection with such statement, they also place upon their shoes, boxes, cartons, or written matter the cautionary inscription "this is not the Dr. A. Reed's original Cushion Shoe." In accordance with such decree the shoes of the defendants were so inscribed and placed upon the market for sale. Under the circumstances presented I think the decision of the Circuit Court of Appeals, in *N. K. Fairbank Co. v. Windsor*, 124 Fed. 200, 61 C. C. A. 233, has direct application. It is sufficient to quote from that decision as follows:

"Whether that decision (interlocutory) was sound or not is immaterial. It would be straining the doctrine of inferred intent beyond all reasonable bounds to hold that one who bought, made, and sold, while that decision between the original manufacturer and the designer of the package remained in force, intended to enter into 'an unlawful competition' with complainant."

Furthermore, I think this case also comes under the doctrine of *Ludington Novelty Co. v. Leonard*, 127 Fed. 155, 62 C. C. A. 269, where an accounting was denied because, in the judgment of the Circuit Court of Appeals, there was grave doubt as to whether there could be substantial recovery. In this case it would be difficult to satisfactorily establish that the purchasers of the cushion sole shoes of the defendant the E-Z Shoe Company and dealers would not have bought them had they known such shoes were not manufactured under the original Reed patents. No accounting for damages will be allowed.

The decree should contain a provision protecting the rights of the defendant Alfred V. Frew to use the name "Dr. A. Reed Cushion Shoe" in connection with his retail business in Buffalo, Tonawanda, and Niagara Falls, as such rights under his contract with complainant's predecessor have been defined and adjudicated by the Supreme Court of the state of New York. The decree relating to the rights of said Frew should not be as broad as suggested by defendant's counsel, for I conceive that, while he may have the right to use the trade-name, his use is restricted by his contract to the sale of shoes made under the original Reed patents, and, accordingly, the palming off of a spurious Dr. Reed shoe for the genuine article is unfair dealing in trade.

The former opinion in this case directing the entry of a decree as prayed for in the bill is modified, as herein before indicated.

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#### In re GRIGNARD LITHOGRAPHING CO.

(District Court, E. D. New York. December 31, 1907.)

##### 1. BANKRUPTCY—PREFERENTIAL CLAIMS—CLASSIFICATION.

The claim of a landlord for rent of premises occupied by the receiver and trustee of a bankrupt is entitled to rank as a preferred claim under Bankr. Act July 1, 1898, c. 541, § 64b (1), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], as a necessary cost of preserving the estate. The trustee's commissions rank under subdivision 3 as a cost of administration. An allowance made to the attorney for the trustee for services ordinarily falls within the same subdivision, although, when such services were necessary to preserve the estate, such claim may be classified under subdivision 1.

##### 2. SAME—ADJUSTMENT OF PREFERENTIAL CLAIMS TO MEET INSUFFICIENT ASSETS.

Where the estate of a bankrupt is insufficient to pay in full the claims entitled to preference, the court may, where equity requires it, scale a claim which would ordinarily be entitled to priority over others.

In Bankruptcy. On report of special commissioner.  
See 155 Fed. 699.

James S. Lehmaier, for trustee.  
Henry Staton, for Trow Directory Co.

CHATFIELD, District Judge. The estate in this proceeding has been substantially used up in the course of litigation. The only creditor who has received anything is the Trow Directory Company, which had a secured claim, and after considerable delay obtained, in a de-



teriorated condition, the property upon which it held its alleged lien. At the present time, as shown by the trustee's report and the opinion of the special commissioner upon the subject of allowances, the condition of the estate is as follows:

Amount in the hands of the trustee.....	\$1,039 21
Against this is an item of taxes.....	\$ 24 37
Expenses of reference.....	32 50
Trustee's commissions.....	85 03
Allowance to attorney for trustee.....	300 00
Claim for rent during occupation by receiver and trustee..	944 01      1,385 91

All of these items fall within the provisions of section 64a and 64b, subds. 1 and 3, Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447].

The item for taxes should first be paid, under the authority of section 64a. The item for expenses of the reference must be paid to the referee, and, inasmuch as the report is necessary to both the creditor and the trustee, the expenses should be divided, and therefore should be paid next. The item of rent, it is considered, falls properly within the provisions of section 64b, subd. 1, as an actual and necessary cost of preserving the estate subsequent to filing the petition, while the trustee's commissions fall, it is believed, clearly under the provisions of subdivision 3 of the same section. The act provides, in section 64b, that the debts be paid in full out of the bankrupt estate, and that the order of payment shall be (1) the actual and necessary cost of preserving the estate subsequent to filing the petition; (2) filing fees, etc.; (3) the cost of administration.

As to the services of an attorney for the trustee, it is considered that under ordinary circumstances the allowance for such attorney's services would fall within the provisions of subdivision 3 and be subordinated to the payment of debts included under subdivision 1. In cases, however, where the services of this attorney have been necessary for the preservation of the estate, and have tended to benefit or preserve the estate, such an item might well be classified under subdivision 1, if there be sufficient property to cover the various items. In the present case, the entire estate falls short by \$346.70 of being sufficient to pay all these claims. The court is unable to consider either party as entirely free from responsibility for the situation. The creditors who have the claim for rent were also the creditors who had a secured lien, and were the only creditors to receive anything out of the estate. The value of their alleged lien was depreciated, assuming that they could have substantiated their claim, by their own actions in opposing a sale. On the other hand, the attorney for the trustee was also the attorney for the receiver and for some of the unsecured creditors, and has received considerable compensation in this case, although his work has probably exceeded, from the standpoint of amount, the extent of his compensation.

While recognizing the principle that no person is to be deprived of a property right, such as the claim for rent, without due process of law, and giving full consideration as well to the proposition that compensation for the use and occupation of real property by a receiver or trustee is a right which cannot be taken away under the provision of

the bankruptcy statute, merely to prevent hardship to some one else, nevertheless, considering this entire proceeding, and the equities as they now exist, as well as the rights which existed at the time both parties to this motion entered upon a course of litigation which has resulted in the present condition of the estate, it is believed that the claims of the attorney for the trustee, and the creditor, for the use and occupation of his premises, should be adjusted, and that the trustee should take as his commissions what may be left.

The report of the special commissioner, therefore, will be confirmed. The special commissioner's fees will be paid, amounting to \$32.50; the taxes will be paid, amounting to \$24.37, with any accrued interest or penalty; the claim for use and occupation will be allowed and paid, to the extent of \$745; the attorney for the trustee will be allowed the sum of \$150; the trustee's commissions and disbursements will be allowed, to the extent of \$85.03; and whatever balance is left from the fund of \$1,039.21, with any accrued interest, may be paid to the attorney for the trustee on account of his disbursements.

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#### THE JOSEPH B. THOMAS.

(District Court, E. D. Pennsylvania. January 9, 1908.)

#### ADMIRALTY—COSTS—ACTION IN FORMA PAUPERIS—STIPULATION FOR COSTS ON APPEAL.

Where, in a suit in admiralty brought in forma pauperis, a decree was entered dismissing the libel, from which an appeal was taken, and a surety entered into a stipulation conditioned that appellant should "answer all damages and costs" if he failed to make his plea good, on an affirmance of the decree by the appellate court, "with costs," the respondent is entitled to a decree against the libellant and the surety for his costs in both the appellate and district courts.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, p. 1636.]

In Admiralty. Objections by surety to proposed decree.

Joseph Hill Brinton, for libellant.

J. Frank Staley, Francis C. Adler, and John F. Lewis, for respondent.

J. B. McPHERSON, District Judge. This was an action brought in forma pauperis, which was ended in the District Court by a decree dismissing the libel, with costs. 136 Fed. 693. An appeal was thereupon taken, and the decree below was affirmed (148 Fed. 762, 78 C. C. A. 428); the order of the Circuit Court of Appeals being as follows:

"It is now here ordered, adjudged, and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby, affirmed, with costs, and that the said respondent, etc., recover against the said libellants, etc., \$20 for his costs herein expended, and have execution therefor."

The appeal was allowed by the District Court upon a petition in the ordinary form, and on the same day Lewis Brinton entered into

a stipulation as surety in the sum of \$250, which recited the fact that an appeal had been taken, and then provided that:

"If the said appellant shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his plea good, then this stipulation shall be void; otherwise, to be and remain in full force and virtue."

In strict accordance with the terms of this stipulation, the appellee now asks that the following decree be entered by the District Court:

"(1) That the judgment of the said Circuit Court of Appeals be, and the same is hereby, made the judgment of this court.

"(2) That the respondent recover from Joseph Punter et al., libelants, and from Lewis Brinton, their stipulator, the sum of \$124.25, his costs in this court and in the said Circuit Court of Appeals, as taxed, and have execution therefor."

The surety objects to so much of the proposed decree as permits execution against him for the costs in the District Court (\$100.75), taking the position that, as the suit was brought in forma pauperis and was prosecuted to final judgment in the District Court under the protection of the act of 1892, the costs in that court cannot be recovered from him now, because they could not have been recovered from his principals. I do not agree with this position. Whether the libelants were entitled to appeal in forma pauperis is a question upon which the federal courts have not agreed, as may be seen by an examination of *The Presto*, 93 Fed. 522, 35 C. C. A. 394, *Brinkley v. Railroad Co.* (C. C.) 95 Fed. 345, *Volk v. Sturtevant Co.*, 99 Fed. 532, 39 C. C. A. 646, *Reed v. Penna. Co.*, 111 Fed. 714, 49 C. C. A. 572, and the cases cited in these decisions. But even if it be assumed, for present purposes, that an appeal in forma pauperis is allowed by the act of 1892, the appellants did not avail themselves of this privilege, and the surety voluntarily entered into an obligation which bound him to answer "all damages and costs," if the appeal should fail, and if the appellants should not themselves satisfy the damages and costs. The bond having become absolute by a breach of the condition, I can see no reason for relieving the surety of his plain and direct engagement. The fact that the libelants were relieved by statute of the obligation to pay costs in the District Court did not extinguish the costs themselves, and it was competent for the surety to assume their payment upon lawful consideration. This he did, and he may now be properly called upon to make his assumption good. The point was ruled, I think, in the following cases: *McClaskey v. Barr* (C. C.) 79 Fed. 408, and *Persons v. Wirgman* (C. C.) 140 Fed. 207.

The clerk is directed to enter the decree proposed by the respondent.

## CAMDEN IRON WORKS v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. January 27, 1903.)

No. 17.

**CARRIERS—INTERSTATE COMMERCE—RECEIVING REBATE—"COMMON ARRANGEMENT."**

Defendant as shipper made an agreement with the Mutual Transit Company, which was a carrier by water only on the Great Lakes, by which the transit company agreed to protect a rate of 45 cents per hundred on a shipment of iron pipe from Philadelphia to Winnipeg, Man. The transit company routed the shipment over a railroad to a port on Lake Erie, thence over its own water line to West Superior, Wis., and from there over two railroads to Winnipeg. The shipment was made on through bills of lading issued by the receiving railroad carrier, in which a rate of 49½ cents was charged, that being the sum of its own published through rate to West Superior and the published rates of the other two railroad companies from there to Winnipeg, and such rate was paid by defendant. From the portion of such rate received by the transit company it refunded to defendant 4½ cents per hundred on the shipment. The transit company had not published nor filed any schedule of rates under the interstate commerce law. *Held*, that its participation in the transportation of the property under the through bills of lading and in the rate charged therein was not under a "common arrangement" between the carriers with respect to such shipment within the meaning of the act so as to make such rate the lawful rate as against the shipper, nor to render the latter subject to criminal prosecution for receiving a rebate under the Elkins Act of Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 [U. S. Comp. St. Supp. 1907, p. 880].

Buffington, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 150 Fed. 214.

Wm. A. Glasgow, for plaintiff in error.

J. W. Thompson, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. The plaintiff in error was tried, convicted, and sentenced upon an information, the gravamen of which appears to be that it, the Camden Iron Works (a corporation), had received from the Mutual Transit Company, a rebate from a rate for transportation of property, which was published and filed with the Interstate Commerce Commission by the said transit company and certain designated railroad companies; but, without pausing to consider whether any crime was sufficiently alleged, we pass at once to the broader and less technical question, whether there was any evidence upon which, as to the offense intended to be charged, the verdict of guilty that was rendered could be sustained. *Wiborg v. United States*, 163 U. S. 632-638, 16 Sup. Ct. 1127, 1197, 41 L. Ed. 289. That offense was created and defined by the act of February 19, 1903, entitled "An act to further regulate commerce," etc. (32

Stat. 847, c. 708 [U. S. Comp. St. Supp. 1907, p. 880 et seq.], in these terms:

"It shall be unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive, any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce, by any common carrier subject to said act to regulate commerce, and the acts amendatory thereto, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebate, concession or discrimination, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

The plaintiff in error admits its receipt of the sum of money specified in the information, but insists that it was not a rebate within the statute, because, as argued, the Mutual Transit Company, by whom and from whose funds it was paid, was not "subject to such act to regulate commerce," and was not "required" to file, and had not filed, any tariff in respect of the transportation in question. The facts material to this insistence may be briefly stated. The Mutual Transit Company was a carrier by water only, having a steamship line on the Great Lakes from Buffalo and Fairport to West Superior. It agreed with the Camden Iron Works to "protect" a rate of 45 cents per hundred pounds for the transportation from the point of origin to Winnipeg, of certain iron pipe which the Camden Iron Works proposed to ship from Florence and Camden, in New Jersey, and from Emaus, in Pennsylvania, to Winnipeg, in the Dominion of Canada, and the route designated by the transit company, and assented to by the Camden Iron Works, was, as to the pipe from Camden and Florence, after its lighterage to Philadelphia, thence by the Baltimore & Ohio Railroad to Fairport, thence by the Mutual Transit Company's steamship line to West Superior, and then by the Great Northern Railway and the Canadian Northern Railway to Winnipeg; and, as to the pipe from Emaus, by the Philadelphia & Reading Railway and the Lehigh Valley Railroad to Buffalo, thence by the Mutual Transit Company's steamship line to West Superior, and thence by the Great Northern Railway and the Canadian Northern Railway to Winnipeg. After the pipe had been shipped, the Baltimore & Ohio Railroad Company and the Philadelphia & Reading Railway Company (neither of them being privy to the Mutual Transit Company's undertaking for a 45 cent rate) presented bills to the Camden Iron Works at 49½ cents per hundred pounds, and, upon this being communicated to the Mutual Transit Company, its representative told the Camden Iron Works to pay the charge of 49½ cents and look to the transit company for a return of the amount of the excess over 45 cents per hundred pounds. Accordingly, the Camden Iron Works paid the bills referred to, and then claimed and received from the transit company the amount of said excess, viz., \$1,230.59, and this sum it is which the information avers was "then and there a rebate and concession in respect of the transportation

of the said 1,500 tons of iron pipe, from said places of origin of shipment and transportation to the said place of destination of shipment and transportation, and being then and there a rebate and concession of and from the full and lawful rates and charges then and before then established and published by the said common carriers, as aforesaid, and filed with the Interstate Commerce Commission as aforesaid, by the said Baltimore & Ohio Railroad Company, the said Philadelphia & Reading Company, the said Mutual Transit Company, and the said the Great Northern Railway Company, and being then and there, and at the times aforesaid, in full force and effect, to wit, the aggregate rate and charge of forty-nine and one-half cents per hundred pounds. Whereby the said property, to wit, 1,500 tons of iron pipe, was then and there transported as aforesaid at a less rate than that named in the said tariffs published and filed, as aforesaid, contrary to the form of the act of Congress in such case made and provided, and against the peace and dignity of the United States of America."

It is now apparent, we think, that the verdict of guilty in this case ought not to have been sustained, unless, as concerning and affecting the defendant, the Mutual Transit Company was subject to the act to regulate commerce, and a party to some tariff or tariffs "published and filed \* \* \* as is required by said act"; and whether or not it was subject to that act depends upon whether or not it was "engaged in the transportation of passengers or property wholly by railroad" (which, admittedly, it was not), "or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment." Act Feb. 4, 1887, c. 104, § 1, 24 Stat. 379 [U. S. Comp. St. 1901, vol. 3, p. 3154]. The learned trial judge held, and with unquestionable correctness, "that the water company is not within the interstate commerce act, and is not required to file a schedule of its rates, so long as it is operating independently and over its water route"; but the crucial question, "Was there an arrangement between these companies?" he submitted to the jury, upon an understanding of the scope of the decision in *Cin., N. O. & Tex. Pac. Railway Company v. Int. Com.*, 162 U. S. 184, 16 Sup. Ct. 700, 40 L. Ed. 935, in which we are unable to concur. The underlying problem now presented involves the ascertainment, not merely of the meaning of the word "arrangement," but of the effect which, in this particular case, should be ascribed to the words "common \* \* \* arrangement," as used in the first section of the act of February 4, 1887, and to the phrase "tariffs published and filed by such carrier," as contained in the first section of the act of February 19, 1903. The court below held throughout, and finally charged the jury "that, if these goods were shipped on a through bill of lading or any other through document or writing, from any place in the United States to an adjacent foreign country upon a contract of continuous shipment by a water company, partly over railroads and partly over its own water route, and such goods are received in transit on this through writing under a conventional division of charges, such water company must be deemed to have subjected its company to an arrangement for a con-

tinuous carriage or shipment within the meaning of the act to regulate commerce." This language is very nearly the same as was employed by the Supreme Court (162 U. S. 193, 16 Sup. Ct. 700, 40 L. Ed. 935) in restrictively defining what it intended to hold in the case of *Railway Company v. Int. Com. Com.*, *supra*, and, of course, it is always incumbent upon this court to accept any judgment of the Supreme Court of the United States as of binding authority; but the nature of the case with which that tribunal was dealing, when it made the deliverance that has been referred to, was so essentially different from that of the case now under consideration as to render the decision in the former wholly inapplicable to the latter. The sort of "arrangement" to which the attention of the Supreme Court was directed was one between the carriers themselves, and all that was actually adjudged is, that a state common carrier by railroad, who receives in transit goods shipped under a through bill of lading from a point in one state to a point in another, and "under a conventional division of the charges," subjects its road to an arrangement within the meaning of the act. Thus understood, there is nothing in that case with which our view of the present one conflicts. In this instance, the contract for a continuous carriage or shipment was between the shipper itself and a single carrier by water, and the question is not whether a carrier subject to the acts had willfully failed "to file and publish the tariffs of rates and charges as required by said acts," but whether the defendant, a shipper, had received from a carrier so subject a rebate from a rate that was named in a tariff or in tariffs which such carrier had in fact published and filed. Act Feb. 19, 1903, § 1. In other words, we are not called upon to determine whether the Mutual Transit Company was required to file a tariff, or to join in those of the railroad companies, or to file an acceptance of them; for, to relieve the Camden Iron Works from the charge of crime, it suffices that none of these things was in fact done. It may be conceded, as the court below held, that participation by one of several carriers in a rate named in tariffs filed by others of them is evidence of a lawful rate as against such participating carrier; but we cannot assent to the instruction which was given to the jury in this case that "participation was evidence of a lawful rate," not only as against the transit company, but also "as against this shipper," the Camden Iron Works. The offense which a carrier subject to the acts may perpetrate by failing to publish and file tariffs, and that which a shipper may commit by accepting a rebate from tariffs published and filed, are distinctively denounced by the statute, and should not be commingled or confused in its administration. But, as to the transit company itself, the proofs show that an element which materially influenced the result in the case of the *Cin., N. O. & Tex. Pac. Railway Company* is wholly lacking from this case; unless, indeed, the transit company's necessary concession to the carriers by railroad of their own lawful rates constituted "a conventional division of the charges," and to us it seems clear that it did not.

Finally, it is pertinent to remark that the legislation which has been under examination is highly penal in its character, and while it is the

duty of the courts to so construe its terms as to suppress, if possible, the mischief against which it is directed, it is no less their duty to see to it that no person, natural or artificial, shall be held guilty of a crime, upon an interpretation of the statute creating it, which does not appear, with at least a reasonable degree of certainty, to be the correct one.

Having reached the conclusion that there was no evidence to sustain the conviction of the defendant, and that therefore its request for a direction to the jury to render a verdict of not guilty should have been granted, the judgment of the District Court is reversed.

GRAY, Circuit Judge (concurring). Fully concurring in the opinion as above written, and in the conclusion that there was no evidence disclosed by this record that would sustain a verdict of guilty against the defendant appellant, I desire to add, by way of emphasis, the following observations:

The act under which the indictment in this case was found clearly defines in the parts quoted in the opinion of the court the offenses denounced as committed either by the carrier or by the shipper. The offense of the interstate carrier is, briefly stated, granting to a shipper, and that of the shipper accepting from a carrier, subject to the act, any rebate, etc., from the rate "named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce." Undoubtedly the published and filed tariff rates are the established legal rates against the carriers, and constructively and *prima facie* notice to shippers, and, so far, the established legal rate as against them. How far this constructive and *prima facie* notice may be rebutted, it is not now necessary to decide. The act, however, contemplates and provides for a condition of things, where no tariff has been published and filed by the carrier, from whom the rebate is charged to have been received. In such cases, it is expressly provided that, if the carrier "participates" in any rates so filed or published by another carrier, "that rate as against such carrier, its officers or agents, shall be conclusively deemed to be the legal rate, and any departure therefrom shall be deemed to be an offense," etc. It is obvious that such a participating carrier has full knowledge of the "legal rate" thus established against him, and by any departure therefrom knowingly commits the offense denounced.

It is perfectly clear, therefore, that this provision of the act does not, and cannot, establish, as against the shipper, a legal rate, by the mere participation of the carrier in a published rate. Knowledge of the rate established by this participation must be brought home to the shipper before he can be convicted of a crime. To hold otherwise, would place upon the shipper, innocent though he would be of any knowledge of offending—even of a constructive or *prima facie* scienter, as in the case of a published rate—a burden that the laws of a free country have never imposed. In this view, even if there had been evidence sufficient to submit to a jury, tending to bring home to the shipper this knowledge of a "legal rate" established by "participation" of the carrier, the court below was clearly in error in its charge to the jury that, when such lawful rate was so conclusively established against the carrier, it must also be deemed a lawful rate against the shipper. This, of itself, would make necessary a reversal.



BUFFINGTON, Circuit Judge (dissenting). The defendant corporation, the Camden Iron Works, was convicted and sentenced in the court below for receiving a rebate of \$1,230.59 from freight prepaid by it on interstate shipments of pipe from Philadelphia and vicinity to Winnipeg, Man. These shipments were made by two routes. For conciseness, I refer to the B. & O. shipment as illustrative of the case. The B. & O. R. R. received the shipment from the defendant's works through a lighterage company and billed it to Winnipeg on a through bill of lading. This waybill routed it by the B. & O. road to Fairport, Ohio, from thence to West Superior, Wis., by the Mutual Transit Company's line of steamships, and from thence to Winnipeg by the Canadian Northern and Great Northern R. R. Companies. It recites the shipment was made over the B. & O. and the Mutual Transit's line at the joint rate of  $24\frac{1}{2}$  cents per hundred, and at the joint rate of all the companies through to Winnipeg of  $49\frac{1}{2}$  cents per hundred. The latter rating was an aggregate from the schedule of rates duly published and filed by the B. & O. on its route from Philadelphia via the Mutual Transit Company of  $24\frac{1}{2}$  cents per hundred from Philadelphia to West Superior, and the joint local ratings in the published schedules of the Canadian Northern and Great Northern from West Superior to Winnipeg of 25 cents per hundred. The fact will be noted that the B. & O.'s published tariff made no rate from Philadelphia to Fairport. The full freight at the through tariff rate of  $49\frac{1}{2}$  cents per hundred was paid by the Camden Iron Works to the B. & O., and by the latter receipted for on a voucher of the Camden Iron Works, which certified, under the signature of Morton, the traffic agent of the Camden Iron Works, that the freight "account is correct, and the items therein specified duly received and authorized and contracted for." The Camden Iron Works sent one of its employes with the shipment to accompany it through to West Superior. The through bill of lading was by the B. & O. road delivered, together with the shipment, to the transit company at Fairport; that company carried the pipe to West Superior, where it delivered it, on the through bill, to the Canadian Northern Railroad Company, and the latter in turn delivered it to the Great Northern, and that company carried it to the consignee at Winnipeg. On settlement of the freight with the Mutual Transit Company the lighterage company was paid  $11\frac{1}{2}$  cents per hundred, the B. & O. retained  $11\frac{1}{2}$  cents and the remaining  $36\frac{1}{2}$  cents was paid by it to the transit company. This settlement left for the transit company, after paying the Canadian Northern and the Great Northern Railways their published rate of 25 cents per hundred,  $11\frac{1}{2}$  cents per hundred as its share, which sum, with the 13 cents retained by the B. & O., constituted the  $24\frac{1}{2}$  cents rate from Philadelphia to Duluth via the Mutual Transit line quoted in the B. & O. published schedule for such freight. The transit company, however, instead of retaining that sum, repaid to the Camden Iron Works  $4\frac{1}{2}$  cents a hundred, amounting with that paid for other shipments under substantially the same conditions, to some \$1,230.59, the result of which rebate was that the Camden Iron Works had its freight carried from Philadelphia to West Superior (and consequently from Philadelphia to Winnipeg) for \$1,230.59 less than the tariff rates between Philadelphia and West Superior. For

receiving this rebate the Camden Iron Works was indicted, tried, and convicted of a violation of that provision of the interstate commerce law which provides:

"It shall be unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of any property in interstate or foreign commerce, by any common carrier subject to said act to regulate commerce, and the acts amendatory thereto, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebate concession or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars."

On the trial of the case, in answer to defendant's request, the court charged that "unless said Mutual Transit Company is engaged in transportation of property with the Baltimore & Ohio R. R. Company, under a common control, management or arrangement for a continuous carriage or shipment, and unless the government has shown in this case, beyond a reasonable doubt, that the Mutual Transit Company was so engaged in transportation under a common control, management, or arrangement but for a continuous carriage or shipment," the verdict should be not guilty. The verdict of the jury must therefore be considered as establishing the fact that this interstate shipment was under a common control, management, or arrangement. But apart from the conclusiveness of the verdict, the undisputed facts leave no room to question that fact. That the Mutual Transit Company, being a water line alone, was, so long as it confined itself to such water transportation, excepted from the interstate commerce act is clear. But when, in the words of the act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), it "engaged in the transportation \* \* \* of property \* \* \* partly by railroad and partly by water when both are used, under a common \* \* \* arrangement for a continuous carriage or shipment \* \* \* from one state \* \* \* to any other state \* \* \* or from any place in the United States to any foreign country," the provisions of the interstate commerce law extended to it. Every such statutory requirement was fulfilled by the facts in this case. As will be seen hereafter, the transit company, instead of confining its operations to water transportation on its own line, contracted to carry the shipment from Philadelphia to Winnipeg; it had no facilities of its own for doing so; it named the B. & O. as its receiving carrier, and such nominee both routed and rated the shipment under a through waybill, partly by rail and partly by water, for a continuous shipment from "one state to another state," viz., from Philadelphia to West Superior via the Mutual Transit at a 24½ cent rate, and from a place in the United States, viz., Philadelphia, to a "foreign country," to wit, Winnipeg, and not only so, but as noted in the testimony hereafter such through routing was expressly agreed to by the Camden Iron Works, acting by one

Morton, and the transit company, acting by one Cappell. This through interstate shipment, thus made on a through interstate waybill, and at a joint interstate freight rate, the transit company received in transit, forwarded, adopted the joint interstate rates charged, and received and disbursed in part the gross freight collected by its nominee by virtue of such joint interstate rates for the entire service. It is true the transit company denied any connection whatever with the railroad. Noble, its manager, who made the arrangement for this shipment, testifies that his line was an "independent water line, working between Buffalo and the head of the Lakes, by way of various way ports," that it did not "enter into an arrangement or contract with another railroad," that he did "not know anything about the bills" (freight bills for the whole freight to Winnipeg) "of the B. & O. as to why they presented them." In view, however, of the transit company selecting the B. & O. and all the other carriers of the through waybill on which the transit company accepted the freight, of the through routing and rating on such bill, and the fact that on its rendered statement the transit company charged and collected from the B. & O. the entire freight over and above what the B. & O. retained, there must necessarily have been some prearrangement between the transit company and the railroad, for we have seen the B. & O. had no tariff rate from Philadelphia to Fairport which fixed what the railroad should charge. In view of these facts and the verdict of the jury, it must be taken as a fact that the rail and water lines were used under a common arrangement for a continuous interstate carriage. Moreover, the action of the transit company in dealing directly with the shipper; in nominating the initial railroad carrier; in selecting the secondary railroads, which, from the testimony of Cappell, the Philadelphia traffic agent of the Great Northern, the transit company had power to do—a much stronger case of common arrangement is shown than in *Cincinnati Railway v. Interstate Commerce Com.*, 162 U. S. 192, 16 Sup. Ct. 700, 40 L. Ed. 935. In that case the Georgia Railroad Company had no dealings with the shipper, made no selection of the route, and had in fact sought to prevent routings on through waybills. "But," says the Supreme Court, "when the Georgia Railroad enters into the carriage of foreign freight by agreeing to receive the goods by virtue of foreign through bills of lading, and to participate in through rates and charges, it thereby becomes part of a continuous line, not made by consolidation with the foreign companies, but made by an arrangement for the continuous carriage in shipments from one state to another; and thus becomes amenable to the federal act, in respect to such interstate commerce. \* \* \* All we wish to be understood to hold is that when goods shipped under a through bill of lading, from a point in one state to a point in another, are received in transit by a state common carrier, under a conventional division of the charges, such carrier must be deemed to have subjected its road to an arrangement for a continuous carriage or shipment within the meaning of the act to regulate commerce." Having, in the words of the Supreme Court quoted, agreed "to receive the goods by

virtue of foreign through bills of lading and to participate in through rates and charges," which it did, the Mutual Transit Company "thereby became part of a continuous line, not made by consolidation with the foreign companies, but made by an arrangement for the continuous carriage in shipments from one state to another, and thus becomes amenable to the federal act in respect to such interstate commerce." The Mutual Company then being thus amenable to the federal act and the accepted waybill showing a rate of 24½ cents per hundred over a joint route over the transit company and the B. & O. from Philadelphia to West Superior, and such rating and routing being expressly stated in the tariff fixed and published by the B. & O., the transit company, quoad this shipment, must be held to have adopted the tariff rate thus published by the B. & O., for the act provides:

"Whenever any carrier filed with the interstate commerce commission or publishes as a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents in any prosecution begun under this act shall be conclusively deemed to be the legal rate and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of the act."

It will be observed that this provision is one not restricted to a prosecution against the accepting carrier, but extends to "any prosecution begun under this act." Now, it is clear that until the receipt of this through shipment through freight and through waybill, the transit company was not amenable to the federal act, and possibly it was not bound to accept as such a shipment of interstate freight, for in the case above quoted the Supreme Court says:

"It may be true that the Georgia Railroad Company, as a corporation of the state of Georgia, and whose entire road is within that state, may not be legally compelled to submit itself to the provisions of the act of Congress, even when carrying, between points in Georgia, freight that has been brought from another state. It may be that if, in the present case, the goods of the James & Mayer Buggy Company had reached Atlanta, and there and then, for the first time, and independently of any existing arrangement with the railroad companies that had transported them thither, the Georgia Railroad Company was asked to transport them, whether to Augusta or to Social Circle, that company could undertake such transportation free from the control of any supervision except that of the state of Georgia."

Not being amenable to the federal act and free to refuse a shipment as an interstate one on a through waybill, it follows the Mutual Transit Company was not therefore bound to publish any schedule, for there is nothing in the act which requires publication except section 6, which provides:

"That every common carrier, subject to the provisions of this act, shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route."

It is true, as stated by the Supreme Court when referring to the above section in *Gulf, Colorado Ry. v. Hefley*, 158 U. S. 100, 15 Sup. Ct. 802, 39 L. Ed. 910. "After this is a provision in respect to joint rates between connecting carriers. Such carriers are required

to file with the Interstate Commerce Commission copies of their joint tariffs, which shall be made public by the carriers when directed by the Commission, in so far as may, in the judgment of the Commission, be deemed practicable, the Commission being given power to prescribe the measure of publicity to be given and the places in which the joint tariff shall be published," but in the present case there was no requirement by the Commission to publish. The transit company being under no obligation to file a schedule up to that time, but being at liberty to accept the through shipment as such and thereby become amenable to the federal act quoad such shipment, it is clear there was neither opportunity nor reason for that company to have already published or to thereafter publish a schedule; but, by the terms of the act, the published rate of the interstate carrier, whose rate they participated in, to wit, that of the B. & O., is, as against such accepting carrier, conclusively deemed to be the legal rate with reference to that shipment. When, therefore, the language in the criminal provision here in question, "whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by the said act to regulate commerce and the acts amendatory thereto," is employed, the tariffs referred to are manifestly not any tariff of the transit company, but that published and filed by the B. & O. from Philadelphia to West Superior, which company alone was by the law itself required to publish it. It is true the Mutual Transit Company, having accepted such joint tariff might thereafter be required by the commission to publish it, but manifestly such optional publication was not the required publication of the criminal clause above quoted. The Camden Iron Works having made the interstate shipment by the B. & O., which had a filed and published rate, and the transit company, which directed the Camden Company to make such shipment, having accepted and carried such interstate shipment and participated in the joint freight, subjected itself to the interstate commerce act and to the rate published by the B. & O. and thereupon it became, in the words of the act, unlawful for the Camden Iron Works, the shipper, to receive any rebate, concession or discrimination in respect of the transportation of any property (pipe) in interstate (Philadelphia to West Superior) or foreign commerce (Philadelphia to Winnipeg) by any common carrier (B. & O., Mutual Transit, Canadian Northern, Great Northern) subject to said act to regulate commerce and acts amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate (to wit, 20 cents per hundred) than that named in the tariffs published and filed (to wit, 24½ cents per hundred) by such carrier, as is required (to wit, the B. & O.) by said act to regulate commerce (viz., section 6, first clause) as above quoted. Act Feb. 4, 1887, c. 104, 24 Stat. 380 [U. S. Comp. St. 1901, p. 3156]. It will thus be seen the transaction fell within the express terms of the law, and the facts disclose its violation. The transaction was one of very substantial character. The defendant company desired to ship some 1,500 tons of iron pipe to Winnipeg, the freight at the tariff rate on which at 49 cents per hundred was nearly \$15,000. Its traffic

management was in charge of one Morton, who selected, routed, and arranged for rates. He says:

"We exhausted the market, and forty-five was the lowest. \* \* \* The Pennsylvania Railroad quoted a rate of forty-nine cents, the Canadian Atlantic quoted a forty-five, the Mutual Transit Company quoted a forty-five."

He says he never "examined the tariffs or looked to see whether any were filed, or whether they were taking it lower than the tariff through rate." And this in the face of the fact that he admits he knew there was a rate from Philadelphia to Duluth (Duluth and Superior being the adjoining respective Minnesota and Wisconsin sides of the lake-end waters), and his concession that he may have been told that "the aggregate rates from Philadelphia to Duluth and from Duluth to Winnipeg exceeded forty-five cents," and the proven fact that the tariff was on file in the B. & O. office in Philadelphia. Among others, Morton applied to one Cappell, the Philadelphia agent of the Great Northern, for rates. The latter came to the office of the Camden Iron Works, and there called by telephone the Mutual Transit Company at Buffalo and requested a rate. Noble, the agent of that company, said he would see, and later reported that his company would take the freight at 45 cents, provided they were allowed to select the route. He later reported the routing adopted to Cappell, who made the arrangement with Morton to that effect. Morton's testimony shows his whole dealings were with Cappell, who alone was known in arranging the route, in paying the legal freight rate and in arranging for the rebate. Thus Morton says as to the route:

"Q. Did you and Mr. Cappell between you agree upon the routing of this iron pipe? A. Yes, sir. Q. How was the pipe to be routed from Philadelphia? A. By the B. & O. and Mutual Transit and Great Northern and Canadian Northern."

As to the payment of the freight and arrangement for the rebate being made by Cappell, Morton says:

"When the bills were presented, I found the rate was not according to the contract. I called up Mr. Cappell and asked Mr. Cappell what he wanted to do with it. He said, 'Pay the bill as presented and the overcharge will be refunded.'"

Cappell in his testimony admits that in directing this course he did not consult the transit company. These men were not mere casual shippers or station agents. They were experienced traffic men dealing in large shipments, and in the nature of things conversant with rates. To put such a transaction as this on the basis of a mere overcharge, which might well occur in a small shipment, will not deceive those familiar with the keen competition of rival routes. Standing alone, the full payment of the full tariff freight to the B. & O. and the subsequent repayment of part through the transit company might be alleged as a casual overcharge, but where precisely the same prepayment was demanded by the Philadelphia & Reading in the case of its shipment, the impression that there was a common arrangement, not only of routes, but of rebates, approaches certainty. The instant the question came up Cappell was able to meet it at

once, without consultation with any one, and the jury were justified under the proofs in concluding that this was one of the evils, "whereby any such property shall by any device whatever be transported at a less rate," etc., the law meant to stop. In this case the defendant says it had exhausted the market on rates; the legal rate of 49 cents was quoted to it by the Pennsylvania Railroad, and if by a mere subterfuge or overcharge and by the use of a transit company, which is supposed not to be amenable to the federal act, an undercut of published tariff rates can be thus successfully made in the great traffic to the Northwest, and \$1,200 in rebates paid to the shipper, it is manifest that the freight traffic of a railroad which obeys the law and adheres to the published rates must suffer. Because I do not believe such to be the case, and because the conviction and sentence of this defendant company for accepting such rebate was, in my judgment, warranted by the decision of the Supreme Court in the case of Cincinnati Railway v. Interstate Commerce Com., 162 U. S. 192, 16 Sup. Ct. 700, 40 L. Ed. 935, I dissent.

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### GRIGGS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 3, 1908.)

No. 1,441.

#### 1. INDICTMENT—SUFFICIENCY OF ACCUSATION—PLACE OF OFFENSE—ALASKA STATUTE.

By Act June 6, 1900, c. 786, § 4, 31 Stat. 322, establishing a district court for the district of Alaska and dividing such district into three divisions, the court in each division is given jurisdiction throughout the district, and an indictment returned in either division is not defective because it fails to charge that the offense was committed in that particular division.

#### 2. FALSE PRETENSES—INDICTMENT—ALLEGING VALUE OR DESCRIPTION OF MONEY.

In an indictment for obtaining money by false pretenses, where the amount of money so obtained is alleged, it is not essential to set forth its description or allege its value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 44.]

#### 3. SAME—OWNERSHIP OF MONEY OBTAINED.

Under the statutes of Alaska, and especially sections 45, 49, and 50, of the Criminal Code (chapter 429, 30 Stat. 1290), which require defects in form in indictments which do not tend to prejudice the substantial rights of the defendant to be disregarded, an indictment for obtaining money by false pretense is sufficient, although it does not state the ownership of the money by direct allegation, if facts are alleged which sufficiently show the ownership, as where it alleges that the false pretenses were made with intent to defraud a person named of a certain sum of money, and that, relying thereon, he paid such sum to defendants.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 44.]

#### 4. JURY—COMPETENCY OF JURORS—FORMATION AND EXPRESSION OF OPINION.

One is not incompetent as a juror in a criminal case merely because he has formed and expressed an opinion as to the guilt or innocence of a person jointly indicted with the defendant on trial.

**5. CRIMINAL LAW—EVIDENCE—OTHER OFFENSES—ACTS PART OF SERIES.**

On the trial of a defendant jointly charged with another with obtaining money by false pretenses, where it appeared that the false pretenses charged were made by such other, evidence was admissible to show that they were so made pursuant to a general scheme entered into between him and defendant to defraud by the use of false representations of a discovery of gold and the sale of interests in fictitious mining claims, that they had previously jointly so obtained money from others, that defendant himself had made such representations to others, and that the interest sold to the person charged to have been defrauded was conveyed under a power of attorney from defendant; such evidence tending directly to prove defendant guilty of the crime charged.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 833, 834.]

**6. FALSE PRETENSES—PERSONS LIABLE.**

The fact that one of two or more persons who obtain property by false pretenses received no share of the property is no defense to an indictment against him for the offense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 28.]

**7. SAME—CHARACTER OF FALSE REPRESENTATION—QUESTION FOR JURY.**

Under an indictment for obtaining money by false pretenses, it is a question for the jury, not whether the false representation made was calculated to deceive a prudent person, but whether it was calculated to deceive the person to whom it was made.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, False Pretenses, § 63.]

**8. CRIMINAL LAW—INSTRUCTIONS—DEFINING REASONABLE DOUBT.**

An instruction in a criminal case, which defines reasonable doubt as "a doubt which must arise from the evidence, or lack of evidence, and for which some reason can be given," while not to be approved, does not constitute reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1906-1922.]

Ross, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

W. H. Bard and James E. Fenton, for plaintiff in error.

George B. Grigsby and Jno. J. Reagan, for the United States.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was jointly charged with one Duncan of the crime of obtaining money by false pretenses. The indictment set forth the false pretenses, alleged that they were made with the intention to defraud F. T. Merritt and obtain from him the sum of \$875, and that, relying upon the same, said Merritt then and there paid to the said Duncan and the plaintiff in error the sum of \$875; and the indictment proceeded to set forth the falseness of the pretenses. The plaintiff in error was tried separately, and was convicted. It is assigned as error that the court overruled a demurrer to the indictment and a motion in arrest of judgment, by both of which the indictment was questioned on three grounds: First, that it does not allege that the offense charged was committed in the Second division of the district of Alaska; second, that it does not allege the value or description of the money so ob-



tained; and, third, that it does not aver that the money alleged to have been obtained on the false pretenses was the property of Merritt.

As to the first objection, we find that in Act June 6, 1900, c. 786, § 4, 31 Stat. 322, it is provided as follows:

"There is hereby established a district court for the district, which shall be a court of general jurisdiction in civil, criminal, equity and admiralty cases, and three district judges shall be appointed for the district, who shall, during their terms of office, reside in the division of the district to which they may respectively be appointed by the President. The court shall consist of three divisions. The judge designated to preside over division numbered one, shall, during his term of office, reside at Juneau," etc.

Section 5 provides:

"The jurisdiction of each division of the court shall extend over the district of Alaska, but the court in which the action is pending, may, on motion, change the place of trial in any action, civil or criminal, from one place to another place in the same division, or to a designated place in another division in either of the following cases," etc.

In Act March 3, 1899, c. 429, 30 Stat. 1286, section 13, subc. 5, provides:

"That the grand jury have power, and it is their duty, to inquire into all crimes committed or triable within the jurisdiction of the court, and present them to the court, either by presentment or indictment as provided in this act."

And section 10 of subchapter 4, provides:

"That but one grand jury shall be summoned in each division of the court to inquire into all offenses committed or triable within said district."

From these provisions it appears that it was the intention of Congress to give to each division of the court jurisdiction over the whole district; and, such being the construction of the law, an indictment is not defective if it fail to allege that the offense charged was committed within the particular division of the court in which it is found.

Nor do we find merit in the second objection to the indictment. Money itself, being a measure of value, cannot be rendered more definite by an averment of its value. *State v. Kube*, 20 Wis. 217, 91 Am. Dec. 390; *Oliver v. State*, 37 Ala. 134; *People v. Millan*, 106 Cal. 320, 39 Pac. 605. And while there are decisions which hold that the kind, character, or denomination of the money obtained shall be set forth in the indictment, the tendency of the more modern decisions is to dispense with the rule, technical as it is, and unsupported by sound reason or common sense. *Commonwealth v. Lincoln*, 11 Allen, 233; *State v. Knowlton*, 11 Wash. 512, 39 Pac. 966; *State v. Reese*, 83 N. C. 637; *Oliver v. The State*, 37 Ala. 134.

A more serious objection is that the indictment contains no direct allegation as to the ownership of the money obtained. Numerous authorities hold that a direct allegation of that nature is essential. The reason assigned for such a rule is that, without such allegation and proof, the defendant may again be indicted for the same offense. Following the common-law rule as laid down in *Norton's Case*, in 8 Car. & P. 196, holding that an indictment under St. 7 & 8 Geo. IV, c. 8, for obtaining money under false pretenses, is not good unless,

in addition to the false pretenses, it contain the requisites of a count for larceny, and that, if it do not allege the money obtained to be the property of any person:

"It will not be sufficient, inasmuch as it could not in that state be pleaded as a bar to a subsequent indictment for larceny, which it is made by the proviso in the fifty-third section."

But that reason has no foundation in fact when applied to an indictment for obtaining money under false pretenses as that offense is defined in the Alaska statute. The gist of the offense is the use of the false pretenses to obtain the money or property of another, and the crime is not in terms made larceny. The indictment in the present case contains all the elements of the offense as it is defined in the statute. Not only is this so, but it is provided in section 45 (30 Stat. 1290):

"That when a crime involves the commission of, or an attempt to commit a private injury and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material."

Section 49 provides that the indictment shall be sufficient if it can be understood therefrom:

"That the act or omission charged as a crime is clearly and distinctly set forth in ordinary and concise language without repetition, and in such a manner as to enable a person of common understanding to know what is intended."

And section 50 provides:

"That no indictment is insufficient, nor can the trial, judgment or other proceedings thereon be affected by reason of a defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

Under these statutory provisions we are disposed to follow a line of cases which hold that the ownership of the money obtained need not be stated by a direct allegation, if facts are alleged which sufficiently show the ownership. *State v. Knowlton*, 11 Wash. 512, 39 Pac. 966; *State v. Boon*, 49 N. C. 463; *People v. Skidmore*, 123 Cal. 267, 55 Pac. 984; *State v. Balliet*, 63 Kan. 707, 66 Pac. 1005; *People v. Monroe* (Sup.) 71 N. Y. Supp. 803. In *State v. Boon* the court, while admitting that in an indictment for larceny it is necessary to aver the ownership of the articles stolen, held that in an indictment for obtaining by false token the averment of an intent to so defraud a particular individual out of the property obtained "does identify it, and secures the same certainty as the averment in an indictment for larceny that the article is the property of a particular individual and affords an equal protection against another indictment."

The indictment in the present case alleged that the false pretenses were used with intent to defraud F. T. Merritt and obtain from him the sum of \$875, and that by such false pretenses the defendants induced Merritt to purchase from them an undivided one-fourth interest in a certain placer mining claim, and that, relying on said false pretenses and representations, he paid to the defendants the said sum of \$875 as part purchase price of said interest. This clearly and dis-

tinctly sets forth the crime in such a manner as to enable a person of common understanding to know what was intended and whose money was obtained, and there is no omission or defect which tends to prejudice the substantial rights of the plaintiff in error. Mere technical defects in criminal pleadings, which do not go to the substance of the accusation or prejudicially affect a substantial right of the accused, ought to be disregarded in an appellate court.

Error is assigned to the refusal of the court to permit counsel for the plaintiff in error to show that certain jurors had formed opinions as to the guilt or innocence of Duncan, who was jointly indicted with the plaintiff in error. But the rule is well settled that one is not an incompetent juror merely because he has formed and expressed an opinion as to the guilt of a person jointly indicted with the defendant. The objection can be urged only by the party against whom the opinion has been formed or expressed. 24 Cyc. 291; *State v. Benton*, 2 Dev. & B. Law (N. C.) 196; *Lambright v. State*, 34 Fla. 564, 16 South. 582; *Weston v. Commonwealth*, 111 Pa. 251, 2 Atl. 191; *State v. Bill*, 15 La. Ann. 114; *State v. Bunker*, 14 La. Ann. 465; *Peddy v. State*, 31 Tex. Cr. R. 547, 21 S. W. 542; *Pierson v. State*, 21 Tex. App. 14, 17 S. W. 468; *Thompson v. State*, 19 Tex. App. 593.

Several assignments of error challenge the rulings of the trial court in admitting evidence of conversations between Merritt and Duncan, not in the presence of the plaintiff in error, and between Merritt and one Watson, who was the agent of both Duncan and the plaintiff in error. The evidence so admitted tended to show that, some time prior to the commission of the act charged in the indictment, the plaintiff in error and Duncan had entered into a general scheme to defraud by the use of false statements of a discovery of gold on Midas creek and by exhibiting gold dust which they falsely stated was obtained there. There was no evidence in the case that the plaintiff in error made false representations to Merritt prior to the latter's purchase of an interest in the alleged mining claim, or was present when Duncan made such false representations. The prosecution was permitted to show that, at the time when Duncan obtained the money of Merritt, he (Duncan) had a power of attorney from the plaintiff in error to sell his interest in the fictitious mining claim, and that prior to that time the plaintiff in error had himself made to others representations similar to those which Duncan made to Merritt, and that he and Duncan had obtained money from others on such representations, and that subsequent to that time the plaintiff in error made false statements to Merritt as to the value of the interest which he had purchased. There can be no doubt of the admissibility of the evidence so objected to, for the case comes within the exceptions to the general rule that it is inadmissible to show that the accused has committed or attempted to commit another crime wholly independent of that for which he is on trial. That rule does not apply where the evidence of the other crime or attempt tends directly to prove the defendant guilty of the crime charged, or where the evidence tends to show his guilty knowledge or criminal intent. "Where the crime charged is part of a plan or system of criminal

action, evidence of other crimes near to it in time and of similar character is relevant and admissible to show the knowledge and intent of the accused, and that the act charged was not the result of accident or inadvertence." 12 Cyc. 411, and cases there cited.

It is contended that the trial court erred in refusing to instruct the jury that, before they could convict the plaintiff in error, they must find from the evidence that he received some part of the money. The instruction was properly refused. The fact that one of two or more persons who obtain property by false pretenses receives no share of the property is no defense. 19 Cyc. 417; *State v. Davis*, 56 Kan. 54, 42 Pac. 348.

Nor was there error in refusing to instruct the jury that under an indictment for obtaining money by false pretenses, the representations made must have been such as were calculated to induce a prudent man, relying upon them, to part with his money. In Indiana, and perhaps in one or two other states, it is held that the question whether the representations and pretenses set forth in the indictment were calculated to induce a prudent person to part with his money is for the jury to determine. But the overwhelming weight of authority is otherwise, and the better rule is that it is for the jury to say whether the representation was calculated to deceive, not a prudent person, but the person to whom it was made. 19 Cyc. 405, and cases there cited.

Counsel for plaintiff in error proffered an instruction on the subject of reasonable doubt. The court declined to instruct as requested, and on that subject instructed the jury as follows:

"The defendant is presumed to be innocent until he is proved guilty by the evidence before you beyond a reasonable doubt. By reasonable doubt is not meant any doubt or conjecture which may occur to your mind, or may be imagined by you; but it is a doubt which must arise from the evidence, or lack of evidence, and for which some reason can be given."

Error is assigned both to the refusal to charge as requested and to the charge as given; but the only question to be determined here is whether there is reversible error in the instruction which was given. In *Owens v. United States*, 130 Fed. 283, 64 C. C. A. 529, in reversing the judgment of the trial court for error in a certain instruction, this court thought it proper to suggest that the following definition of "reasonable doubt," given to the jury by the court below, should be omitted on a new trial:

"A reasonable ground of doubt is one which is reasonable from the evidence or want of evidence. It must be a ground of doubt for which a reason can be given, which reason must be based upon the evidence or want of evidence."

And this court remarked:

"A doubt arising out of evidence is a mental operation for which it may often be very difficult, and indeed impossible, to assign any reason, and yet, if honestly entertained by the jury in a criminal case, must be acted upon; for they are only authorized to bring in a verdict of guilty when satisfied and convinced beyond a reasonable doubt of the guilt of the accused. Such a doubt has been often and correctly defined as a doubt which is reasonable in view of all of the evidence, and such as arises upon an impartial comparison and consideration of all of it, and prevents the jury from being able candidly

and truthfully to say that they have an abiding conviction of the defendant's guilt."

It will be observed that this court, while disapproving the phraseology of the instruction, carefully refrained from expressing the opinion that it was ground for reversing the judgment then under consideration. In the definitions of "reasonable doubt" there is hopeless confusion in the adjudicated cases. Definitions approved in some courts have been held reversible error in others. The difficulty lies in explaining words which perhaps define themselves better than can be done by any paraphrase or elucidation. Said Mr. Justice Woods in *Miles v. United States*, 103 U. S. 312, 26 L. Ed. 481:

"Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury."

The definition which was given by the court below in the present case was given in substance by Chief Justice Waite in *United States v. Butler*, 1 Hughes (U. S.) 457, Fed. Cas. No. 14,700, and has been sustained in a number of cases, and, among others, in the following federal decisions: *United States v. Stevens*, 2 Hask. (U. S.) 164, Fed. Cas. No. 16,392; *United States v. Johnson* (C. C.) 26 Fed. 682; *United States v. Jackson* (C. C.) 29 Fed. 503; *United States v. Jones* (C. C.) 31 Fed. 718; *United States v. Cassidy* (D. C.) 67 Fed. 782. The objection to that definition lies in the danger of conveying the impression to the jurors that the reason for the doubt must be one that can be expressed in words. For this reason it has been rejected in a number of jurisdictions. In others, with better reason, we think, it has been disapproved, but held not to constitute reversible error. *State v. Sauer*, 38 Minn. 438, 38 N. W. 355; *People v. Stubenvoll*, 62 Mich. 329, 28 N. W. 883; *State v. Morey*, 25 Or. 241, 35 Pac. 655, 36 Pac. 573. And we so hold in the present case.

The judgment is affirmed.

ROSS, Circuit Judge. I dissent. That no one can be legally convicted of a crime, but by the unanimous verdict of 12 jurors upon evidence which satisfies their minds of the guilt of the defendant beyond a reasonable doubt, will not be disputed. It necessarily results that, when the court undertakes to instruct the jury as to what a reasonable doubt is, it is essential that it do so correctly. In the present case the trial court instructed the jury that such a doubt is one "for which some reason can be given." I am aware that some appellate courts have sustained a similar instruction; but in the case of *Owens v. United States*, 130 Fed. 283, 64 C. C. A. 529, we said, and I think correctly said, that:

"A doubt arising out of the evidence is a mental operation for which it may often be very difficult, and indeed impossible, to assign any reason, and yet, if honestly entertained by the jury in a criminal case, must be acted upon; for they are only authorized to bring in a verdict of guilty when satisfied and convinced beyond a reasonable doubt of the guilt of the accused."

Upon the ground here indicated, I think the judgment should be reversed, and a new trial awarded.

## WECHSLER v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 7, 1907.)

No. 53.

## 1. PERJURY—MAKING FALSE OATH IN BANKRUPTCY PROCEEDING—IMMUNITY STATUTE.

Bankr. Act July 1, 1898, c. 541, § 7, 30 Stat. 548 [U. S. Comp. St. 1901, p. 3424], which requires a bankrupt to submit to an examination under oath as to various matters specified, with the proviso that "no testimony given by him shall be offered in evidence against him in any criminal proceeding," does not give immunity from prosecution for giving false testimony upon any such examination.

## 2. SAME—CONSTRUCTION OF STATUTE.

Bankr. Act July 1, 1898, c. 541, § 29b (2), 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433], providing for the punishment of any one who shall willfully and fraudulently make a false oath in or in relation to any proceeding in bankruptcy, does not create a new offense, but merely prescribed a different penalty for the crime of perjury already defined by Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653], when committed in or in relation to bankruptcy proceedings; the offense being within either statute.

## 3. INDICTMENT—SUFFICIENCY—INDORSEMENT UNDER WRONG STATUTE.

That an indictment is indorsed on the margin as having been based on a particular statute is immaterial; such indorsement being no part of the indictment, which is good if it charges an offense under any statute, although indorsed and purporting to be drawn under a different one.

## 4. CRIMINAL LAW—JUDGMENT—EXCESSIVE SENTENCE.

The imposition of sentence in a criminal case under the wrong statute, and for a more severe penalty than authorized, does not render the prosecution unavailing, but a new judgment may be entered conforming to the law.

[Ed. Note.—Powers of court to revise sentence, see note to *Nichols v. United States*, 46 C. C. A. 412.]

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York. The plaintiff in error, a bankrupt, was indicted for the commission of willful and corrupt perjury before a special commissioner in bankruptcy while giving testimony upon oath as to certain of his transactions. He was convicted on two counts, and sentenced to two years' imprisonment and to pay a fine of \$1. Two assignments of error only were argued before this court, and these only will be considered. They are as follows: (1) The court erred in admitting in evidence the testimony of the defendant upon his examination in the bankruptcy proceedings herein. (2) The court erred in not dismissing the indictment on the ground that the crime charged in the indictment did not come within section 5392 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 3653], but within section 29 of the bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 554 [U. S. Comp. St. 1901, p. 3433]).

A. J. Dittenhoefer and Gerber & James (Dudley F. Phelps, Jr., of counsel), for plaintiff in error.

Henry L. Stimson, U. S. Atty., and E. J. Myers, Asst. U. S. Atty.  
Before LACOMBE, COXE, and WARD, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts as above). The bankruptcy act of July 1, 1898 (30 Stat. 548, c. 541, § 7 [U. S. Comp.

St. 1901, p. 3424]], requires the bankrupt to submit to an examination under oath as to various matters specified therein, with the proviso that "no testimony given by him shall be offered in evidence against him in any criminal proceeding." It is contended that the immunity thus accorded in broad, unqualified language should apply to prosecution for falsely testifying upon any such examination; and it is suggested that the section quoted from does not contain the qualification found in section 860, Rev. St. U. S. [U. S. Comp. St. 1901, p. 661] (and in other federal statutes), that the immunity provision "shall not exempt any \* \* \* witness from prosecution and punishment for perjury committed in \* \* \* testifying as aforesaid." Plaintiff in error cites in support of his contention the opinion of Judge Hanford in *U. S. v. Simon* (D. C.) 146 Fed. 89, and the dissenting opinion of Judge Phillips in *Edelstein v. U. S.*, 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236, which are directly in point and fully sustain his contention. He also cites dicta in *Re Marx* (D. C.) 102 Fed. 676, and in *Re Logan* (D. C.) 102 Fed. 876, in *Re Leslie* (D. C.) 119 Fed. 406, in *Re Dow's Estate* (D. C.) 105 Fed. 889, and in *Re Gaylord*, 112 Fed. 668, 50 C. C. A. 415. On the other hand, the provision quoted was held not to give immunity from prosecution for giving false testimony upon an examination under the bankrupt act in a well-considered opinion concurred in by a majority of the court in *Edelstein v. U. S.*, 149 Fed. 636, 79 C. C. A. 328, 9 L. R. A. (N. S.) 236 (C. C. A. Eighth Circuit); and an application for certiorari in that cause was refused by the Supreme Court (205 U. S. 543, 27 Sup. Ct. 791, 51 L. Ed. 922). Whatever might be our conclusions were the question presented as a novel one, we are clearly of the opinion that we should follow the construction adopted in the Eighth Circuit and left undisturbed by the Supreme Court, so that in a matter of so much importance the decisions of the federal courts in the different circuits may be uniform.

It is manifest from its inspection that the pleader who drew the indictment in this case framed it on the provisions of section 5392, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3653], which he referred to in the margin, and which reads as follows:

"Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor, not more than five years; and shall, moreover, thereafter, be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed."

The bankruptcy act of 1898 (section 29) provides that:

"A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offence of having knowingly and fraudulently \* \* \* made a false oath or account in, or in relation to, any proceeding in bankruptcy."

It is manifest that what the bankrupt did, assuming the facts to be as the jury found them, was equally within the provisions of either

of these sections. He made a false oath in a proceeding in bankruptcy. Having taken an oath before a competent person in a case in which a law of the United States authorizes an oath to be administered that he would testify truly, he stated material matter which he did not believe to be true. When a person states matter which he does not believe to be true "wilfully and contrary to his oath," he may certainly be said to make a false oath "knowingly and fraudulently." We have then an offense covered by two penal sections; the earlier one imposing the heavier sentence. How shall they be construed? The earlier statute is most comprehensive. It covers oral and written false statements when sworn to before any competent, tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered. The later statute covers such statements only when made in, or in relation to, any proceeding in bankruptcy. The principle of construction to be applied, unless there are some special considerations which prevent such application, is too well settled to require the citation of authorities. The later special statute operates to restrict the effect of the general act from which it differs. The two sections may be construed together as providing a stated penalty for the crime of false swearing generally, with the proviso that, when such false swearing occurs in a bankruptcy proceeding, the offender, upon conviction, shall be subjected to a different penalty.

Counsel for the government, however, contends that this rule of construction does not apply, because section 29 of the bankruptcy act creates a new statutory offense, not covered by section 5392 of United States Revised Statutes. The proposition advanced is that:

"A false oath made or taken before a commissioner of deeds, a justice of the peace, or a master in chancery would be capable of being used in a bankruptcy proceeding, \* \* \* but would alone be insufficient to constitute the crime of perjury."

The argument is that the making of such a false oath would not be "within either the common-law or statutory definition of perjury." The making of a false affidavit is not perjury at common law when not made in a judicial proceeding or court of justice. The authorities relied upon by defendant in error are almost entirely concerned with perjury at common law. 2 Whart. Crim. Law, §§ 1244, 1267; Bishop on Crim. Law, §§ 1014, 1026, 1027; Hood v. State, 44 Ala. 81; Pegram v. Styron, 1 Bailey (S. C.) 595. A single authority only deals with perjury under the statute of the United States. U. S. v. Bailey, 9 Pet. 238, 9 L. Ed. 113. In that case Bailey was indicted for perjury and false swearing under section 3 of the act of March 1, 1823 (3 Stat. 771, c. 37), and section 13 of the act of March 3, 1825 (4 Stat. 118, c. 65). The first of these sections provided:

"That if any person shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury."

The other section provided:

"That if any person in any case, matter, hearing or other proceeding, where an oath or affirmation shall be required to be taken or administered, under or by any law of the United States, shall, upon the taking of such oath or



affirmation, knowingly and willingly swear or affirm falsely, every person so offending shall be deemed guilty of perjury, and shall, on conviction thereof, be punished," etc.

Of these acts the court said that they did not create or punish the crime of perjury, technically considered, but created a new and substantive offense of false swearing, and punished it in the same manner as perjury. "The oath, therefore, need not be administered in a judicial proceeding \* \* \* so as to make the false swearing perjury." When this Bailey Case was under consideration, the federal statutory definition of perjury was substantially that of the common law. It was found in section 18 of the act of April 3, 1790 (1 Stat. 116, c. 9) and read as follows:

"And be it (further) enacted, that if any person shall wilfully and corruptly commit perjury, or shall by any means procure any person to commit corrupt and wilful perjury, on his or her oath or affirmation in any suit, controversy, matter or cause depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States, every person so offending, and being thereof convicted, shall be imprisoned not exceeding three years and fined not exceeding eight hundred dollars; and shall stand in the pillory for one hour, and be thereafter rendered incapable of giving testimony in any of the courts of the United States, until such time as the judgment so given against the said offender shall be reversed."

It will be seen that section 5392, Rev. St. U. S., contains the provisions both of the act of 1790 and of the act of 1825, and exactly covers false oaths such as the defendant made. The bankruptcy act, therefore, in this particular did not create a new offense, but merely prescribed a different penalty for one already defined.

It is suggested that we are not to conclude that Congress could have intended to reduce the punishment of persons who made false oaths in bankruptcy proceedings below that prescribed for others who made such oaths elsewhere, since all false oaths are morally wrong. The relative adjustment of punishments is, however, one wholly for the regulation of Congress, and this is not the first instance in which that body has introduced similar discriminations into the statutory penal law. The making of a false oath in applying for a pension would be within the provisions of section 5392, but it is specially provided in section 4746 [U. S. Comp. St. 1901, p. 3279] that for that offense the punishment shall be imprisonment not more than three years or a fine not to exceed \$500, or both. So, too, the making of a false affidavit on making an entry of imported merchandise would be perjury under section 5392, but by section 9 of the customs administrative act of 1890 (Act June 10, 1890, c. 407, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895]), the maximum penalty for such offense is two years' imprisonment or a fine of \$5,000, or both. In like manner section 5395, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3654], provides that where an oath or affidavit is made or taken under or by virtue of any law in relation to the naturalization of aliens, or in any proceeding under such laws, any person taking such oath or affidavit who knowingly swears falsely shall be punished by imprisonment of not more than five years or less than one year, and by a fine of not more than \$1,000. While we agree with plaintiff in error that the offense which Wechsler committed was within

the special provisions of section 29 of the bankruptcy act, under which he was to be tried, and, if convicted, punished, it by no means follows that the judge erred in not dismissing the indictment. As was stated before, the indorsement on the margin shows that the United States District Attorney proceeded under section 5392, and the trial judge evidently assumed that the indictments were founded on that section. But, as was said by the Supreme Court in *Williams v. U. S.*, 168 U. S. 389, 18 Sup. Ct. 94, 42 L. Ed. 509:

"It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force. The indorsement on the margin of the indictment constitutes no part of the indictment, and does not add to or weaken the legal force of its averments. We must look to the indictment itself, and, if it properly charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have supposed that the offense charged was covered by a different statute."

The indictment charges that, upon examination before a special commissioner in bankruptcy, it became and was a material matter and inquiry to ascertain and discover what property and assets the alleged bankrupt had and what disposition or transfer had been made of property; that Wechsler having been sworn before the special commissioner, and having under his oath testified [on certain named days] and signed his testimony, "did [on certain named days] falsely, corruptly, knowingly, willfully, and contrary to such oath, swear and depose before the said special commissioner." Then follows a statement of what he said, and the averment that it was not true, and that at the time of so swearing Wechsler did not believe it to be true. Manifestly this sufficiently charged Wechsler with having knowingly and fraudulently made a false oath in a proceeding in bankruptcy, unless it be held that false swearing "corruptly, knowingly, willfully, and contrary to his oath" is not false swearing "knowingly and fraudulently." We are not prepared so to hold, being satisfied that a man who "corruptly and willfully" makes a false oath may properly be said to do so "fraudulently." The defendant was tried under the assumption that the indictment was founded on section 5392, and, upon conviction, was sentenced under that section. But under the authority of *Williams v. U. S.*, *supra*, it must be held that such error does not involve an entire failure of the prosecution. In that case indictment was drawn, and conviction had under section 3169, Rev. St. U. S. [U. S. Comp. St. 1901, p. 2059], which imposed a fine of not less than \$1,000 nor more than \$5,000, and imprisonment for not less than six months nor more than three years. The court sentenced defendant to pay a fine of \$5,000 and be imprisoned three years. The court held that section 3169 did not apply, but that section 5481 [U. S. Comp. St. 1901, p. 3701] did, and that the indictment fairly charged an offense thereunder. This latter section provided for punishment by fine of not more than \$500 or imprisonment not more than one year. The Supreme Court held that, if this were the only error complained of, it would only be necessary for the court below to enter a new judgment, imposing such fine or imprisonment or both as the statute permitted.

In conformity to this authority, the judgment is reversed, and the cause remanded to the Circuit Court, with instructions to enter a new judgment imposing such imprisonment as section 29 of the bankruptcy act permits.

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**O. G. HEMPSTEAD & SON v. UNITED STATES.**

(Circuit Court of Appeals, Third Circuit. December 16, 1907.)

No. 33 (1926).

**1. CUSTOMS DUTIES—CLASSIFICATION—GLASS ARTICLES—MICROSCOPE SLIDES.**

In Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 100, 30 Stat. 157 (U. S. Comp. St. 1901, p. 1633), providing for "vessels or articles of glass, \* \* \* all the foregoing, filled or unfilled, and whether their contents be dutiable or free," the reference to the filing of such articles does not, in view of the history of the legislation, imply that only articles capable of being used as containers are covered by the paragraph; and microscope slides cannot for that reason be excluded.

**2. SAME—STATUTORY CONSTRUCTION—CATCH-ALL CLAUSES.**

In enacting tariff laws it has evidently been the intention of Congress that the enumeration of dutiable articles should be as nearly exhaustive as possible; and imported articles should therefore not be classified under clauses for articles "not otherwise provided for," if by fair construction they can be embraced within a specific enumeration of dutiable articles.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Jasper Yeates Brinton (J. Whitaker Thompson, U. S. Atty., on the brief), Asst. U. S. Atty.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from a decision of the Circuit Court of the United States for the Eastern District of Pennsylvania, affirming a decision of the Board of General Appraisers, as to the classification of certain merchandise under the revenue act of July 24, 1897. The merchandise in suit consisted of microscopic slides, with concavities in their centers for placing specimens for observation under a microscope. They were assessed for duty by the Collector and Board of Appraisers, at 60 per centum, under paragraph 100 of said act of July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633], which provides as follows:

"Glass bottles, decanters or other vessels or articles of glass, cut, engraved, painted, colored, stained, silvered, gilded, etched, frosted, printed in any manner or otherwise ornamented, decorated, or ground (except such grinding as is necessary for fitting stoppers), and any articles of which such glass is the component material of chief value, and porcelain, opal and other blown glassware; all the foregoing, filled or unfilled, and whether their contents be dutiable or free, sixty per centum ad valorem."

The contention of the importers is, that they were dutiable at 45 per centum, under paragraph 112 of the same act of July 24, 1897,

c. 11, § 1, Schedule B, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635], as manufactures of glass not specially provided for in the act. Paragraph 112 provides as follows:

"Stained or painted glass windows, or parts thereof, and all mirrors, not exceeding in size one hundred and forty-four square inches, with or without frames or cases, and all glass or manufactures of glass or paste, or of which glass or paste is the component material of chief value, not specially provided for in this act, forty-five per centum ad valorem."

It is argued for the appellants that the peculiar language of the last clause of paragraph 100, viz., "all the foregoing, filled or unfilled, and whether their contents be dutiable or free, sixty per centum ad valorem," excludes from the purview of said paragraph any articles of glass that are not containers,—that is, susceptible of being filled, and therefore are necessarily to be classified as a manufacture of glass not specially provided for in the act, upon which the duty is 45 per centum ad valorem.

Congress evidently intended, in the customs act of 1897, as in its predecessors, that the enumeration of dutiable articles should be as nearly exhaustive as possible, and paragraph 112, like all "not otherwise provided" paragraphs of tariff acts, was only intended to make dutiable such inevitable omissions as must occur in such enumeration. An imported article should not, therefore, be classified under the "not otherwise provided" clause, if it can, by fair construction, be embraced within a specific enumeration of dutiable articles. Care in this respect would prevent inequality and injustice in the incidence of these important taxes, that might otherwise occur. The Board of General Appraisers rested its decision upon the judgment of the Circuit Court of Appeals for the Second Circuit, in *Stern v. U. S.* 105 Fed. 937, 45 C. C. A. 141, that case involving, as they said, identically the same issue as that herein presented. It seems to be admitted by counsel for the appellants that this case is directly in point, and would consequently be controlling, if the reasoning upon which it is based had not been rejected and overruled in effect by the Supreme Court in the later case of *United States v. Downing*, 201 U. S. 354, 26 Sup. Ct. 476, 50 L. Ed. 786. That case involved the rate of duty under the act of 1897, upon certain sticks of carbon used for electric lighting. The Collector of Customs at the port of New York held them to be dutiable at 90 cents per 100 sticks, under paragraph 98 of the act of July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 156 [U. S. Comp. St. 1901, p. 1633], which provides as follows:

"Gas retorts, three dollars each; lava tips for burners, ten cents per gross and fifteen per centum ad valorem; carbons for electric lighting, ninety cents per hundred; filter tubes, forty-five per centum ad valorem; porous carbon pots for electric batteries, without metallic connections, twenty per centum ad valorem."

On protest and review, the Board of Appraisers affirmed the decision of the Collector. They held, however, that the sticks were not within the enumeration of paragraph 98, nor within that of paragraph 97, but were dutiable under paragraph 98 by virtue of the similitude clause (section 7) of the act of July 24 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]. The Circuit Court for the

Southern District of New York, held that the articles were dutiable under the act of 1897, and reversed the ruling of the Board of Appraisers, and was affirmed in so holding by the Circuit Court of Appeals. Upon certiorari, the Supreme Court sustained the decision of the Board of General Appraisers, and reversed the Circuit Court of Appeals and the Circuit Court. It was contended by the importer that the articles imported were not "carbons" either in the trade or popular sense, and do not become such until fit for use in lamps, and that the articles are correctly described and enumerated only in paragraph 97, as articles composed of carbon, not specially provided for. Paragraph 97 is as follows:

"Articles and wares composed wholly or in chief value of earthy or mineral substances, or carbon, not specially provided for in this act, if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem."

The Supreme Court, in the course of its opinion, said that this "contention encounters a serious difficulty. As was decided in *Dingelstadt v. United States*, 91 Fed. 112, 33 C. C. A. 395, the paragraph covers articles which are susceptible of decoration, and not, as contended by respondent, articles decorated or not decorated, irrespective of their capability of being decorated." Counsel for appellants rely upon this language of the Supreme Court, as establishing a principle which, he contends, must control the case before us, and therefore, that in paragraph 100, the words "all the foregoing, filled or unfilled," confines the classification to glassware containers,—that is, to glassware susceptible of being filled. While this contention is not without force, we think it has been sufficiently and clearly met in the argument and brief of the learned counsel for the government. It was there pointed out that the Supreme Court in the *Downing Case* had arrived at the conclusion on independent grounds, that under the similitude clause of the customs act, these carbon sticks should be referred, for classification as to the rate of duty, to section 98.

"The question before the court was, as to what meaning should be given to a particular section in the light of other sections of the act, and the use of these words was found to confirm an interpretation arrived at upon other and distinct grounds, and to be in accord with another and equally strong circumstance stated immediately afterward."

But the court which decided the case of *Dingelstadt v. United States* was composed of the two Circuit Judges who afterwards, with Judge Shipman, constituted the Circuit Court of Appeals, which decided the case of *Stern v. United States*. In its opinion in the latter case, the court considers the very language in the *Dingelstadt Case*, which was approvingly quoted by the Supreme Court in the *Downing Case*, and says:

"This court held that the phrase 'if decorated, 40%, if not decorated, 30%,' apparently indicated that Congress had in mind 'articles susceptible of decoration.' But, while such an argument may lend support to some particular theory of construction, it is not, of course, controlling. Words are not always used in tariff acts with grammatical or scientific accuracy, and the most persuasive argument as to the intent of Congress, when such intent is not entirely clear upon a mere reading of the statute, will be found in an ex-

amination of the history of the words employed, and a comparison with earlier acts *in pari materia*."

The court then proceeds to a critical examination of previous tariff acts, including those of 1890 and 1894, and finds that certain paragraphs of the old acts have been condensed into the new paragraph 100 of the act of 1897, and concludes that, "under these circumstances, to hold that the result of the condensation has been to cast away all provisions as to 'articles of glass, cut, engraved,' etc., which are not containers, because the new paragraph includes a provision that duty shall be paid 'filled or unfilled,' would be a strained construction."

We only wish to add that, as an original question, the grammatical construction of the "filled or unfilled" clause, in connection with the whole paragraph, does not necessarily require the exclusion from the purview of the section, of articles of glass not susceptible of being filled. The words may be interpreted distributively, and would thus apply only to "all the foregoing" which were capable of being filled. It is, perhaps, worth noting also, that by the peculiar language of paragraph 97, the articles there described are made dutiable in two classes, viz., "if not decorated in any manner, thirty-five per centum ad valorem; if decorated, forty-five per centum ad valorem," thus confining the imposition of the duty to these two classes alone, while, as we have pointed out, the words "all the foregoing, filled or unfilled \* \* \* sixty per centum ad valorem," makes no such classification as to duty, but merely, by way of abundant caution, includes all such as are containers, whether filled or unfilled. But whether such a distinction can be made in the construction of the two paragraphs 97 and 100, or not, we agree with the court in the *Stern Case*, that while under different circumstances, and with a different history of legislation preceding it, these words might have a very persuasive influence in determining the intention of Congress, they must not be allowed to wrest from their true meaning, as shown by circumstances and the course of prior legislation, the classifications established by paragraphs 100 and 112 of the act of 1897. The views here expressed are strongly supported by the opinion of the Board of General Appraisers in the matter of certain imported merchandise, photographic glass baths, glass lamp shades, lamps and chimneys, all of which were made of glass. The articles were variously returned by the appraiser as "blown glassware," "opal glassware," and "opal and blown glassware," being the very merchandise which was the subject-matter of decision in the *Stern Case*. They were assessed for duty by the collector, at 60 per centum ad valorem, under said paragraph 100. The contention of the importers was the same as that afterwards before the court, that all of the articles were dutiable at 45 per centum ad valorem, under paragraph 112 of said act, as "manufactures of glass \* \* \* not specially provided for" in said act. The opinion of the Board, G. A. 4,298 (T. D. 20,214), was written by Judge Somerville, and presents a clear and closely reasoned discussion of the tariff legislation with which we are here concerned, and of the peculiar language of section 100 of the act of 1897. In the course of

the opinion (which is found in Synopsis of Decisions Treasury Department, July to December, 1898, volume 2) Judge Somerville says:

"The concluding phrase of said paragraph 100, namely, 'all the foregoing, filled or unfilled,' etc., appeared in the form of a proviso to paragraph 90 of the tariff act of 1894, as follows:

"Provided, that if such article shall be imported filled, the same shall pay duty, in addition to any duty chargeable upon the contents as if not filled,' etc.

"It would be a strained construction of the paragraph in question to restrict all the enumerated articles to such as are capable of being filled or used as containers. In re Hoehn Company, G. A. 4,035 (T. D. 18,637). The intent of the lawmakers, in our judgment, is clearly met by applying the words 'filled or unfilled' to glass bottles, decanters, or other vessels of like kind capable of being filled. The words seem to have been inserted from abundant caution to avoid an ambiguity arising from their omission in a previous tariff, which led to much litigation. In re Grace, 79 Fed. 315, 24 C. C. A. 606, reversing 75 Fed. (C. C.) 2."

It is only necessary to refer to, and not to quote, what seems to us the clear and conclusive opinion of the Circuit Court of Appeals of the Second Circuit, as to the same merchandise, in the case of *Stern v. United States*, above referred to, as the ground of our own decision in affirming, as we do, the decree of the court below.

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### SPRAGUE CANNING MACHINERY CO. v. FULLER.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1908.)

No. 1,737.

#### 1. SALES—PAYMENT OF PRICE—CONCURRENT CONDITIONS—PASSING TITLE—RECLAMATION OF PROPERTY.

Where personal property is sold for cash on delivery, the payment stipulated for is a condition precedent to the passing of title, and, unless made, the seller may reclaim the property, under the rule that where the buyer is bound to do anything as a condition precedent or concurrent, on which the passing of title depends, the title will not pass until the condition is fulfilled, though the goods may have been delivered.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 542, 892.]

#### 2. BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—DELIVERY UNDER SALE CONTRACT.

Machinery was sold and shipped to a corporation, to be paid for on delivery. The corporation's president obtained possession from the carrier on his promise to send a check, which was not done. Thereafter the president admitting that the machinery belonged to the seller, took a lease thereof for a year, which provided for the making of certain payments, denominated rentals, which equalled the contract price, with interest, the seller agreeing on payment of the entire rental to execute a bill of sale for the machinery; the seller taking negotiable vouchers to secure such rentals, which were not paid prior to the corporation becoming a bankrupt. *Held*, that the title to the machinery did not pass to the corporation or its trustee in bankruptcy.

#### 3. CORPORATIONS—AUTHORITY OF OFFICERS.

Where a corporation's president obtained possession of machinery purchased for it, without complying with the condition precedent providing for payment of price on delivery, and thereafter the president admitting that the title to the machinery was in the seller, accepted a lease thereof from the seller to the corporation, the latter could not deny the president's authority so to act, and at the same time claim title to the property on account of the prior transactions with him.

**4. BANKRUPTCY—SUPERINTENDENCE AND REVISION—JUDGMENT.**

Where a court of bankruptcy erred in dismissing a claim for the return of personal property delivered to a bankrupt corporation, the Circuit Court of Appeals, in the exercise of its power to superintend and revise, would reverse the order, and by its own order require the bankrupt's trustee or receiver to surrender the property.

Petition to Superintend and Revise from the District Court of the United States for the Northern District of Alabama.

For opinion of District Court, see 155 Fed. 372.

Milton Humes and Paul Speake, for petitioner.

S. S. Pleasants and Oliver D. Street, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The respondent represents the Cullman Fruit & Produce Association, a private corporation, adjudged bankrupt. The bankrupt is an Alabama corporation, its plant and place of business being at Cullman in that state. Among other general purposes of the corporation, its business was to purchase, ship, and sell fruits and produce. L. A. Fealy was general manager of the association, and, as such manager, authorized and required to attend to all the business of the association. The proof shows that he claimed to have, under the by-laws, power to carry on all kinds of business in which the corporation engaged, and that he was the largest stockholder in the concern, and virtually owned the business. The Sprague Canning Machinery Company, the petitioner, is a corporation organized under the laws of Illinois. Its principal business is the manufacture and sale of canning machinery, embracing machinery for the canning of fruit and vegetables. On May 14, 1906, using the forms adopted by it, it entered an order on behalf of the bankrupt corporation for certain machinery, specified in the order, with this stipulation:

"All the above goods for delivery f. o. b. cars Hoopston, Ill., June 1, 1906, for the sum of \$1,300.00 cash; settlement to be made by your payment of our ten days' sight draft made at the time of shipment with bill of lading attached."

The machinery was shipped June 6th with draft attached to the bill of lading. On June 21st, L. A. Fealy, manager of the Cullman Association, wrote the petitioner: "We do not care to pay exchange on drafts, and if you will release draft we will send check for amount due on machinery;" and on June 26th sent petitioner a telegram in these words: "Release car. Will send check." Acting on the promise to send the check, the petitioner instructed the railroad to let the Cullman Association have the goods, which the railroad did. The check was not sent, and no money was then or ever afterwards paid on the goods.

On August 1st, H. O. Crane, treasurer of the petitioner company, went in person to Cullman, Ala., and saw Mr. Fealy, president and manager of the Cullman Association, and demanded the machinery or the money, which had been promised for it, when Mr. Fealy acknowledged that the machinery belonged to the petitioner company, but explained that they were just beginning to put up their goods; that he had not the money then, but would have it in a few days; and such



negotiations were had that the petitioner allowed the Cullman Association to retain and use the machinery for a time under an arrangement by which the money was to be paid part on the 15th of August and the rest on September 1st. The payments were not made. About the 4th or 5th of September, C. F. Colbert, a representative of the petitioner, went to Cullman, saw the president and manager of the Cullman Association, and demanded a settlement as per previous agreement, or he would remove the machinery from the building and ship it back to Hoopston, the petitioner's factory. They went out to the Cullman factory together, and identified the machinery to be taken back, all of which Colbert claimed as still belonging to the petitioner company, and the manager of the Cullman Association admitted that it did. Such negotiations were then had that the petitioner corporation executed a lease, giving the property on lease contract to the Cullman Fruit & Produce Association for one year, providing for certain payments to be made the 1st of October, 1906, May 15, 1907, and October 1, 1907, aggregating the price of the machinery, and stipulating that in the event of failure to pay any installment the entire amount shall become due immediately, etc.; and, further, "that upon payment of the entire rental, together with interest, the party of the first part shall execute a good and sufficient bill of sale to the party of the second part for the aforesaid machinery." This instrument was dated September 7, 1906. None of the payments were made. On the 27th of February, 1907, a petition was filed in the proper court by creditors seeking to have the Cullman Association adjudged a bankrupt; and the respondent was appointed receiver of its estate. On the 19th of July, 1907, the petitioner applied to the court for an order requiring the respondent as trustee or receiver to surrender full possession of the property to the petitioner. Thereupon such proceedings were had that the court ordered that the petitioner's application be dismissed.

It is contended for the respondent that the transactions had on and prior to the 1st of August, 1906, vested the absolute title to the machinery in the Cullman Association, and that there can be no reclamation of it by the petitioner under the lease or conditional sale contract executed the 7th of September, 1906, for the reason that the title having vested absolutely in the Cullman Association the lease bearing date of September 7th could have no force for reinvesting the title in the Sprague Company, because it does not purport to be, and is not in fact, an instrument seeking to convey the title from the Cullman Association to the Sprague Company, and if the lease or conditional sale contract were an instrument purporting and seeking to convey the title of the Cullman Association to the Sprague Company, it could not be effective, because not executed by authority of the corporation. We concur with the learned District Judge in the opening sentence of the opinion he delivered in this case that "the first question which confronts us, and indeed the controlling and decisive question is, did the title to the property in fact and in law ever pass from the Sprague Canning Machinery Company into the Cullman Fruit & Produce Association?" And we also concur in the contention urged by counsel for the petitioner, as stated by the learned judge, "that the whole transaction from start to finish shows an intention not to part with the ti-

title until the purchase price was paid." In considering these propositions, we have to bear in mind that the respondent has no other title than the title which the bankrupt had. The respondent, in his answer in the District Court, refers to a deed of trust executed the 1st of July, 1905, by the Cullman Fruit & Produce Association to secure an issue of bonds covering all and singular the property of the company theretofore acquired and thereafter to be acquired, and the manufacturing buildings and plant of the company in the city of Cullman, state of Alabama, and alleges that the property in this case involved became fixed upon and attached to the mortgaged property prior to the execution of the instrument referred to in the pleadings as the lease contract of date September 7, 1906. This suggestion of the answer does not appear to be urged in the printed brief filed by counsel for the respondent in this court, and the learned judge of the District Court refers to it only in these words:

"Then, if that lease should be construed as a valid lien upon the property of the bankrupt, it would not now at this time be necessary for this court to pass upon the effects of that lien in its relation to the mortgage given to secure the payment of the bonds."

The learned judge also says that "at the time of the acceptance of these vouchers and bonds by the Sprague Company the property was in the possession of the Cullman Association at Cullman, Alabama, and was in use as a part of its canning factory, being attached to the building by pipes." We have carefully examined the proof bearing upon the matter of the attachment of the Sprague machinery to the other plant of the Cullman Company, and we are clear in our conclusion that the connection made was not such as to complicate or affect, in any respect, the question of the ownership, as between the Sprague Company and the Cullman Association, of the canning machinery here claimed.

We concur with the learned District Judge that "there is no doubt about the proposition that, where personalty is sold for cash on delivery, the payment stipulated for is a condition precedent, and, unless complied, the seller may reclaim the property." We think it is settled law that "where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." Benjamin on Sales (3d Ed.) § 320." And it has been held by controlling authority that, where goods were sold to be paid for in cash or securities on delivery, "the sales were conditional only, and that the vendors were entitled to retake the goods, even after delivery, if the condition was not performed, the delivery being considered as conditional." "Where no fraud is intended, but the honest purpose of the parties is that the vendee shall not have the ownership of the goods until he has paid for them, there is no general principle of law to prevent their purpose from having effect." *Harkness v. Russell*, 118 U. S. 667, 7 Sup. Ct. 51, 30 L. Ed. 285. We quote further from the same opinion:

"Whatever the law may be with regard to a bona fide purchaser from the vendee in a conditional sale, there is a circumstance in the present case which

makes it clear of all difficulty. The appellant in the present case was not a bona fide purchaser without notice. The court below find that at the time of and prior to the sale he knew the purchase price of the property had not been paid, and that Russell & Co. claimed title thereto until such payment was made. Under such circumstances, it is almost the unanimous opinion of all the courts that he cannot hold the property as against the true owner. \* \* \* It is only necessary to add that there is nothing either in the statute or adjudged law of Idaho to prevent, in this case, the operation of the general rule, which we consider to be established by overwhelming authority, namely, that in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction; and the further rule that a bailee of personal property cannot convey the title, or subject it to execution for his own debts, until the condition on which the agreement to sell was made has been performed." 118 U. S. 681, 7 Sup. Ct. 60 (30 L. Ed. 285).

From the 6th of June, when these goods were shipped, to the 7th of September, when the writing called "lease contract" passed between the parties, a period of only three months, there is not an instant when the parties came in sight that the Sprague Company is not claiming title to this property, and that the president and manager of the Cullman Association is not fully and clearly recognizing the Sprague Company's title thereto. The shipment was made at the beginning of the canning season, the original conditional delivery was made upon a misrepresentation, not, indeed, constituting a moral fraud, but to give the delivery the effect of waiving the condition precedent would, under the circumstances, work a legal fraud on the seller. The conditions were substantially the same the 1st of August, and the claim of title and property continued to be clearly asserted on the one part, and as clearly recognized on the other; and under circumstances and conditions which operated no fraud upon anybody, and especially no fraud upon the purchaser, it was allowed temporarily to use the machinery on the promise and in the expectation of its being able to pay the price within a month, and on the constantly expressed readiness to always acknowledge, and to give any written evidence that might be desired of the fact, that the machinery remained the property of the Sprague Company until it was paid for. The taking of the orders on the company's treasury—call them vouchers or drafts, or what you will—and of bonds of the company as collateral security, worked no imposition on the Cullman Association, and had in fact no element of waiver of the condition precedent and concurrent, so far as that company was or could be affected by it; and then as to the writing that was executed the 7th day of September, whether we call it a lease or an instrument of conditional sale, whether it was executed or accepted by the president and manager of the Cullman Association, with or without specific authority from the board of directors to execute or accept a lease, it does assume, and, to our minds, conclusively shows that, at that date and between the parties, the fact was clearly recognized that this canning machinery belonged to the Sprague Company, and was to so belong to it until the price was paid in a specified time, and that if default was made in the payment that company had the right to remove the property. The Cullman Association cannot question the president and manager's authority to act in these matters as he did, and at the same time claim title to the property on account of the trans-

actions with him. After the original order, and certainly after the shipment of the goods to Cullman, all of the transactions with reference to these goods were had with Fealy, president and manager; and it is difficult to see, in connection with these transactions, a different party from the individual who was conducting them, and to let in, for the benefit of this different party, a waiver which the individual negotiator not only has never claimed, but has constantly disclaimed.

We conclude that the court of bankruptcy erred in dismissing petitioner's claim, and, in the exercise of our power to superintendent and revise, we reverse the action of the District Court, and here enter our order requiring and commanding respondent, as trustee or receiver, to surrender the possession of the property described to the petitioner, adjudging the costs against the estate of the bankrupt.

SHELBY, Circuit Judge, took no part in the decision of this case.

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HALL & KAUL CO. v. FRIDAY et al.

(Circuit Court of Appeals, Third Circuit. December 27, 1907.)

No. 27.

**BANKRUPTCY—CORPORATIONS SUBJECT TO ACT—"ENGAGED PRINCIPALLY IN MANUFACTURING."**

A corporation, the principal business of which is the building and construction of concrete arches, bridges, buildings, walls, and other structures in situ, the concrete being mixed as used in the structure which when completed became a part of the realty, is not one engaged principally in manufacturing, within the meaning of Bankr. Act July 1, 1898, § 4b, c. 541, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3423], and is not subject to adjudication as an involuntary bankrupt.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7650, 7651.

What persons are subject to bankruptcy law, see note to Matoon Nat. Bank of Matoon, Ill., v. First Nat. Bank of Matoon, Ill., 42 C. C. A. 4.]

Appeal from the District Court of the United States for the Western District of Pennsylvania.

George L. Roberts, for appellant.

Alexander J. Barron, for appellees.

Before DALLAS and GRAY, Circuit Judges, and CROSS, District Judge.

GRAY, Circuit Judge. This is a petition for review by the Hall & Kaul Company, a corporation of the state of Pennsylvania, asking that the order of the court below, adjudicating the Monongahela Construction Company, also a corporation of the state of Pennsylvania, to be a bankrupt, may be revised in matters of law under section 24 (b) of the bankruptcy act of 1898. Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431].

The question is one of jurisdiction, and was presented to the court

below, as it is presented here, upon an agreed statement of facts, the material parts of which are as follows:

"A petition in involuntary bankruptcy having been filed in the above entitled case against the said Monongahela Construction Company, by J. H. Friday et al., and answer thereto having been filed by Hall & Kaul Company, of Ridgeway, Pa., judgment creditors, objecting to the petition in bankruptcy of said company, for the following reasons:

"First. That neither the petitioners nor the form of petition are within the requirements of the bankruptcy act of 1898.

"Second. That the records do not show that said corporation has complied with the corporation laws of the state of Pennsylvania.

"Third. That as a corporation, the nature of the business in which it is engaged is not such as will give this court jurisdiction under said bankrupt act of 1898 or its supplements.

"Now, therefore, in order that the questions raised by the petition and answer may be properly determined by this court, the following facts are admitted and agreed upon by the parties hereto:

"1. That the Monongahela Construction Company succeeded the Hill Construction Company, a corporation organized and existing under the laws of the state of Pennsylvania, having been incorporated on the 23d day of May, 1905, and by resolution of the board of directors, the said Hill Construction Company changed its name to the Monongahela Construction Company, on the 19th day of February, 1906, but that the certificate of such change was not recorded in the county of Allegheny, state of Pennsylvania, where its principal office is located, until February 9, 1907, ——— days after the petition in this case was filed.

"2. That the purpose for which the said Hill Construction Company was organized and created, as set forth in its charter, was as follows: 'Corporation is formed for the purpose of constructing, erecting and repairing railroads, traction lines, duly incorporated, and streets, roads, buildings, structures, works or improvements of public or private use or utility.'

"3. That the business of the said Monongahela Construction Company has been making, constructing and erecting concrete arches, bridges, buildings, walls and other structure; also excavating, grading and ballasting of roadbeds and laying tracks for railroads. With the exception of the contract with the P. S. & N. R. R. for the making of roadbed and laying of track from Detsch to Paine, Elk county, Pennsylvania, and the remodeling of a warehouse, in which concrete work is the chief item, all the other contracts at the time of the filing of the petition in this case, and the business in which the company has been engaged during the past year has been making and constructing arches, walls, and abutments, bridges, buildings, etc., out of concrete.

"4. That in carrying on its business it buys and combines together raw materials, such as cement, gravel and sand in the making of concrete, and supplies labor, machinery and appliances necessary for the proper carrying on of said business, of constructing and erecting concrete arches, piers, buildings and structures, and excavating therefor at such time and places, as its contracts call for. That it carries on no other manufacturing business except the above. The question whether this business is manufacturing or not is left to the determination of the court.

"5. That its principal place of business is in the city of Pittsburgh, county of Allegheny, and state of Pennsylvania, where its office is located. It has no permanent shop or factory, but has a warehouse at Nineteenth street, South Side."

The third section of the act of February 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1025], amending the bankrupt act of 1898, provides:

"Any natural person, except a wage earner, or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any corporation engaged principally in manufacturing, trading, printing, publishing,

mining or mercantile pursuits, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."

The sole question raised by the counsel for the petitioners is, whether the court below erred in adjudicating, as a bankrupt, the Monongahela Construction Company, as being a "corporation engaged principally in manufacturing." The court below decided that it was such a corporation, and that the motion of the execution creditors, for dismissal of the petition in bankruptcy, must be denied and an adjudication in bankruptcy made. The conclusion at which the learned judge of the court below arrived, is strongly supported in the opinion which accompanies it. He is also in agreement with the decisions of several of the district courts, and notably with that of the Circuit Court of Appeals for the Eighth Circuit, in the recent case of *In re First National Bank of Belle Fourche et al.*, 152 Fed. 64, 81 C. C. A. 260. Notwithstanding the weight of such authorities, we must, as long as this section of the act remains unamended, in respect to the language here under consideration, and until the Supreme Court construes it otherwise, be governed by our own view of the proper interpretation of the act.

The words "manufacture" and "manufacturing" seem to us to have a well-ascertained and defined meaning. There is no confusion in the general concept conveyed by these words, as referring to the making of raw material or natural substances by hand, art or machinery, with more or less skill, into commodities for use. The leading lexicographers all agree as to this general signification. No special technical or legislative use of them, different from their general or popular use, has been suggested. It appears from the agreed statement of facts that the Monongahela Construction Company carried on no manufacturing business, unless the business of "making, constructing and erecting concrete arches, bridges, buildings, walls and other structures; also excavating, grading and ballasting of road beds and laying tracks for railroads," be such a business. The alleged bankrupt in this case, therefore, was a builder or constructor of concrete arches, bridges, buildings, walls and other structures. These were erected in situ, and when erected, were attached to and became part of the real estate. No one in ordinary parlance would ever think of saying that such a builder was a manufacturer of arches, houses, etc. It is only by a forced construction, founded on verbal refinements, that such a conclusion can be arrived at. It is true, that such a builder assembles and combines the raw materials of cement, sand, and water, which are mixed with more or less skill with tools and appliances adapted for such purpose, and the composite thus formed being poured into moulds, gradually and by successive repetitions of the process, forms the arch, building or wall intended to be erected. We cannot see upon what possible ground a person or corporation engaged in this work is to be distinguished from one engaged in the erection of an arch, building or walls with other materials, such as stone, bricks and mortar, or how, except arbitrarily, the one can be called a manufacturer and the other not.

It may be admitted, as argued by the court below, that if the materials entering into the formation of this concrete had been fashioned at a factory or other place, in the shape of blocks fit for building purposes, to be furnished to those engaged in erecting buildings, just as stone and bricks are furnished for that purpose, the producer of such blocks, so far as their production was concerned, would be engaged in manufacturing, in the ordinary acceptance of that word, but this admission does not help us to the conclusion reached in the court below. There is no such situation in the present case. The bankrupt was not engaged in such a business, which would have been as distinct from that of erecting the building, as the business of a brickmaker would have been from that of the one who constructed the wall with the bricks; and certainly it would not be asserted that, if the supposititious concrete blocks had been furnished to the builder of the structure, both the producer of the blocks and the builder of the wall would have been engaged in manufacturing.

In construing the bankruptcy act, as in construing other acts of legislation, the words used must be given their ordinary and everyday meaning, unless they are shown to have been used in some special or technical sense differing from such meaning. The construction given to the words referred to by the court below, seems to us to violate this rule, and to enlarge the class of persons or corporations to whom Congress intended to make applicable the provisions of the bankrupt act. In the light of the decisions, it must be admitted there is room for a different opinion, but we can only govern ourselves by the views which we ourselves entertain and have here expressed. We have examined the cases referred to on both sides, and, after a full consideration, are of the opinion that the Monongahela Construction Company was not, under the agreed statement of facts, a "corporation engaged principally in manufacturing," and that therefore the court below was without jurisdiction to adjudicate it a bankrupt.

The decree of the court below is therefore reversed, with directions to dismiss the petition of the petitioning creditors.

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In re GILES.

(Circuit Court of Appeals, Sixth Circuit. January 16, 1908.)

No. 1,708.

**BANKRUPTCY—EXEMPTION—HOMESTEAD—"UNMARRIED FEMALE."**

Rev. St. Ohio 1906, § 5441, authorizes an allowance in lieu of a homestead to a widow, or to an unmarried female, having in good faith the care, maintenance, and custody of any minor child or children of a deceased relative, resident of Ohio, and not the owner of a homestead. *Held* that, since under the decisions of Ohio, the words "having in good faith the care, maintenance and custody of any minor child or children of a deceased relative" qualified the word "widow" as well as the words "unmarried female," where a bankrupt was a divorced woman, who supported her two minor children, she was entitled to an exemption in lieu of homestead, as an "unmarried female" having the custody, etc., though she might not be regarded as a widow.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7196, 7197.]

Petition for Revision of Proceedings of the District Court of the United States for the District of Ohio, in Bankruptcy.

Stanley Matthews, for petitioner.

Alfred J. Croll, for appellants.

Carl H. Beckham, for respondent.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. On June 23, 1906, Ella E. Giles was adjudged a bankrupt upon her own petition, and on June 30, 1906, the trustee allowed her household goods of the value of \$100, as exempt under section 5430, Rev. St. Ohio 1906, and a lot in Toledo, Ohio, of the value of \$400, as exempt under section 5441, Rev. St. Ohio 1906, in lieu of a homestead. At the time the petition was filed, the bankrupt was living in Toledo with her two minor sons of the ages of 17 and 19 years, respectively, and was supporting them. Prior to February 20, 1906, she was the wife of one Thomas A. Giles, who on that day procured a divorce from her, and she has not since been remarried. The referee overruled the exception of the creditors to the allowance by the trustee, under section 5430, Rev. St. Ohio 1906, of the household goods of the value of \$100, and sustained the exception to the allowance of the real estate of the value of \$400, in lieu of a homestead, under section 5441, Rev. St. Ohio 1906. The latter exemption was disallowed on the ground that the bankrupt was not a "widow," and was not an "unmarried female having in good faith the care, maintenance and custody of any minor child or children of a deceased relative, resident of Ohio, and not the owner of a homestead" as required by section 5441, Rev. St. Ohio 1906. The question thus raised, as to the proper construction of section 5441, Rev. St. Ohio 1906, was certified to the judge below for his opinion; and he held that the referee was not justified in disallowing the exemption of the real estate in Toledo claimed by the bankrupt in lieu of a homestead. This order is now here for review.

When the case was presented to us, after an examination and consideration of the pertinent statutes of Ohio and certain applicable decisions, particularly those of Judge Haynes in *Weber v. Beier*, 7 O. C. D. 381, and of Judge Wing in the *Matter of Rhodes*, Bankrupt (D. C.) 109 Fed. 117, we reached the provisional conclusion that the court below was right in allowing the exemption, but since then our attention has been called to the case of *Brown v. Parham*, 25 Ohio Cir. Ct. R. 640, affirmed by the Supreme Court of Ohio in 71 Ohio St. 516, 74 N. E. 1132. In this case, it was held that the words "having in good faith the care, maintenance and custody of any minor child or children of a deceased relative" qualified the word "widow" as well as the words "unmarried female," and a widow not having the care of such children cannot hold property exempt under section 5441, Rev. St. Ohio 1906. This decision was affirmed by the Supreme Court of Ohio without opinion, and we were at first inclined to the view that our obligation to follow the construction placed by the highest court of Ohio on its laws compelled us to follow a decision which closed the question raised in this court against the bankrupt, who is a di-



vorced woman, but, although the question may be a narrow one, we are now disposed to think that the case of *Brown v. Parham* may be distinguished, and under its facts does not furnish a rule for the construction of section 5441, Rev. St. Ohio 1906, that covers the ground and is controlling.

It does not appear that the cases of *Weber v. Beier* and *In the Matter of Rhodes* have been overruled or qualified. And therefore, to a limited extent, each may serve as authority. In the *Beier* Case, an exemption in lieu of a homestead was claimed under section 5441, Rev. St. Ohio 1906. *Beier*, when a widower with minor children, married a widow with minor children of her own. His second wife left him and after a suit secured alimony. Afterwards, *Beier* and his wife lived apart, he with his children, and she with hers. The Ohio circuit court, Judge Haynes delivering the opinion, took the broad view that *Beier* was the head of a family, and therefore entitled to the exemption in lieu of a homestead, although the language of section 5441, Rev. St. Ohio 1906, was not precisely applicable, since he and his wife did not live together, and he was not "a widower with an unmarried daughter or minor son." In the *Matter of Rhodes*, *Rhodes* was a divorced man, with a minor son, living on premises which, before the divorce, had been set off to him as a homestead. Judge Wing held, following the *Beier* Case, that he was entitled under section 5441, Rev. St. Ohio 1906, as the head of a family, to an exemption in lieu of a homestead, although the words of the statute did not accurately apply to him. In both these cases, the judges held that it was the spirit and not the letter of the law which should control, Judge Haynes saying in the *Beier* Case, 7 O. C. D. 386:

"We think that where a man is living with his minor children, or a woman is living with her minor children in the homestead, that she should be entitled to a homestead, or that he should be entitled to a homestead, the same as if husband and wife were living together and occupying the homestead. In various decisions in this state it has been held that a liberal construction should be given to this act for the benefit of the families of the debtors."

To return to the case of *Brown v. Parham*, 25 Ohio Cir. Ct. R. 640, in which it was held that a widow, who was not the owner of a homestead, and who had not "in good faith the care, maintenance and custody of any minor child or children of a deceased relative," was not entitled to hold property exempt in lieu of a homestead under section 5441, Rev. St. Ohio 1906, we are unable, in the first place, to perceive any distinction between "an unmarried female" and a divorced woman, as the bankrupt in this case is. Both are unmarried females. In the next place, looking to the reason of the law, we cannot perceive any just distinction between the minor children of a deceased relative, which it may be the duty of an unmarried female to support, and for which she can claim a homestead, and the minor children of an unmarried female who happens to be a divorced woman. No reason has been suggested or can be given why a divorced woman who cares for her own minor children should be deprived of an exemption in lieu of a homestead, which is clearly, under the precise terms of the statute, granted to an unmarried female, who cares for the minor children of a deceased relative. To carry the matter a little farther, and

put the case somewhat stronger, it is quite impossible for any intelligent mind to explain why the exemption in lieu of a homestead should be granted to a divorced woman if the children she is supporting are those of a deceased relative, and yet refused if such children are her own.

To sum up, the case of *Brown v. Parham* puts the widow on the same footing as an unmarried female. Now, if a divorced woman is not to be regarded as a widow, then she is, within the meaning of the statute, to be treated as an unmarried female. Under the statute as construed by the court an unmarried female, who has the care of the minor children of a deceased relative, may hold exempt certain property in lieu of a homestead, and, by parity of reason, a divorced woman, who has the care of her own minor children, is entitled to a like exemption.

The judgment of the court below is affirmed.

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MASON CITY & FT. DODGE R. CO. v. BOYNTON.

(Circuit Court of Appeals, Eighth Circuit. December 12, 1907.)

No. 2,172.

1. WRIT OF ERROR—REVIEW—EXCESSIVE DAMAGES.

A claim that the damages are excessive, where it merely challenges a finding upon a question of fact, cannot be considered by the federal appellate courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3993-3995.]

2. EMINENT DOMAIN—IOWA STATUTE—JUDGMENT ON APPEAL FROM COMMISSIONERS' ASSESSMENT.

Under the Iowa eminent domain statute (Code 1897, §§ 2007, 2011) the court, on an appeal from the commissioners' assessment, cannot render a personal judgment against the condemnor for the landowner's damages, because the condemnor is free to decline to take the property at the assessment.

[Ed. Note.—Following state practice, see note to *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 394.]

3. WRIT OF ERROR—ERROR IN JUDGMENT ENTRY DOES NOT NECESSITATE NEW TRIAL.

Where all questions of fact have been tried and determined without error, the incorporation in the judgment of provisions which are unauthorized does not necessitate a new trial, but only a modification of the judgment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4483-4487.]

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the Southern District of Iowa.

A. G. Briggs, John L. Erdall, Thomas D. Healy, M. F. Healy, and Robert Healy, for plaintiff in error.

Benj. I. Salinger, for defendant in error.

Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

VAN DEVANTER, Circuit Judge. This was a condemnation proceeding whereby the railroad company, an Iowa corporation, sought to acquire, as a right of way for the construction and operation of its railroad, certain real property in Carroll county, Iowa, owned by Boynton, a citizen of Missouri. Commissioners appointed by the sheriff assessed the owner's damages at \$4,750, and the railroad company, having first deposited that sum with the sheriff, took possession of the property. The owner, being dissatisfied with the assessment, appealed therefrom to the district court of the county, and then, on the ground of the diverse citizenship of the parties, removed the proceeding into the Circuit Court of the United States. Upon a trial under a written stipulation waiving a jury, that court rendered a judgment (a) assessing the owner's damages at \$10,000 with interest thereon from the time when the company took possession; (b) declaring that the proceeding had resulted in transferring the ownership to the railroad company; and (c) directing the company to pay the owner's damages and the costs of the proceeding, including \$300 as a reasonable fee for the owner's attorneys. The railroad company sued out this writ of error.

The principal question arising upon the record, that of the right of the owner, whom the Iowa statute declares shall be the plaintiff, to remove the proceeding into the Circuit Court, was certified by us to the Supreme Court, and it, in response to the certification, has sustained the right of removal. *Mason City, etc., Co. v. Boynton*, 204 U. S. 570, 27 Sup. Ct. 321, 51 L. Ed. 629. It is now earnestly insisted that the damages are excessive, but as this contention, in the circumstances in which it is here made, merely challenges a finding upon a question of fact, it is not open to consideration by us. Rev. St. §§ 649, 700, 1011 [U. S. Comp. St. 1901, pp. 525, 570, 715]; *Hall v. Houghton & Upp Mercantile Co.*, 8 C. C. A. 661, 60 Fed. 350; *Southern Pacific Co. v. Maloney*, 69 C. C. A. 83, 136 Fed. 171; *Illinois Central R. R. Co. v. Davies*, 76 C. C. A. 613, 146 Fed. 247; *Omaha Water Co. v. Schamel*, 78 C. C. A. 68, 147 Fed. 502; *Nelson v. Bank of Fergus County*, 84 C. C. A. 609, 157 Fed. 161.

Other contentions make it necessary to determine whether the judgment conforms to the statute under which the proceeding was had, and, if not, whether the error is one which necessitates a new trial. The statute and the decisions interpreting it make it plain that the object of the proceeding is to ascertain the damages to be paid to the owner, if the railway company elects to take the property; that the company is free to pay the damages, and take the property or to abandon its original purpose in that regard, even where it has taken possession pending an appeal from the commissioners' assessment; that the ownership is not transferred until the damages are finally ascertained and actually paid; and that, on the appeal, no personal judgment can be rendered against the railroad company except for the costs, including a reasonable fee for the owner's attorney. Iowa Code 1897, §§ 2007, 2011; *Hastings v. Burlington, etc., Co.*, 38 Iowa, 316; *Hartley v. Keokuk, etc., Co.*, 85 Iowa, 455, 460, 52 N. W. 352; *Haggard v. Independent School District*, 113 Iowa, 486, 496, 85 N.

W. 777; *Reed v. Chicago, etc., Co.* (C. C.) 25 Fed. 886. In the last case it was said by Judge Shiras:

"The sole object of the appeal from the sheriff's jury is to have ascertained and finally determined the amount of the damages to be paid to the property owner. Under the statute no money judgment can be entered up against the company for the damages; nor can the collection thereof be enforced by execution. The statute points out the proceedings that may be had for the protection of the property owner in case the company fails to pay the damages after entering into possession of the right of way."

It follows, as we think, that the judgment, in so far as it assesses the owner's damages and charges the railroad company with the payment of the costs of the proceeding, including a reasonable fee for the owner's attorney, is in full conformity to the statute, and, in so far as it declares that the proceeding has resulted in transferring the ownership of the property to the company and charges it with payment of the owner's damages therein assessed, is in contravention of the statute and erroneous. But this error does not necessitate a new trial. It was committed after the questions of fact had been tried and determined without error, and all that is necessary to correct it is to so modify the judgment as to eliminate what was thus erroneously incorporated therein. Rev. St. § 701.

Subject to such a modification, which the Circuit Court is directed to make, the judgment is affirmed.

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STIER v. NASHVILLE TRUST CO.

(Circuit Court of Appeals, Sixth Circuit. January 25, 1908.)

No. 1,709.

1. WILLS—CONDITIONS AND RESTRICTIONS—ENFORCEMENT.

The intentions of a testator should be carried out in respect to restrictions and limitations which he imposes upon that which is his own to give or withhold at his pleasure, provided he does not contravene public policy.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 955-961, 1525.]

2. SAME—ESTATE IN TRUST—SUIT TO TERMINATE TRUST.

A testatrix devised and bequeathed property to a trustee to be held in trust until her son should reach the age of 30 years, the income in the meantime to be paid to him, and the property to be then transferred to him. *Held*, that the trust was lawful, and although there was no express restriction against alienation by the son of either the income or corpus of the property, and no provision for contingent remainder in case he should not reach the age of 30, it was within the discretion of a court of equity to refuse to override the limitation of the will by terminating the trust before the stated time.

In Error to and Appeal from the Circuit Court of the United States for the Middle District of Tennessee.

W. B. Stier, for appellant.

C. D. Berry (J. C. Bradford, of counsel), for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

**LURTON**, Circuit Judge. This is a bill to terminate a trust created by a clause in the will of Mary Kerrigan, by which she gives to the Nashville Trust Company, in trust for the use of her son, Martin J. Kerrigan, an interest in certain town lots and \$3,500, par value of the mortgage bonds of a Nashville street railway company, with direction to deliver the corpus of the property to her said son when he should be 30 years of age, paying to him the income, upon his voucher, until the time indicated, at which time it is directed to make a deed to the realty and deliver the bonds. Martin Kerrigan was 23 years of age when this will was executed and is now 27. He has assigned his interest in the corpus and income to the complainant, Stier, and his grantee now asks to have the restriction upon the delivery of the corpus declared null and void, and the trust company required to deliver the trust estate to him now. The court below sustained a demurrer, and dismissed the bill.

The bequest and devise are not to the beneficiary subject to restrictions upon alienation or manner of use, but to the Nashville Trust Company. The trustee is to hold and preserve the property, collect the income, and pay the same over upon the voucher of the beneficiary from time to time, and to deliver the corpus to Martin J. Kerrigan when he shall reach 30 years of age. There is no contingent remainder in case Kerrigan shall not reach the age of 30, and no express restriction against alienation of either income or corpus except the bare inference from the general character of the trust, the relation of the parties, and the intimation that the income is payable only to Martin J. Kerrigan upon his personal voucher. The clause is lacking in those earmarks which are ordinarily essential to a trust for maintenance and support, sometimes called "spendthrift trusts," such as that upheld by this court against creditors in *Brooks v. Reynolds*, 59 Fed. 923, 8 C. C. A. 370, and by the Supreme Court of the United States in *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254, or that sustained by the Supreme Court of Tennessee in *Jourolman v. Massingill*, 86 Tenn. 81, 5 S. W. 719. The fact that the testatrix withheld the corpus from her son until he should reach 30, that she placed it in the possession of a trustee until that time with the duty of receiving and paying the income only until that date, is significant of a purpose to protect the corpus against his acts in so far as that was possible with so slight a restriction. That she has not imposed other limitations and restrictions may be unfortunate, but, if the limitation she has imposed is not unlawful or contrary to public policy, it should not be nullified. The plain purpose of the testatrix was that her son should not receive the corpus of her gift until he attained the age of 30.

The intentions of a testator should be carried out in respect to restrictions and limitations which he imposes upon that which is his own to give or withhold at his pleasure, provided he does not contravene public policy. *Jourolman v. Massingill*, 86 Tenn. 81, 5 S. W. 719; *Brooks v. Reynolds*, 59 Fed. 923, 938, 8 C. C. A. 370; *Claffin v. Claffin*, 149 Mass. 19, 20 N. E. 454, 3 L. R. A. 370, 14 Am. St. Rep. 393; *Nichols v. Eaton*, 91 U. S. 716, 23 L. Ed. 254. Why

shall not the plain intention of this testatrix be carried out? There is no public policy to be subserved by treating this restriction as void. Assume that the trustee might without liability consent to deliver the property before the time fixed. It has not consented. It stands upon the provisions of the will, and says it will not override the intention of the testatrix. In view of the fact that the only persons interested are of age a court of equity might, in the exercise of a reasonable discretion, be moved to terminate the trust, inasmuch as the original cestui que trust has now no interest. *Whall v. Converse*, 146 Mass. 345, 15 N. E. 660; *Sears v. Choate*, 146 Mass. 395, 15 N. E. 786, 4 Am. St. Rep. 320. But the court below refused to consent to the termination of the trust, if any discretion it had. The case upon its facts is closely like that of *Clafin v. Clafin*, cited above. There the bequest was of a fund to trustees in trust to pay over \$10,000 to Adelbert E. Clafin when he was 21 years of age, a like sum when he was 25, and the balance when he was 35. When he came of age he was paid \$10,000. He then filed his bill to terminate the trust and acquire the trustee to pay the sum withheld. The Massachusetts court denied relief, saying:

"The restriction upon the plaintiff's possession and control is, we think, one that the testator had a right to make."

We see no sufficient reason for disturbing the refusal of the chancellor to override the limitation of the will. Decree affirmed.

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#### IN RE E. S. WHEELER & CO.

(Circuit Court of Appeals, Second Circuit. November 7, 1907.)

No. 72.

#### BANKRUPTCY—EXAMINATION OF WITNESS CONCERNING ACTS OR PROPERTY OF BANKRUPT—PRODUCTION OF DOCUMENTS.

On the examination of the president of a bank in a bankruptcy proceeding concerning the "acts, conduct, or property" of a bankrupt corporation in aid of a suit brought by the trustee against the bank to recover sums alleged to have been taken by it from the corporation when insolvent, and applied on a personal indebtedness of the bankrupt's president, a private memorandum book of the witness, and which he testified was kept by him during the time the payments were being made, and contained entries of such payments as made, is competent evidence, and the witness may properly be required to produce the same.

Petition for Revision of Proceedings of the District Court of the United States for the District of Connecticut, in Bankruptcy.

For opinion below, see 151 Fed. 542.

This cause comes here upon petition to review an order of the District Court, District of Connecticut, which, in response to a certification of the question by the referee, refused to require a witness to produce a certain book, upon an examination then being had before the referee under section 21a of the bankruptcy act July 1 (30 Stat. 552, c. 541 [U. S. Comp. St. 1901, p. 3430]).

Goodwin Stoddard and S. C. Loomis (Adelbert A. Skeel, of counsel), for petitioner.

Bristol Stoddard and Beach & Fisher, for respondent.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. The district judge apparently reached the conclusion indicated in the order sought to be reviewed, because he was of the opinion that the entries in the book were not competent evidence. The matter being inquired about was the receipt and disposition by a bank of 8 per cent. discounts on certain notes of the bankrupt; it being suggested that all sums taken by the bank in excess of 6 per cent. were applied by it with full knowledge to an old indebtedness due to the bank from the president of the bankrupt. The president of the bank was on the stand, and the book was within his control, being in the hands of his counsel. Said counsel testified that the book did not belong to the bank, but was the president's personal property, containing a mere compilation from the books of the bank, a mere mathematical computation or calculation. Manifestly this statement is largely hearsay. Whether the book contains original entries or merely compilations from other entries could be told only by one who knew when and under what circumstances the entries were made. The president himself testified that the book was one which "he kept during all the time that these payments were being made," that the "payments were entered therein as they were made," and that the entries were in the handwriting of the president or the cashier. Under these circumstances the evidence was competent certainly as to details of date and amount which could not be carried by the unaided memory; and it should have been produced. Whether or not any particular entry was obnoxious to some valid objection was a question to be determined by the referee with the book before him.

The order of the District Court is reversed, and the order of the referee requiring the production of the book is sustained.

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UNITED STATES FIDELITY & GUARANTY CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 7, 1907.)

No. 17.

INTERNAL REVENUE—ACTION ON DISTILLER'S BOND TO RECOVER TAXES—DEFENSES.

On a seizure and sale of distilled spirits under the internal revenue law for nonpayment of the tax thereon, the proceeds are applicable on such tax, and, if sufficient, extinguish the same; and in an action by the government on a distiller's bond to recover a tax on spirits an answer containing allegations under which the defendant is entitled to prove such a state of facts is not demurrable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 29, Internal Revenue, § 67.]

In Error to the District Court of the United States for the District of Connecticut.

For opinion below, see 144 Fed. 866.

This cause comes here upon a writ of error to review a judgment of the District Court, District of Connecticut, entered after trial by the court without a jury.

J. L. Barbour, for plaintiff in error.

H. Parker, U. S. Atty.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. This action was brought against the surety on a distiller's bond to recover a tax assessed upon certain proof spirits manufactured by such distiller. It appears from the findings of the judge and from certain averments of the answer which were demurred to and demurrer sustained, such averments being thus admitted, that a tax of \$1,045 was assessed against the distiller upon 950 gallons of proof spirits by an internal revenue agent, and that the commissioner of internal revenue of his own volition, and without request of the distiller, abated \$414.52 of this assessment, leaving outstanding and unabated \$630.48. A tax of \$60.11 was also assessed upon other proof spirits produced by said distiller. He did not himself pay any part of either of these taxes. The answer averred as a so-called "third defense" that:

"The principal on said bond, Morris Vogel, the distiller mentioned in said complaint, prior to the commencement of these proceedings, had property which was seized and sold under the internal revenue laws of the plaintiff, the United States of America, in forfeiture proceedings, and that the said plaintiff realized from the sale of said property of the said Morris Vogel the following sums, to wit: \$691.47 and \$57.68—and that said assessments were a first lien upon said property and upon the proceeds of the sale thereof, and that, therefore, the said assessments have been satisfied in full out of the property of said distiller prior to the bringing of this action."

Under such an averment the defendant could (if such were the facts) have shown upon the trial that the property of the distiller which was seized and sold in forfeiture proceedings was the identical whiskey upon which these taxes were assessed, and that the misconduct of the distiller upon which forfeiture was predicated was his failure to pay such taxes. A demurrer to this third defense was sustained, and defendant thus precluded from introducing testimony in its support. If the facts were as suggested above, the defense would be a good one under *U. S. v. Ulrici*, 111 U. S. 38, 4 Sup. Ct. 288, 28 L. Ed. 344. Whether, if the facts were in some respects otherwise, the *Ulrici* Case would still control, is a question upon which we express no opinion until it is seen what the facts are. When defendant puts in its proof under this defense, the transaction will be fully shown.

The court erred in sustaining demurrer to this third defense; and the judgment is therefore reversed, and cause remanded for a new trial.



## AHEARN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 7, 1907.)

## No. 9.

## 1. CRIMINAL LAW—EVIDENCE.

On the trial of an indictment for receiving stolen property, consisting of certain pigs of tin, alleged to have been stolen from a pile, it was competent for the government to introduce in evidence other pigs from the same pile to show the similarity between them and the ones found on defendant's premises.

## 2. SAME—TESTIMONY OF ACCOMPLICE.

The testimony of an accomplice need not necessarily be corroborated in a federal court which is governed by the rules of the common law; its credibility and weight being for the jury to determine under proper instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1124-1128.]

In Error to the Circuit Court of the United States for the Eastern District of New York.

This cause comes here upon writ of error to review a judgment of conviction under indictment for receiving stolen goods, viz., four pigs of tin alleged to have been stolen from the United States Navy Yard at Brooklyn.

G. F. Elliott and Jones & Fanning, for plaintiff in error.

William J. Youngs, U. S. Atty., and W. P. Allen, Asst. U. S. Atty.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. It is assigned as error that the court did not dismiss the case because of lack of sufficient proof of ownership by the United States. It appeared that the lot of tin, from which the evidence indicated that these pigs were taken, was in a building known as "store No. 2" in the navy yard, in charge of a storekeeper, to whom it was delivered and whose duty it is to deliver it on requisition to different departments in the yard. It did not appear from whom the government bought the pigs, nor whether it had paid for them, but those circumstances are immaterial. The evidence fairly warranted the inference that they belonged to the government, which held possession of them for use in its navy yard business. The jury were carefully instructed on this point, and duly charged as to the burden of proof in criminal causes. To the charge there was no exception.

Error is also assigned to the admission in evidence of four pigs (other than those stolen) from the same pile. In what respect the jury could thereby have been prejudiced, and "their minds confused and led away from the point at issue," we fail to see. It was quite competent for the government to show by actual presentation of the articles that the pile in the navy yard from which pigs were missing contained pigs in all respects like those which were found immediately outside the navy yard gate on the shoulders of the four thieves, and which were traced to defendant's premises.

The court charged the jury as to the weight to be given to the testimony of an accomplice, as to felonious intent, and as to the presumption of innocence. The testimony of the accomplice was corroborated as to several material facts, although corroboration is not essential in the federal courts (*Hanley v. U. S.*, 123 Fed. 851, 59 C. C. A. 153), and could not have been withdrawn from the jury. It was for them to say what weight should be given to it.

Judgment affirmed.

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SAMPLE v. BEASLEY et al.

(Circuit Court of Appeals, Fifth Circuit. January 7, 1908.)

No. 1,671.

**BANKRUPTCY—PRIOR LEVY—FORECLOSURE DECREE—SALE—INJUNCTION—JURISDICTION.**

A court of bankruptcy has no jurisdiction to enjoin the sale of property on judgment rendered in a state court enforcing mortgage liens of date long prior to four months preceding the filing of the petition or adjudication of the mortgagor a bankrupt.

Petition to Superintend and Revise an Order of the District Court of the United States for the Western District of Louisiana.

W. P. Hall, for petitioner.

E. H. Randolph, for respondent.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

McCORMICK, Circuit Judge. The petitioner filed two suits by ordinary process in the state district court for Caddo Parish, La., against the respondent, J. C. Beasley, a resident of that parish, to enforce two separate mortgages on two separate tracts of land, one mortgage having been given on the 23d day of December, 1904, and the other on the 5th day of December, 1905. The respondent (defendant in the suits in the state court) pleaded to the same various defenses, which were not sustained, and that court rendered its decision in favor of the plaintiff in those suits for the amounts claimed in each case, with recognition of the mortgages sought therein to be foreclosed, and ordered the enforcement of the judgments to be effected on the lands described therein, and that the lands should be sold to pay the judgments. These judgments were rendered, respectively, February 2, 1907, and February 6, 1907, and thereon were promptly issued writs of fieri facias to the proper officer, who duly seized the lands and advertised them for sale in obedience to the writs, designating April 6, 1907, as the day on which the sales would be made. On that day, and before the sales, the respondent Beasley filed a voluntary petition in bankruptcy, and was adjudged a bankrupt, and on the same day, joined by his wife, obtained from the bankrupt court an order temporarily staying the sale and a rule on the sheriff and the petitioner (plaintiff in the state court) to show cause why the sale should not be perpetually stayed. The petitioner answered the rule, setting out the facts as above shown. The court of bankruptcy, after hearing argument, ordered that the rule be made perpetual.

Petitioner asks this court to revise that action on the grounds: (1) That the bankrupt court was without jurisdiction to stay proceedings on judgments rendered in the state court enforcing liens and mortgages of date long prior to four months preceding the petition and adjudication in bankruptcy; (2) that the United States court erred in staying proceedings in the state court for the sale of property after the same had been seized on valid judgments and enforcing liens acquired more than four months prior to bankruptcy and taken in custody and possession of the state court. So far as this record discloses, the respondents do not, in the bankruptcy court or in this court, seek to contest the validity of the liens claimed and sought to be enforced in and adjudicated by the state court, but submit:

"That the seizure by fieri facias made by the petitioner in the state court was on a claim from which the bankrupt could be discharged, and that under Act July 1, 1898, c. 541, § 11, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], the bankrupt has a right to apply for a stay of proceedings until the question of his discharge is determined; that the property which the petitioner was proposing to sell in the state court could realize more than enough to pay the seizing creditor, and as the sale, if permitted in the state court, would go without the benefit of appraisal, whereas a sale by trustee in bankruptcy would be under the approval of court, it is probable that a larger sum would be realized from a sale by the trustee than from a sale in the state court, and the general creditors would be beneficiaries of this enhanced price, and therefore it was the duty of the federal court to see that the best results were obtained for the general creditors; that under the circumstances it is within the discretion of the court of bankruptcy to stay proceedings in the state court, and permit the trustee to take charge of the same in lieu of the officers of the state court."

We deem it unnecessary and unprofitable to indulge in any discussion of issues presented by this case as shown by the foregoing statement. These questions have been before us a number of times, and if they are not settled by our previous decisions we think they are settled by the decisions of the Supreme Court, which have been from time to time reviewed by this court in its reported opinions. We cite only *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, *Pickens v. Roy*, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128, and *White v. Thompson*, 119 Fed. 868, 56 C. C. A. 398.

The action of the bankruptcy court, which we are asked to superintend and revise, was erroneous, and its order staying the proceedings in the state court should be annulled, at the cost of the respondents; and it is so ordered.

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WIEGAND et al. v. ALBERT LEWIS LUMBER & MFG. CO. et al.

(Circuit Court of Appeals, Third Circuit. January 22, 1908.)

No. 20.

1. CORPORATIONS—BONDS—VALIDITY UNDER CONSTITUTIONAL PROVISIONS.

Bonds issued by a corporation held void under Const. Pa. art. 16, § 7, which provides that no corporation shall issue stock or bonds except for money, labor done, or money or property actually received, and that all fictitious increase of stock or indebtedness shall be void, where such bonds were issued to a promoter and his associates in payment for options on the property of competing companies of comparatively small, actual, and uncertain prospective value.

2. SAME—CHARTER AUTHORITY TO ISSUE BONDS FOR BORROWED MONEY.

Such bonds cannot be considered as having been issued for borrowed money so as to render them valid under a provision of the company's charter authorizing it to borrow money, and bond its property therefor.

Appeal from the District Court of the United States for the Middle District of Pennsylvania.

Wm. S. McLean, for appellants.

John G. Johnson, for appellees.

Argued before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal from an order of the District Court, sitting in bankruptcy, for the Middle District of Pennsylvania, whereby the purchasers of the bankrupt's real estate, the holders of certain first-mortgage bonds of the said bankrupt corporation, were not permitted to deposit said bonds with the trustee, and receive credit therefor on the balance of the purchase money due.

The order of sale made by the referee set forth the following terms:

"Terms of sale to be \$2,000 down on day of sale, and the balance on confirmation of sale and delivery of deed; and in case a lienor purchase the said real estate and leasehold interests, said lienor, after making the down payment aforesaid, may receive credit for a due proportion of his lien on account of the purchase price; and if the validity of the lien of such purchasing lienor shall be questioned or disputed by any person interested, the validity thereof shall be determined by the referee, subject to review by the judge, and in case it shall be determined that the lien is invalid and that the purchaser is not entitled to receive the money, the sale will be set aside and the property resold, unless the full price be paid in cash to the trustee."

Upon the return of the sale under this order, exceptions were filed by certain creditors, the appellees here, contending that no legal consideration was given for the bonds secured by said mortgage, and that the trustee ought not to have allowed to the purchasers a credit on the balance of their bid. Testimony was taken upon the exceptions, pro and con, and after argument the referee found that the exceptions should be overruled and the sale confirmed. Exceptions to this ruling of the referee brought the matter before the District Court, where they were sustained, the court holding that the bonds were invalid under the Constitution of Pennsylvania, which provides that "no corporation shall issue stock or bonds, except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void." Article 16, § 7. The court was also of opinion that the said bonds should not be regarded as valid obligations of the company, because, though the act of assembly by which it was incorporated gave the company power to borrow money, not exceeding in amount one-half of the capital stock at the time the loan was made, the authority given to bond the property and franchises of the company in this way is for money borrowed, and nothing else, and that the transaction in question could not be made, by any liberality of construction, to assume that character.

Agreeing with these conclusions, and with the findings of fact upon which they are founded, we are content to rest our decision upon

the reasons as stated in the very clear opinion of the learned judge of the court below. Referring to this opinion, *In re Wyoming Valley Ice Co.* (D. C.) 153 Fed. 787, the judgment of the court below is affirmed.

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In re LANS.

(Circuit Court of Appeals, Second Circuit. November 7, 1907.)

No. 49.

**BANKRUPTCY—PETITION FOR REVIEW—SCOPE.**

On a petition of a bankrupt which brings up for review only an order of the District Court adjudging him in contempt for failure to obey a prior order requiring him to turn over property, the propriety of such prior order cannot be considered.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

Petition for Revision of Proceedings of the District Court of the United States for the Southern District of New York.

M. M. Greenstein, for petitioner.

G. A. Seixas (Almeth W. Hoff, of counsel), for respondent.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. Having failed to secure a review of the order of December 14, 1906, which found that the bankrupt was concealing property and directed him to turn it over to the trustee, he is in no position to question its propriety upon this petition, which brings up only the order adjudging him to be in contempt for failure to comply with the provisions of said order of December 14th.

The order of the District Court is affirmed.

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**ELECTRIC STORAGE BATTERY CO. v. GOULD STORAGE BATTERY CO.**

(Circuit Court of Appeals, Second Circuit. August 24, 1907.)

No. 235.

**1. PATENTS—SCOPE—CONSTRUCTION OF CLAIMS.**

While a patentee is entitled to all the beneficial uses of his invention, when the property or function is inherent in the invention or is described or claimed by him, yet where such change or function is neither described nor claimed, and especially where other changes are described and insisted on as essential and specifically claimed, it is significant proof that the change which has not been disclosed by him to the public is not his invention.

**2. SAME—INFRINGEMENT—ELECTRIC CURRENT REGULATOR.**

The Mailloux patent, No. 430,868, for a regulating system for electric circuits, construed, and held valid, as disclosing a patentable improvement on the devices of the prior art, but, as limited by its terms, not infringed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the Circuit Court, Southern District of New York, dismissing bill for infringement of complainant's patent, No. 430,868, granted June 24, 1890, to Cyprien O. Mailloux, for regulation system for electric circuits. The opinion of the Circuit Court is reported in 148 Fed. 695.

A. B. Stoughton (Edmund Wetmore, of counsel), for appellant.  
Richard Eyre and W. H. Kenyon, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The patent in suit relates to improvements in the regulation of the compensating action of a storage-battery when applied to compensate for fluctuations of electrical condition of a working-circuit, and consists essentially in reinforcing such battery by a supplemental generator at the time of discharge and regulating the action of the re-enforcing agent automatically by the electric condition of the working-circuit. The claims involved are as follows:

"2. The combination with a dynamo-machine and the working-circuit supplied thereby, of a compensating storage battery, a supplemental re-enforcing generator in the battery connection, and means for varying the power of such generator in accordance with fluctuations of current on the working-circuit."

"6. The combination, with a dynamo-machine and circuit supplied therefrom, of a compensating storage-battery fed from such dynamo and a supplemental dynamo whose electro-motive force re-enforces the battery on discharge, and whose field is variable according to the fluctuations of electrical energy on the supplied current."

The defendant denies patentable novelty and asserts noninfringement on various grounds.

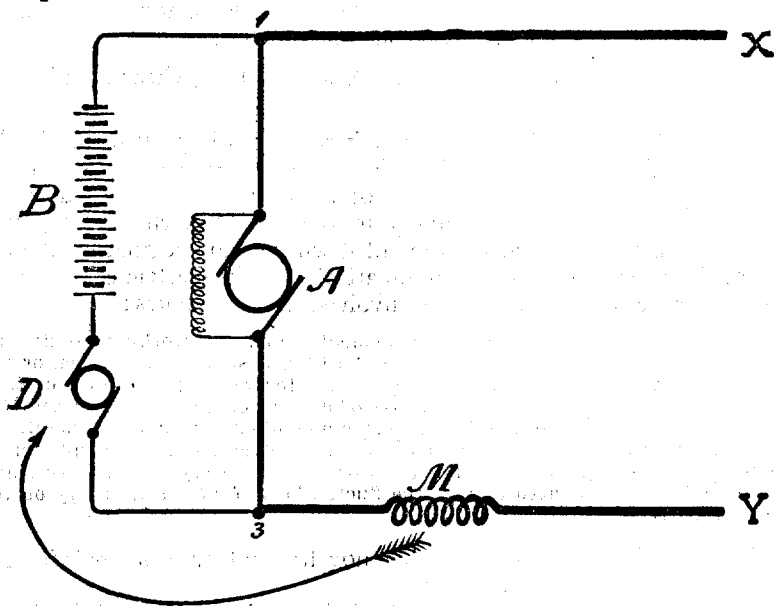
We are relieved from a discussion of complainant's or defendant's apparatus, or of the state of the prior art, by the exhaustive, accurate, and eminently fair opinion of the court below, in which, for reasons stated by it, it concluded that the patent was valid, but was not infringed. We are not satisfied that the evidence shows that electrical connections in the working-circuit, as distinguished from the generator circuit, to regulate the supplemental generator, "produce a different kind of regulation and distinct results," but with the other statements of fact in Judge Hazel's opinion we are in accord. Indeed, we fail to find in the briefs or argument for complainant any criticism of those statements material to the issues involved herein. To a considerable extent the findings as to said issues are referred to and relied upon by complainant in its brief. We shall confine ourselves, therefore, to a discussion of the conclusions of the court below raised by the following assignments of error, namely:

"First. In deciding that the patent in suit is limited to an apparatus in which the regulating coil is situated in the generator circuit and operates directly upon the supplemental dynamo machine or 'booster.'"

"Second. In deciding that the defendant's system, cannot be included in the scope of claims 2 and 6 in suit, and its means of regulation do not correspond to those of complainant nor do they produce the same result."

There seems to be some clerical error in the phrasing of this first assignment of error. The court did not hold that under the patent

the regulator coil must be "situated in the generator circuit," but did hold that it must be situated in the "working-circuit," as distinguished from the "generator circuit." An understanding of the questions presented by this assignment of error will be more easily obtained by reference to what is called in the record a simplified drawing of the Mailoux patent:



A is the main dynamo, B the storage battery, D the supplemental generator or booster, and M a regulation coil which controls the booster, as indicated by the arrow, being itself responsive to the fluctuations of electric condition on the circuit in which it is located. The drawing shows a circuit, colored red, which leads from the main generator to the points of connection, 1 and 3, with the battery branch; a circuit, colored blue, through which the current flows when the battery is charging or discharging; a circuit, colored green, which leads from the points of connection (1, 3) out to the translating devices—trolley cars, lamps, or what not—and carries the algebraic sum of the red and blue currents. This circuit, lettered X, Y, is supplied by the generator, as stated in the specification, "directly or indirectly"—directly as to the energy which is not stored up in the battery and indirectly as to the energy which is first stored up in the battery. This is the circuit which carries the current which does the work sought to be done by the entire system. Complainant's expert Duncan admits that he understands "the term 'working-circuit' to refer to that part of the system which carries the total current at each instant that the translating devices are taking, or, put in other words, the circuit that at each instant is carrying the algebraic sum of the generator and battery circuits." It is also called by complainant's expert Woodbridge

the "outside supply circuit." All the witnesses concur in describing the blue circuit as the "battery circuit," and further concur that the phrase "generator circuit" is a proper one to distinguish the circuit leading from the main generator to the battery connections (1, 3).

In the defendant's apparatus the regulation coil, which controls the booster through intermediate devices, is located in the generator circuit. Complainant's expert concedes that if the specification of the patent should be construed as employing the terms "working-circuit," "main line circuit," "main circuit," and "mains" synonymously—that is, that each expression applies to the same circuit—the regulation coil of defendant would not be included within the description of the patented device. So far as the second claim is concerned this concession disposes of the question of infringement, for that claim expressly refers to a control of regulation through fluctuations of "current on the working-circuit." Indeed, although infringement of that claim is still contended for in the brief, it is thought that upon the oral argument counsel practically admitted that they could rely only upon the sixth claim.

Complainant seeks to differentiate claim 6 from claim 2, so as to hold defendant thereunder. That claim covers a regulation coil so placed as to be "variable according to the fluctuations of electrical energy on the supplied circuit." It is suggested that claim 6 does not in terms refer back to the specifications or drawings; and it is contended that the phrase "supplied circuit" is to be more broadly construed than the phrase "working circuit," that defendant's coil is in a circuit supplied by the main generator, that it is placed there to compensate for load changes or electric fluctuations of energy on X and Y, and that such fluctuations on X and Y are, partially at least, found in the generator circuit. "In defendant's system the regulation coil receives the smaller fluctuations in current, because the battery is connected outside of the coil and absorbs most of the current fluctuations, allowing, however, enough of them to fall on the generator and the coil and the red circuit for effecting the desired regulation." (Complainant's Brief.)

We do not find this argument persuasive. It seems to be an after-thought. No such differentiation between the claims was suggested when they were discussed by complainant's expert in his analysis of the patent. He says:

"The regulating coil of the auxiliary generator must be so connected to the main circuit that it shall feel the effect of the change of load in the working-circuit in order to make the auxiliary generator perform its regulating functions. In the drawings Mailloux has shown the regular coil \* \* \* so placed in the circuit that all of the currents supplied to the working-circuit passes through the coil, and all of the changes of current that occur in the working-circuit also occur in the coil."

He quotes from the specifications the phrase, "It is only necessary to connect to the mains the proper regulating-coil or other electro-responsive device," discusses the second claim, whose "last element is a coil interposed in some part of the main circuit so as to be affected by fluctuations of the load," and then, taking up the sixth claim, says:

"This claim is a little more specific than claim 2, in that it calls for the charging of the battery from the main generator, and it limits the means for



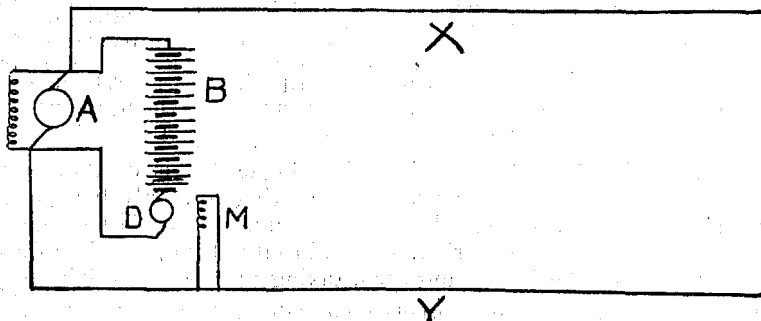
varying the power of the supplemental generator to a field coil for that generator, variable according to the fluctuations of electrical energy on the supplied circuit."

Throughout the specifications and claims the circuit into which the regulation coil is to be electrically connected is referred to indifferently as "main circuit," "working circuit," "mains," "main line circuit," "main line," or "supplied circuit," and there is nothing to indicate that these varying terms import any variances in the subject to which they refer. Every electric circuit is necessarily a "supplied" circuit. If current were not supplied to it from somewhere, it would be a useless bit of metal. The main dynamo is the source of supply directly from itself or indirectly through discharge from the secondary battery which it had itself supplied, and nothing in the specification indicates that the "supplied circuit" of the claim is to be limited to direct supply. The ninth claim employs the phrase "changes of electrical condition of the main or working circuit," and the same phrase is found in the specification, where it says: "Another amperometer, C, is also shown interposed in the main or working circuit"—the drawing showing C in the working circuit. Evidently the patentee understood that the terms "main circuit" and "working circuit" were synonymous or interchangeable, and the overwhelming weight of testimony is to the effect that the art would so understand them. When, therefore, the patentee says that "the coil in any case [should be] electrically connected into the main circuit," it seems reasonably clear that what he intended to describe and claim was a coil connected into the working circuit. The whole teaching of the patent is to the same effect. Six different drawings show variations of his system, and in every one of them the regulation coil is connected into the working-circuit.

That the patentee, by the use of the term "supplied circuit," did not mean to include the generator circuit, is further indicated by diagram prepared by complainant to illustrate the following statement in the specifications, describing the drawings:

"B indicates a series or multiple series of secondary battery cells connected to the terminals of the armature, A (of the main dynamo), as indicated."

DEFENDANT'S EXHIBIT—DUNCAN DIAGRAM "D"



A is the main generator, having its terminals directly connected to the secondary battery, B. D is the supplemental generator or booster, and M is the regulation coil located in the working circuits, X, Y.

Complainant's expert testified that this drawing correctly represents the patented arrangement as described, and that if the battery be connected to the terminals of the armature of the main generator, as stated in the Mailloux patent, and arranged as shown in said diagram, there could be no difference of terms between the working circuit and the main circuit, and that with the connections thus made there is no place in the circuit where a regulating coil could be so placed as to have the current changes that occur in defendant's field coil of its counter machine, although the drawings of the patent show plenty of room for the location of defendant's coil. He admits, therefore, that in his drawing illustrating the patent there is no generator circuit. The patent nowhere refers in terms to a generator circuit. When, therefore, the patentee referred to the supplied circuit, it may fairly be assumed that he could not have meant a coil located in the generator circuit, for he evidently needed no such circuit for his coil, and had no such circuit in mind.

Furthermore, the meaning of the term "supplied circuit" is indicated by the following language in the specification:

"A is the armature of the main or generating dynamo, which supplies the energy to the main line or circuit leads, X, Y, directly or indirectly. In the present instance the lines, X, Y, are supposed to be constant-potential lines supplying translating devices of a character such, for instance, as railway motors, in multiple."

Counsel for defendant says:

"The supplied circuit is therefore circuit X, Y—the circuit upon which the translating devices are connected—and this supplied circuit is supplied by the energy of the generator 'directly or indirectly.' This means that part of the energy in that circuit is supplied without being first stored in the battery, while part is supplied directly from the battery after being first stored in the battery. The supplied circuit is that which, when the battery is discharging, is receiving current both from the generator and from the battery, and, while the battery is charging, is receiving only that portion of the generator current that is not being absorbed by the battery. The battery and the generator are two of the supplying sources for this supplied circuit, and, if there be a generator circuit, as distinguished from the generator itself (as there is in defendant's system), then the battery circuit and the generator circuit are two branch supplying circuits, together giving the energy to the working or supplied circuit."

In determining the construction of this claim, we think there is also much force in the argument of defendant that, as the booster is specified as reinforcing "the battery on discharge," the supplied circuit is the working circuit, whose energy at the time of discharge is being supplied in part by the generator and in part by the battery. The patent, therefore, fails to furnish any substantial support for the construction of the term "supplied circuit" contended for by complainant. We conclude that, when the patentee refers to the supplied circuit in claim 6, he means "the working circuit supplied" by the dynamo of claim 2, and that the two terms are used interchangeably and synonymously

as meaning the "main circuit," and as not including the generator circuit.

If, upon any construction of the invention, the sixth claim could be held to embrace the generator circuit, the fact that the sixth claim refers neither to the specifications or drawings might be material as permitting a broad scope to the patent. But here it does not appear that the patentee disclosed, or even knew of, the possibility of regulation by his coil in the generator circuit, or, if he may have known it through the teachings of the prior art, he ignored or repudiated and failed to claim it, because he believed his novel location to be superior to any other location. Therefore, in denial of infringement, we may well invoke the application of the settled rule, namely, that the patentee cannot cover what was neither inherent in his invention nor specified nor illustrated by him, because either it is not his invention or it was not disclosed to the public. That location of the regulation coil in the generator circuit is preferable to location in the working circuit is shown by the history of the art subsequent to the date of Mailloux's patent.

The complainant claimed, and the court below has found, that under the system of the patent in suit a dynamo having a flat characteristic—that is, one in which changes of current do not affect the voltage—may be used so that changes of current in the main circuit shall set in motion the compensating apparatus consisting of booster and regulating coil. It is contended that in the apparatus of the prior art the compensating apparatus could only be set in motion by dynamos having either a drooping or rising characteristic, meaning thereby those in which changes of current caused a decrease or increase of voltage, and that in order to operate said apparatus a change of voltage in the main dynamo was necessary. The following language from the specification of the patent in suit supports the view that the patentee had in mind the use of a generating dynamo having a flat characteristic. Referring to the drawings, he says:

"A is the armature of the main or generating dynamo, which supplies the energy to the main line or circuit leads, X, Y, directly or indirectly. In the present instance the lines X, Y, are supposed to be constant-potential lines supplying translating devices of a character such, for instance, as railway motors, in multiple."

The term "constant-potential" indicates that, whatever might be the fluctuations of current or variations in the rate of flow, the voltage or pressure or potential was constant. As the court below says:

"In the system described in the specification of the Mailloux patent the voltage of the main generator at all times remains constant."

And claim 2 in suit supports this contention by the use of the expression therein "fluctuations of current."

On the other hand, it is admitted that none of the drawings show a generator having a flat characteristic, and, except as above noted, there is no reference in terms to current regulation as such; the language otherwise used being "fluctuations of the electrical condition of the working circuit," or words of similar import. It seems to be admitted

or proved that this language is broad enough to cover regulations either by changes in voltage or changes in ampere or current changes.

We need not enter into a discussion of this branch of the case, because, upon a careful consideration of the entire patent, we are constrained to conclude that the real invention of the patentee consisted in so locating his coil that it would operate directly through fluctuations or changes of electrical condition in the main or working circuit. We are further of the opinion that this arrangement was an improvement on the prior art in its capacity for use with generators having a flat characteristic, and that defendant, by the location of its coil in the generator circuit, has secured the same advantages as those secured by the combination of the patent in suit. In view, however, of the failure of the patentee specifically to point out, illustrate, or broadly claim such location, we cannot so read it into the patent as to embrace defendant's construction. In fact, it may be said that defendant's construction is founded on a discovery not disclosed in the patent in suit, namely, that the change, which the patentee supposed could only be obtained by a location in the main or working circuit, might be obtained by a location in the generator circuit. In these circumstances the rule must be applied that, while a patentee is entitled to all the beneficial uses of his invention when the property or function is inherent in the invention or is described or claimed by him, yet that, where such change or function is neither described nor claimed, and especially where other changes are described and insisted on as essential and specifically claimed, it is significant proof that the change which has not been disclosed by him to the public is not his invention. *Fastener Co. v. Kraetzer*, 150 U. S. 111, 14 Sup. Ct. 48, 37 L. Ed. 1019; *Goodyear Tire Co. v. Rubber Tire Co.*, 116 Fed. 375, 53 C. C. A. 583; *Long v. Pope Mfg. Co.*, 75 Fed. 835, 21 C. C. A. 533; *Wells v. Curtis*, 66 Fed. 318, 13 C. C. A. 494; *Bates v. Force Co.* (C. C. A., 2d Circuit, Nov. 7, 1906) 149 Fed. 220.

The decree of the Circuit Court is affirmed, with costs.

NOTE.—Judge TOWNSEND heard argument, participated in consultations, and approved the conclusions above expressed. The case was assigned to him, and a large part of the above is a reproduction of what he wrote in preparation for final draft of opinion.

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BENJAMIN ELECTRIC MFG. CO. v. DALE CO. et al.

(Circuit Court of Appeals, Second Circuit. November 13, 1907.)

No. 10.

1. PATENTS—ANTICIPATION—PRIORITY BETWEEN PATENTS TO SAME INVENTOR.

To the general rule that of two patents granted to the same inventor the one first numbered takes precedence of the other, there is an exception where the patentee had an application pending for the second when the first was issued, and especially where the two are the result of the splitting of the same original application by the Patent Office, in which case

neither can be held an anticipation of the other, but they may be treated as a single patent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 79–81.]

**2. SAME—INFRINGEMENT—CLUSTER LIGHTS.**

The Benjamin patents, Nos. 721,774 and 721,777, granted on a divisional application, and both relating to a cluster of electric lights, disclose invention and are valid. Claim 32 of the former and claims 5 and 13 of the latter, however, are void, as too broad and covering other than the "wireless cluster" of lamp sockets, which is the essential feature of the invention. Claims 5 and 7 of No. 721,774 also held infringed.

**3. SAME.**

That one structure may be a patentable improvement on another will not relieve it from infringement of a patent for the latter, where it contains a specific device covered by such patent.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 379.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree of the Circuit Court, Southern District of New York, dismissing a bill in equity for injunction and accounting upon the ground that the articles manufactured and sold by defendant did not infringe the patents sued upon. The opinion of the Circuit Court is reported in 141 Fed. 989.

Wm. H. Kenyon, W. Clyde Jones, and Seward Davis, for appellant.  
Wm. M. Stockbridge, for appellees.

Before LACOMBE, COXE, and WARD, Circuit Judges.

**PER CURIAM.** The patents sued upon were both issued to Reuben B. Benjamin on the same day (March 3, 1903) upon an application filed May 20, 1898, and renewed August 10, 1901. Complainants here rely on three claims of patent No. 721,774, viz.:

"5. An electric-lamp cluster, comprising a plurality of metal receivers for the lamps, a metallic truncated portion carrying the receivers and attached to the base, an electric connection with the receivers, an additional contact for each receiver and an electric connection with said contacts, as set forth."

"7. In a plural lamp-socket the combination with an insulating base and a metallic contact-plate mounted thereon, of a plurality of metallic threaded shells for the lamp-bases, supported thereon and in electrical contact therewith, and contacts for the central-lamp terminals arranged opposite the respective shells, substantially as described."

"32. A cluster-lamp fixture comprising an insulating base, a number of threaded shells and center contacts constituting the lamp-sockets mounted upon the insulating-base and a cover having an opening opposite each socket, substantially as described."

The claims of the second patent No. 721,777 which are relied upon are:

"5. A cluster-lamp fixture comprising an insulating-base, a plurality of threaded shells suitably associated therewith, a casing having an opening opposite each shell, and insulating-rings fitting in said openings and secured to said shells."

"13. An electric-light clamp cluster consisting of an insulating-base, a plurality of lamp-receivers supported by said base, center contacts associated therewith, and a finishing or protecting cap or cover separated from the receivers by insulating material."

It is not necessary to discuss the patents or the prior art in detail. Sufficient is set forth in Judge Holt's opinion to indicate what it was that Benjamin accomplished; and we concur in his finding that, although the Benjamin device did not involve any electrical invention, it "had mechanical improvements which at once made a cluster light constructed in accordance with those patents commercially successful," and that "the clusters manufactured under the patents immediately entered into extensive commercial use." We concur, also, in the conclusion that "there is sufficient mechanical invention shown in the Benjamin patents to make the patents valid." They disclose a novel, ingenious, and meritorious invention. Examination of the claims above quoted will show that there is but little difference between the structures shown in the two patents. Claims 5 and 7 of the first patent cover the combination which has been called in argument the cluster unit, without any cover. Claim 32 brings in the cover with an opening opposite each socket, the sockets being separated electrically from the cover by air spaces. The second patent shows the same cluster unit, the same cover, and the same openings; insulating bushing having taken the place of air spaces. In view of this the Circuit Court held that:

"It is very doubtful whether the second patent is not to be regarded as invalid because anticipated by the first patent. \* \* \* As I understand the rule the patent numbered first takes precedence of the other."

This is a correct statement of the general rule, defendants citing *Underwood v. Gerber*, 149 U. S. 224, 13 Sup. Ct. 854, 37 L. Ed. 710; *Writing Machine Co. v. Elliott & Hatch Book-Typewriter* (C. C.) 106 Fed. 507; *Willcox & Gibbs S. M. Co. v. Machine Co.*, 93 Fed. 206, 35 C. C. A. 269; and *Crown Cork & Seal Co. v. Standard S. Co.*, 136 Fed. 841, 69 C. C. A. 200. But where the patentee has had an application pending for the allowance of the later numbered patent at the time when the earlier numbered patent was issued, and especially when it was through no fault of his that his original application for a single patent was split up and a plurality of patents issued, an exception is made to the enforcement of this rule. *Electrical Co. v. Brush Co.*, 52 Fed. 137, 2 C. C. A. 682; *Thomson-Houston El. Co. v. Elmira & H. R. Co.*, 71 Fed. 404, 18 C. C. A. 145; *Independent Electric Co. v. Jeffery Mfg. Co.* (C. C.) 76 Fed. 989. As was stated in *Badische Anilin Co. v. Klipstein* (C. C.) 125 Fed. 554:

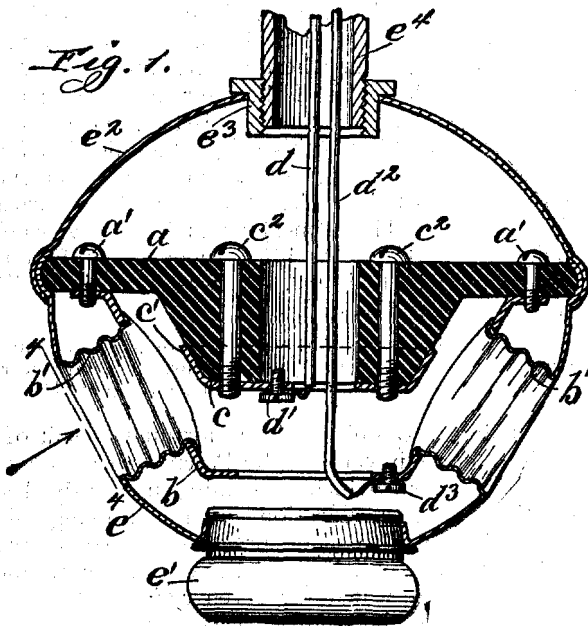
"It would be a failure of justice if the patentee of a meritorious invention should be deprived of the fruit of his labors because an arbitrary rule of the Patent Office has brought about complications not contemplated."

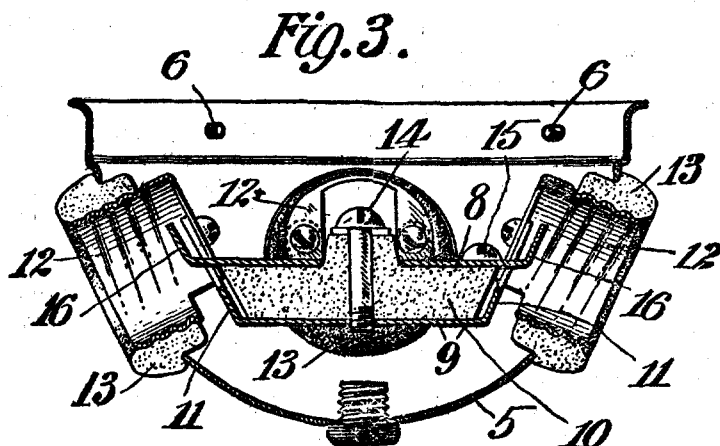
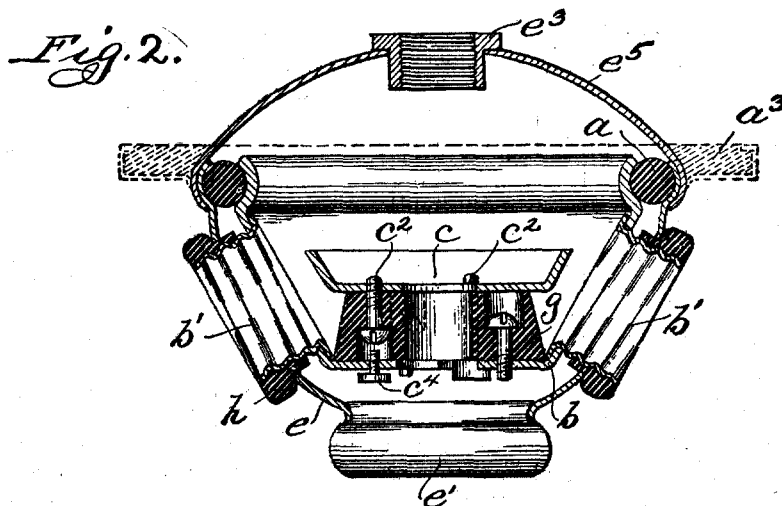
This case is a striking example of the unfortunate result of too close adherence to rule. Benjamin came to the Patent Office with a meritorious invention—a simple one which was quite sufficiently described in a brief specification. The specification and the drawings showed his cluster-unit, by itself and also made practically a commercial article by the use of a cover and a switch; varieties of cover with and without bushing being shown. He asked for seven claims. The logical way would have been to include the genus and its varieties in the same pat-

ent, and half a dozen claims would have covered every possible combination which he was entitled to hold. But by the time the Patent Office got through with him Benjamin was the holder of four separate patents granted upon divisional applications split off from his original one; the four patents containing together 98 claims. It does not seem just that the patentee, who was powerless to obtain any modification of the rule for dividing applications, should be made to suffer from such misdirected energy. There seems sufficient authority to warrant a construction, which will hold that these two patents, based on a single original application and issued on the same day are to be treated as a single one, containing the five claims above quoted.

Of these claims, however, it is conceded by complainant's expert that claim 32 of the first patent and claims 5 and 13 of the second patent are broad enough in their terms to include forms of the plural or cluster lamp sockets other than the wireless form. We have been able to concur with the Circuit Court as to the validity of Benjamin's invention only because by his combination of parts he was able to dispense with the individual lamp wires and made the so-called "wireless cluster" a commercial success. Therefore these three claims, which may fairly be construed to cover clusters, which are not "wireless" cannot be sustained.

The question of infringement, the only one left in the case, will be best understood by reference to the following diagrams:





Of these Figure 1 is the complainant's first model as shown in the first patent, Figure 2 is complainant's second model shown in the second patent, in which the contact plates are on different sides of the base, and Figure 3 is defendants' device as shown in the brief of defendants' counsel. Figure 3, however, does not show the upper or back plate, the equivalent of  $e'$  and  $e^5$  of Figure 1 and 2, respectively, which is screwed to the conduit pipe that brings in the wires from the line circuit. The structure shown in Figure 3 is fastened to the upper plate by a bayonet joint and is readily removable. It is at once apparent that the claims above quoted read upon this structure, which is a plural



lamp socket or electric lamp cluster. The "insulating base" is 10; the "metallic contact plate" or "metallic truncated portion" is 11; 12, 12, are the "threaded shells" or "plurality of lamp receivers"; 16, 16, are the "contacts for the central lamp terminals" or "additional contacts for each receiver." In defendants' device part of the metallic truncated portion is dispensed with, the threaded shells being fastened to prongs which project upward from the contact plate. This change of form, however, is unimportant. What is left after the superfluous metal is removed performs substantially the same function.

Extended argument has been presented as to the meaning of the phrase "insulating base," it being contended by defendants that their porcelain part, 10, is not the insulating base, *a*, of the patent, because in their device 10 rests upon 9, which is itself fastened to 12, which is supported through the bushing, 13, by the metal cover, 5; whereas, in the patent, *b* and *c* are fastened to and dependent from *a*, while the cover, *e*, is also hung from *a*. We fully concur in the statement of the Circuit Court that the "true and essential insulating base \* \* \* in all the wireless clusters is the body of insulating material between the two contact plates; and in that sense \* \* \* the insulating base of defendants' patent is substantially the same as the insulating base of both the Benjamin patents." That court, however, found in the circumstance that in the Dale device the insulating base and contact plates are placed within the lower hemispherical casing and supported by it sufficient mechanical difference from the Benjamin device to entitle Dale to a patent, and therefore found noninfringement, although with "much doubt." In this final conclusion we are unable to concur. It may be conceded that Dale improved on Benjamin. His structure is more convenient, in that it may be removed bodily from the back plate, instead of compelling the workmen to wire and repair through the small aperture covered by cap, *e'*. Possibly the improvement may be patentable, but that circumstance will not relieve it from infringement, if it contains the specific device which Benjamin made and patented. *Thomson-Houston El. Co. v. Ohio Brass Co.* (C. C.) 130 Fed. 549; *Perkins Elec. Switch Co. v. Buchanan* (C. C.) 129 Fed. 135. Interpreting the phrase "insulating base" as we have, the Dale structure seems fairly within claims 5 and 7.

The decree is reversed, without costs of this appeal, and cause remitted, with instructions to decree for injunction and accounting under claims 5 and 7 of No. 721,774, and to dismiss the bill as to No. 721,777.

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### JAMES SPEAR STOVE & HEATING CO. v. KELSEY HEATING CO.

(Circuit Court of Appeals, Third Circuit. January 7, 1908.)

No. 40.

#### PATENTS—INVENTION—HOT AIR FURNACE.

The Kelsey patent No. 476,230, for a hot air furnace, claim 5, is void for lack of patentable invention as covering merely an aggregation of old elements, each performing its old function independently of the others and producing no new result, although their aggregation in the same structure may produce an improved result.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 155 Fed. 976.

Charles Howson, for appellant.

Howard P. Denison, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This is an appeal by the defendant appellant from an interlocutory decree of the Circuit Court of the United States for the Eastern District of Pennsylvania. The decree comprehended the decision of the court below, that the letters patent in suit, No. 476,230, granted to W. W. Kelsey, May 31, 1892, are good and valid in law, as respects claim 5 thereof; that they are owned by the complainant; that said claim 5 had been infringed by the defendant appellant in the manufacture of two forms of furnaces, illustrated by the "Complainant's Exhibit Drawing No. 1" and the "Complainant's Exhibit Drawing No. 2," and also an order for a perpetual injunction, and the usual reference for an accounting.

Complainant appellee's patent in suit contains five claims. The first four relate to certain "improved means for obtaining a direct hot air passage from the hot air flue of the furnace to the apartment of the building to be heated," and in this improved means, the patent says the invention chiefly consists. These claims, however, are not involved in this controversy. In addition to these "improved means," in which the invention chiefly consists, the patentee says:

"And the invention also consists in an improved construction of the combustion-chamber, having air flues extending vertically through it and tie-rods extending longitudinally through said flues, and tying thereto the bottom plate and crown sheet of the combustion-chamber, said arrangement protecting the tie-rods from soot and rust and obviating obstructions in cleaning the interior of the combustion-chamber, all as hereinafter more fully described."

In this respect, the alleged invention is covered by claim 5, which is the only one with which we are here concerned. The claim is as follows:

"5. The combustion chamber C, composed of the bottom plate a, provided with the flanges, a' a', and apertures, the shell e, and flues ff, seated on said bottom plate, said flues being formed with the shoulder f', the crown-sheet g, resting on said shoulders, and the rods, l, extending through the aforesaid flues and tying thereto the aforesaid bottom plate and crown-sheet, substantially as described and shown."

Each element of the combination set forth in this claim is distinct in its character, and clearly and specifically described, and there is nothing in its structure to make it an exception to the general rule, that every part of the combination claimed is conclusively presumed to be material, so that if one of its elements is omitted, the thing claimed does not exist. This essential character of each of these elements is thus emphasized and set forth in the specifications:

"The combustion-chamber is composed of the bottom plate a, provided with apertures, from which extend the flues fff, which are mounted on said bottom plate and held in place by flanges a' a' on the plate and embracing the bases of the flues, as shown in Fig. 2 of the drawings. Upon the bottom plate is seated the shell e, which is likewise held in place by a circumferential flange a' on said plate. The flues ff are formed with shoulders f' a short distance from the upper ends thereof, and upon said shoulders rests the crown-sheet g, which is also provided with openings, through which the upper ends of the flues ff protrude. Said flues extend above the crown-sheet and terminate within the dome D, and the shell e also extends above the crown-sheet, and thereby forms upon the top of the combustion-chamber a bed b for sand, which serves to pack all the joints on the crown-sheet. The bottom plate a, and crown-sheet g are tied to the air-flues ff by means of rods, i, which extend longitudinally through the interior of the air-flues and pass with their lower ends through ears j on the bottom plate and are provided with nuts under said ears, as shown in Fig. 2 of the drawings. The upper ends of the rods are bent outward and made to bear on the crown-sheet. Said rods are thus protected from soot and rust and obviate obstructions in cleaning the interior of the combustion-chamber."

The defenses to the suit were invalidity of the patent, for lack of invention and novelty, and noninfringement. These defenses were urged, in view of the prior art, which is abundantly illustrated in the record by former patents covering all the elements of the combination of the patent in suit, though in no one of them were all its features combined. This is clearly set forth in the opinion of the learned judge of the court below, as follows:

"It is true that the different elements of it are not new. There is no novelty for instance in a combustion-chamber made up of top and bottom plates, with an encasing shell or jacket, and vertical flues with apertures above and below, extending through it. This is to be found in the Winchester (1869), the Bonnell (1871), the Guttermann (1877), the Godley (1886), and the earlier Kelsey (1889) furnaces; in the last three of which also the flues are held in place by flanges on the bottom plate over which they fit; while in the Guttermann, the Jaques (1878), the Godley, and the Kelsey, the flues are provided with shoulders to support the top plate, these shoulders in the Jaques and the Kelsey being external and the flues protruding up through the top plate. In the Jaques also, the space between the raised edge of the top plate and the projecting ends of the flues is utilized as a bed to be packed with sand or cement so as to make gas-tight joints, a feature, which so far as it enters into the case in hand, is thus not new. Neither is there anything novel in tie-rods, fastening together upper and lower plates; which are shown in the Bryant (1847), the Tillman (1872), the Hemmich (1875), the Boynton (1876), the Guttermann, the Godley, and the Heim (1888). In all of these, moreover, they are located in hot air flues, or away from the space given up to fire and smoke; and in the Tillman also, the advantage of having them so removed and protected against the action of the products of combustion is expressly claimed. It may be that the Tillman is a somewhat different type of furnace or heater, but tie-rods are tie-rods, wherever they are, and the novelty of locating them away from the reach of fire and smoke cannot be maintained upon any such supposed distinction."

The learned judge, however, was able to find invention in the combination of these old elements. He says:

"It is said that no inventive advance is shown, and it must be confessed that it is not large. But the Patent Office, whether the Tillman patent was before it or not, has put the seal of its approval upon the invention, and it is not to be lightly set aside."

We are compelled to differ, however, from the learned judge in the conclusion thus reached. All the structures of the patents

referred to have a marked similarity to that of the patent in suit. The bed-plate and top-plate, called for in claim 5, are common to them all, and the flanges on the bottom plate, as well as the shoulders on the flues, are not uncommon; in fact, they are such well-known mechanical devices that, in structures of this kind, their presence is almost inevitable. The same may also be said of the tie-rods, extending from the bottom plate to the crown-sheet and holding and clamping the whole structure together. As a mechanical device, it was not only old, but in stove structures especially had been so long in use, and with a function so obvious, that their employment might well be taken for granted, without specification, and in fact that seems to have been the case in the first Kelsey patent, as pointed out by the counsel for the appellant. That the location of these tie-rods in the tubes, so as to be protected from the gases of combustion, was not new, is also admitted. After what was said by the learned judge of the court below, and quoted above, it is hardly necessary to discuss in detail the patents referred to, or point out the different elements of claim 5 of the patent in suit to be found therein.

The prior patent to Kelsey himself, No. 415,870, and now expired, demands our attention. The description of this structure in the specifications of the patent and the accompanying drawings, clearly show its similarity in the arrangement and function of its parts, to the structure of the patent in suit, and especially to the elements set forth in claim 5. We have here the top and bottom plate, the latter with its flanges shown in the drawings, precisely as in the patent in suit; also the air tubes, with the shoulders indicated in the drawings, though not described, supporting the top-plate or crown-sheet. In fact, as seems to be admitted by counsel for the complainant appellee, it only differs structurally from the hot air furnace of the later patent in suit, in the matter of the location of the tie-bolts. In reviewing the patents urged as anticipations by the defendant appellant, counsel for complainant appellee only says, in speaking of this former Kelsey patent:

"This is one of the patentee's earlier patents. It does not show tie-bolts within or passing through any one of the circular series of hot air flues, and does not therefore anticipate the claim sued upon."

This location of the tie-bolts seems, then, to have been the improvement on the structure of the older patent, upon which the patentee relied as *the* feature of his invention in the later patent. Tie-bolts between the bottom-plate and top-plate, or crown-sheet, had been in common use before the date of either patent, and were presumably used in this earlier patent of Kelsey. It would not be without difficulty that we could be brought to the opinion that the mere location of these tie-bolts, in and through the air tubes, though accomplishing a desirable result in protecting them from the effect of the gases of combustion, was patentable invention. However that may be, such location of these bolts was not new in the art at the date of the patent in suit, as stated by the learned

judge of the court below in that part of his opinion which we again quote. He says:

"Neither is there anything novel in tie-rods, fastening together upper and lower plates; which are shown in the Bryant (1847), the Tillman (1872), the Hemmich (1875), the Boynton (1876), the Guttermann, the Godley, and the Heim (1888). In all of these, moreover, they are located in hot air flues, or away from the space given up to fire and smoke, and in the Tillman also, the advantage of having them so removed and protected against the action of the products of combustion is expressly claimed."

In what way, however, does this location of the tie-bolts, in combination with the other elements set forth in the claim (all of them admittedly old), produce any new and useful result? The aggregation of these several old elements in one structure may have produced, and doubtless did produce, a hot air furnace that was some improvement upon the prior art, in the respect that they may have been stronger, more durable, or easier of construction. But these results were due to the function of each old element acting independently and by itself, without co-action with the other elements. A box put together with screws, mitred joints and dowel pins, may be an improvement, in appearance, strength and utility, upon one put together with nails alone, but the elements of screws, mitred joints and dowel pins is an aggregation of elements, each contributing its own function and not a patentable combination. No new and useful result, in the sense of the patent law, was achieved or claimed by the combination or aggregation of the elements described in claim 5. The mode of distribution of heat was not modified or changed, and neither its quantity nor quality was affected at all by this combination of old elements. The most that could be claimed is that the structure was more enduring, more easily and securely put together, because the tie-rods which were performing the same function of clamping together the top and bottom plates were protected from deterioration by being located within the tubes, and the shoulders on the tubes made a convenient and sufficient support for the top-plate, and the flanges on the bottom plate serve to hold securely the bottom of the tubes in place, and the projection of the tubes through the top-plate serve to hold the sand around the joints. Each of these elements contributed its own function and attribute, which was in nowise dependent upon the others, or affected thereby. We are compelled, therefore, to think that claim 5 set forth a mere aggregation of old elements, and not a new combination involving patentable invention.

The decree of the Circuit Court is therefore reversed, with instructions to take such further proceedings as are not inconsistent with this opinion.

## BENBOW-BRAMMER MFG. CO. v. STRAUS et al.

(Circuit Court, S. D. New York. March 23, 1908.)

No. 9,630.

## PATENTS—INFRINGEMENT—MEANS FOR OPERATING WASHING MACHINES.

The Schroeder patent, No. 535,465, for means for operating washing machines, the essential feature of which is the means by which, while the horizontal driving shaft is turned continuously in the same direction, it imparts a reciprocal movement to the vertical operating shaft, while an improvement patent, is as to such feature in the nature of a pioneer and entitled to a fairly liberal range of equivalents. Such movement is accomplished by having a cylinder or sleeve mounted on the operating shaft which carries the gears, and which slides upon the shaft, and, by moving up and down in operation, brings the cogwheel of the driving shaft in alternate engagement with sets of cogs or teeth above and below it. The patent *held* infringed by a machine in which the same movement is obtained on the same principle and by substantially the same means; the only difference being that the up and down movement necessary to make the alternate engagements is transferred to the driving shaft by the use of a grooved hub, instead of a sleeve on the operating shaft, and the change being merely colorable.

In Equity. Suit to restrain alleged infringement of United States letters patent, No. 535,465, dated March 12, 1895, to John Schroeder for "means for operating washing machines," application filed October 23, 1894, and for an accounting.

Ralph L. Scott, Taylor E. Brown, and Clarence C. Poole (Philip Mauro, of counsel), for complainant.

C. D. Davis and Charles C. Bulkley, for defendants.

RAY, District Judge. Claim 1 of the patent in suit has been under consideration by the courts many times, and its validity sustained. *Schroeder v. Brammer* (C. C.) 98 Fed. 880; *Brammer v. Schroeder*, 106 Fed. 918, 46 C. C. A. 41; *Benbow-Brammer Co. v. Simpson* (C. C.) 132 Fed. 614; *Benbow-Brammer Co. v. Heffron Tanner Co.* (C. C.) 144 Fed. 429; *Benbow-Brammer Co. v. Richmond Cedar Works* (C. C.) 149 Fed. 430; *Benbow-Brammer Co. v. Wayne Mfg. Co.* (C. C.) 157 Fed. 559. However, its scope, its standing as a pioneer or as a mere improvement, is important in determining whether or not the defendant infringes. In *Benbow-Brammer Co. v. Richmond Cedar Works* (reported in 149 Fed. 430 on application for preliminary injunction), Judge Kohlsaat, on final hearing, has decided that defendant does not infringe. He arrives at the conclusion that Schroeder's invention resided in the "cylinder mounted upon an operating post and having a vertical sliding movement thereon and also having a double row of teeth or cogs meshing with the teeth of the cog at the end of the driving shaft in such a manner as to secure a reciprocating rotary movement of the cylinder," and which, as he understands claim 1, is the third element of that claim; that the means employed by defendant does not include this cylinder, or an allowable equivalent, giving the Schroeder patent its proper construction in view of the prior art; and that therefore defendant does not infringe. If correct in this interpretation of the claim in suit and

of defendant's device and its operation, his conclusion is, of course, correct.

Claim 1 of the patent in suit reads as follows:

"1. An operating shaft having a rotary reciprocating motion, a cylinder placed upon the shaft, and having a sliding movement thereon, and through which cylinder motion is alone communicated to the shaft, and a double row of teeth or cogs upon the cylinder extending at an angle to the shaft, combined with a driving shaft having means for revolving it attached to one end, and a wheel for engaging the teeth on the cylinder at the other, the driving shaft being driven continuously in one direction, substantially as shown."

The first element is the operating shaft, which is moved for a time in one direction and then for the same length of time in another. In a washing machine, or any other for that matter, whatever is attached to the lower end of this shaft will be carried first in the one direction and then in the other. Hence clothing in a washtub will not be wound about it. This operating shaft properly pivoted could be given this motion by an arm or lever attached to its upper end, and alternately pushed and pulled by the operator. Schroeder, however, sought to impart this reciprocatory motion continuously and uniformly by means of a horizontal driving shaft continuously turned or driven in one direction by means of a crank or handle at one end. It is self-evident that the necessary reciprocating motion of the operating shaft will be produced by cogs on the operating shaft meshing with cogs on the driving shaft, continuously driven or turned in one direction, provided the cogs on the driving shaft so mesh with those on the operating shaft as to move them first in one direction and then in the other. Moving the cogs on the operating shaft, assuming them to be integral therewith, from left to right, carries the shaft and the stirrer in the tub attached thereto in the same direction. So from right to left the same result. Now, if by some arrangement of parts the continuous movement of the cogs on the driving shaft in one direction can be made to so mesh with those on or attached to the operating shaft as to move them first from left to right and then from right to left, the problem is solved. This is what Schroeder set himself to do. It was self-evident that the result sought would be accomplished if the cogs on the driving shaft, it being stationary, but revolving from left to right, should for a time mesh with those on the operating shaft from above and then for the same length of time from below. Where meshing from above, the cogs of the driving shaft moving from left to right would pull those of the operating shaft from right to left and turn that shaft in the same direction, right to left. Where meshing from below, the cogs of the driving shaft moving in the same direction, that is from left to right, would push those of the operating shaft from left to right and move that shaft in the same direction, left to right. It was now necessary to provide some means or construction which would either transfer the cogs of the driving shaft from the upper to the lower side of the cogs of the operating shaft at short intervals, or transfer the cogs of the operating shaft from the upper to the lower side of the cogs of the driving shaft at short intervals.

Hence Schroeder provides means for doing this in the following manner: Upon his operating shaft he places a cylinder or sleeve, the

shaft being so constructed that the cylinder will not turn thereon, which sleeve will slide up and down, this movement being limited. This sleeve has a double row of cogs, upper and lower cogs, extending at an angle to the shaft. If now motion is communicated to those cogs, the cylinder is turned, and the operating shaft with it, and thus through this cylinder motion is communicated to the shaft as it cannot turn thereon. The sole and only purpose of the sliding movement is to give to the cogs on the operating shaft the necessary up and down movement at the proper time; that is, allow them to pass from the upper to the lower side of the cogs on the driving shaft. The shaft itself has no up and down movement, but the part of it (considering the cylinder as a part of it) carrying the cogs does. The driving shaft and cogs thereof have no movement in any direction except to revolve. It is perfectly obvious that, if the cogs of the operating shaft are made integral with it, and it does not move up and down, the same result will be accomplished; that is, the imparting of the reciprocal or reciprocating motion to the operating shaft, by making the driving shaft, or the part of it carrying the cogs which are to mesh with the cogs of the operating shaft, movable up and down so as to allow its cogs to pass from the upper to the lower side of the cogs of the operating shaft. This is exactly what defendants have done in their construction now before the court and alleged to constitute an infringement of the complainant's patent. To do this they have enlarged the operating shaft and grooved it above and below its cogs so as to furnish a road for the inner end of the driving shaft to traverse, and thus effect complete and perfect meshing and the proper transfer of the cogs of the driving shaft from the one side of the cogs of the operating shaft to the other. They have jointed the driving shaft so its inner end carrying the cogs will move up and down in a slit or mortise in the frame, and thus, instead of the cogs on the operating shaft moving up and down at the proper moments of time, each two revolutions of the driving shaft, the cogs on the driving shaft move up and down, or are carried up and down with the pivoted or hinged end thereof. If there is anything patentable in Schroeder's claim 1, in suit, any conception that entitled him to consideration, it has been appropriated in the construction of these defendants. There is, however, quite a difference, several differences, in the means employed for carrying the idea into effect. In Schroeder the cogs of the operating shaft, and carried by it, move up and down with the sleeve or cylinder, which is the means employed for transferring the cogs from the one position to the other without moving the operating shaft up and down. Such a movement of the operating shaft would interfere with and perhaps destroy the effectiveness of the device in a washing machine. In Schroeder, the cogs of the driving shaft have no motion up and down or from side to side, except as they revolve with the shaft. This driving shaft simply revolves. In defendants' device there is no sleeve or cylinder on the operating shaft. The cogs of the operating shaft are, or may be, integral with it. There may or may not be two rows of cogs. No part of the operating shaft moves up and down. But in defendants' device, the driving shaft being jointed and pivoted and



the frame provided with the slit or mortise, a vertical movement of its cogs at the proper time is permitted, and the result is the same as in Schroeder. It is entirely immaterial to the effectiveness of the device which set of cogs has the vertical movement. One or the other must have it. The law of movement is the same in both devices. The mechanical construction differs. That the one is the equivalent of the other cannot be doubted. But in a patented device which belongs to an old art and is for an improvement merely we are to find what the patentee has claimed and described and what is covered by that claim. If his improvement resides in improved means for accomplishing a given result, and he has specifically described and claimed those means, he cannot claim all means for attaining the result. Others may use the old means, or come into the field of improvement and describe and claim and have a patent for different means, if they disclose patentable invention. It has been held that complainant's patent shows, describes, and claims a patentable improvement in means for accomplishing a given result. In this I have concurred heretofore, and that decision was not appealed from. *Benbow-Brammer Mfg. Co. v. Heffron Tanner Co.* (C. C.) 144 Fed. 429.

In *Brammer v. Schroeder*, 106 Fed. 918, 46 C. C. A. 41, the Circuit Court of Appeals, Eighth Circuit, affirming the validity of claim 1 of this Schroeder patent, pointed out wherein Schroeder's invention resides, the principle of his invention, and wherein it differs from the prior art. I quote:

"Now, what was the principle of Schroeder's invention? What was the advance in the progress of the art which his combination marked? What was the peculiar combination of devices which distinguished his from all prior machines? It was the combination of the sliding cog-bearing cylinder, by which alone the reciprocating rotary motion was imparted to the operating shaft, with the old and familiar elements of his combination. The history of the prior art has been searched in vain for any device or machine in which a sliding actuating cylinder on the operating shaft, provided with cogs or cog-wheels adapted to mesh with those of the driving wheel, is disclosed. The use of such a sliding cylinder to impart motion to the shaft, in combination with the other parts of this machine designated in the first claim of this patent, was new in the art; and the facts that its usefulness is not denied, and that the appellant has seen fit to depart from the many devices open to his use, and to adopt that of the appellee, strongly indicate that it marks a distinct and useful advance in the progress of this art. \* \* \* It is plain that the cog-bearing, actuating, sliding cylinder was the element of this combination which embodied its principle and distinguished its mode of operation from those which preceded it. This principle has been appropriated by the appellant. He has adopted this new mode of operation. He has placed in his machine this sliding cylinder, by which alone motion is imparted to the operating shaft. He has placed upon that cylinder two rows of cogs, which extend at an angle to the cylinder and mesh with the pinion of the driving shaft. These two rows of teeth are simply the double row of Schroeder separated into two parts and placed facing each other on either side of the pinion of the driving shaft. The two rows of Brammer and the double row of Schroeder perform the same function, operate upon the same principle, and produce the same effect. They mesh with the driving pinion, and by this means revolve the cylinder and its inclosed shaft alternately in opposite directions."

But in those cases the infringing devices differed from the one complained of here. In both the infringing device had a cylinder described in *Brammer v. Schroeder*, *supra*, as follows:

"Turning now to the cut of the device of the appellant, the shaft, D, and the pinion, F, on the end of it, constitute the driving force and are continuously revolved in the same direction. The vertical shaft, G, is angular in form above the cover of the washtub, and the spool-shaped sleeve or cylinder, L, is provided with a corresponding opening so that it will slide vertically on the shaft, G, and yet when revolved will rotate the shaft with it. The ends of this cylinder are formed into two beveled wheels with cogs facing each other suitable to engage with the cogs of the pinion, F. Among the teeth upon each of these wheels are three which are higher than those on the remainder of the wheel, the middle one of which, N, is higher and wider than the other two, so that when it strikes the teeth of the pinion it does not insert itself between them, but rides upon them, throws its wheel out of gear with the pinion, and causes the latter to mesh with the opposite wheel. The lower wheel has a flange about three-quarters of the distance around it which by resting upon the lugs, S and T, respectively, supports the cylinder alternately in its higher and lower position as it is operated. The break in this flange and the large teeth upon the two wheels fall in the same vertical line. If the cylinder, L, is in the position shown in the cut, and the shaft, D, is revolved continuously in the same direction, the pinion, F, rotates the cylinder, L, and the shaft, D, within it in one direction until the large tooth, N, in the lower wheel of the cylinder, strikes the pinion. When that tooth strikes upon the cogs of the pinion, it slides the cylinder downward on the shaft, G, disengages the pinion from the lower wheel, and meshes it with the upper wheel, and thus causes the cylinder and the shaft within it to rotate in the opposite direction until the pinion reaches the large tooth in the upper wheel. When that tooth is reached, it strikes on the cogs of the pinion and forces the cylinder upward until the pinion is disengaged from the upper wheel and meshed with the cogs of the lower wheel, when the direction of the cylinder and of the shaft within it is again changed, and thus the continuous revolution of the horizontal driving shaft in one direction produces the reciprocating rotary motion of the vertical shaft by means of the sliding cylinder upon it."

And as to the combination of that infringing device, the court said:

"The combination of the appellant contains the very principle of the appellee's invention, the new mode of operation which he conceived, described, and claimed in his patent, the cog-bearing, sliding cylinder by which alone motion is imparted to the operating shaft in combination with the angular shaft, the driving shaft, and its pinion. It contains every element of the patented combination, except the sliding cylinder, in the identical form described in the specification of the appellee, and it contains the mechanical equivalent of the sliding cylinder. While the sliding cylinder of Brammer is not in the same form as that of Schroeder, it is the same thing. It performs the same function and attains the same result, the imparting of reciprocating rotary motion to the shaft, by the same mode of operation, and as this principle and mode of operation were new, so far as is disclosed by this record, in the art to which the patent of Schroeder relates, his cylinder falls within the fair meaning of the term 'mechanical equivalent,' and it should be applied to the combination in suit."

In the infringing device here we have something more than the mere interchange of certain operative parts (of different construction, as stated). At the upper end of the operating shaft a hub is fixed thereon. Its only movement is to rotate with the operating shaft. The driving shaft extends inwardly towards this hub so as to enter the groove therein and hereinbefore referred to, and form a guide. This hub has a reversing rack with teeth or cogs to engage with the teeth or cogs of the said driving pinion. The gear connection consists of this guide, the pinion on the driving shaft, and the reversing rack on the hub with its cogs. The substantial difference in the two devices is that, in place of the vertically movable cylinder with cogs, we have the

grooved hub with a reversing rack carrying cogs or teeth (the name is immaterial), which engage the cogs or teeth of the pinion on the floating driving shaft. The substitute for the cylinder, grooved hub, does not float up and down, but the pinion on the driving shaft does.

In *Brammer v. Schroeder*, supra, the Circuit Court of Appeals said:

"It is obvious that there is no substantial difference in the principle or mode of operation of a horizontal driving shaft imparting reciprocating motion to a vertical operating shaft by means of cogwheels fastened upon it (the driving shaft) and a horizontal driving shaft imparting reciprocating rotary motion to a vertical operating shaft by means of cogwheels fastened upon the latter."

In point of fact, in both constructions, we have: (1) A perpendicular operating shaft with cogs, pins, or teeth attached thereto; the object thereof being to impart a reciprocating rotary motion to the operating shaft. (2) A horizontal driving shaft, with a pinion, having cogs, pins, or teeth at its inner end and means for turning or revolving it, imparting thereto a rotary motion, at its outer end. (3) Means for changing the position of the meshing cogs of the one from the upper to the lower side of those of the other. In both constructions power is imparted at the outer end of the driving shaft. In both constructions the teeth or cogs of the driving shaft mesh with those of the operating shaft, and thereby impart to the operating shaft its rotary motion. In both constructions the reciprocating movement of the operating shaft is imparted by changing the position of the cogs, or pins, or teeth, of the one shaft with reference to those of the other. In the one case this is done by the sliding up and down of a cylinder, carrying the cogs on the operating shaft; and in the other by the sliding up and down of the pivoted arm of the driving shaft carrying its cogs. If there is any substantial difference in principle or mode of operation in the two structures, I fail to see it. If we ask, Is there a difference in construction, the answer is plainly in the affirmative. If *Schroeder* is limited to a vertically sliding cylinder on the operating shaft, and is not entitled to the doctrine of equivalents, that ends this case. If he is entitled to the benefit of that doctrine, so that the mere substitution of a well-known equivalent for the purpose of changing the position of the cogs or teeth is not permissible without infringing, there being some necessary changes, and modifications of construction in order to effect the substitution, none of which changes are new or show invention, then the defendants infringe, and complainant is entitled to a decree.

The solution is not free from doubt. I have searched the prior art to ascertain if there is substantial foundation for the contention of the defendants that their device is but a use of the combinations of the prior art, or of the elements of the prior art, excluding the essential idea and element of the *Schroeder* invention. I am not satisfied that this is true. It seems clear to me that *Brown's* book, 507 *Mechanical Movements*, there called "mangle movement," does not disclose it. So of *Cromwell's* book, "A Treatise on Toothed Gearing." I cannot assent to the proposition that this is a patent for a mechanical movement merely. It is granted as one for "means for operating washing machines." And, says the patent:

"My invention relates to an improvement in means for operating washing machines, and it consists in a shaft which is revolved continuously in one direction by the operator, combined with an angular revolving shaft which is made to revolve first in one direction and then in the other, and a vertically moving cylinder placed upon the angular shaft, and which is provided with a double row of teeth or cogs which extend partially around the cylinder, and which mesh with the pinion upon the driving shaft for the purpose of causing the angular shaft to revolve, all of which will be more fully described hereafter."

The floating shaft of defendants' device would be unavailing to effect the change of position of the cogs of its pinion, were it not for the peculiar form and construction of this "hub" on the operating shaft, and which "hub" I have referred to as an enlargement of the operating shaft. The pinion, or cogs of the floating driving shaft, is kept in proper engagement with the cogs of the reversing rack on the hub by means of the projection or extension of the driving shaft beyond its pinion, and while, through the cogs of this pinion, motion is communicated to the cogs of the reversing rack, and to the hub and through it to the operating shaft, still there would be no proper or effective vertical or up and down movement of the pinion of the driving shaft, but for the groove in the hub extending at an angle to the shaft on which it is mounted. The groove in the hub and its reversing rack and cogs take the place of the double row of cogs upon the cylinder extending at an angle to the operating shaft. I think the hub, with its groove and rack, is the equivalent of the cylinder and its cogs in every respect but one. It does not have a vertical sliding movement on the operating shaft, but this is not necessary, as the hinged or pivoted driving shaft and its cogs do. However, this vertical movement of the cogs of the driving shaft is imparted wholly by the hub and its peculiar construction. In every essential, therefore, the hub takes the place of the cylinder; vertical movement being permitted to the pinion on the driving shaft. In short, in defendants' device a nonsliding cylinder is substituted for the sliding cylinder of the Schroeder patent; necessary changes being made in other details. The history and construction of the various infringing devices disclosed in the cases that have been before the court, including the alleged infringing device in question here, show great ingenuity in efforts to avoid infringement of the Schroeder patent. Have defendants secured a noninfringing device? It is perfectly clear they have not gone back to the prior art and taken an old combination, or a combination of old elements. If they avoid infringement, it is by the use of a new combination including some new element or elements of construction, some new means not covered by the Schroeder patent because of its self-imposed limitations. I think this last question is reduced to the single proposition: Do the words "and having a sliding movement thereon" limit complainant to a construction where the operating shaft actually has a cylinder thereon, and which cylinder actually has a sliding movement on such shaft? If so, defendants do not infringe. But, if Schroeder is entitled to a construction of his claim, as to this particular element—the operating shaft—which will cover an equivalent for the sliding cylinder, then defendants do infringe.

The books show many cases which will sustain either contention. Schroeder is an improver, but in his improvement here he brought in

a new element not found in the prior art. Here was the essence, the very heart, of his invention. As to that particular thing, he was something of a pioneer. Is he not entitled to a construction and a range of equivalents accordingly? I think he is, and that the object and purpose of the patent law would be defeated by limiting him in such an invention to the precise details mentioned by him. If his invention were a mere new combination of old elements, I might think differently. The infringing device used and sold by defendants is a change of construction, form mainly, and a transposition of movements in part from one place to another, and a substitution of one well-known element for another, such as the substitution of the floating driving shaft for the stationary driving shaft, and which supplies the necessary vertical movement of one set of cogs, and thereby does away with the necessity of a vertically sliding cylinder. But in effect a cylinder, "the hub," is retained which answers every purpose of the one described by Schroeder; the floating shaft being substituted in the combination. The operative law remains and controls. The principle is the same. The result is the same. It is attained in substantially the same way by substantially the same means, and I think infringement of a meritorious invention is established.

On the other hand, it can be said with some force: That this is a crowded art. That the field for improvement was open to all comers. That Schroeder is an improver merely, and assumes to be nothing more. That in his specifications he repeatedly mentions and describes a vertically sliding cylinder placed upon the angular shaft, the operating shaft, and sums up by saying:

"As will be seen, the parts consist of only the driving shaft provided with a wheel and the operating shaft, B, provided with the vertically moving toothed cylinder, I."

That then follows his claim in which he specifically claims: (1) An operating shaft having a rotary reciprocating motion; (2) a cylinder placed upon the shaft and having a sliding movement thereon, and through which cylinder motion is alone communicated to the shaft, and a double row of teeth or cogs upon the cylinder extending at an angle to the shaft; and, lastly, the driving shaft.

It can be claimed with some force that any combination which dispenses with the vertical movement of the cylinder is not an infringement, even if its office or function—that is, the office of such vertical movement—is performed and accomplished by the substitution, not of a new element in the combination, or of an equivalent additional element, but by the substitution of an allowable equivalent for the driving shaft, viz., a floating driving shaft. No one can contend for a moment that infringement would be avoided by substituting in the Schroeder construction the floating shaft for the fixed driving shaft shown. Assume that Schroeder has the floating shaft, but no slot in his frame; then what have defendants done to avoid infringement? This, simply, they have slotted the frame so as to permit a vertical movement of the driving shaft; they have so fixed the cylinder to the operating shaft as to deprive it of its vertical motion, and then have grooved it diagonally and substituted one row of cogs for two, an immaterial

change. They have then transferred the vertical movement from the one set of meshing cogs to the other with minor changes of construction, which are incidental to the change, but which are well known and involve only ordinary mechanical skill.

The defendants have adopted the method of the claim of Schroeder's patent. They have not been able to dispense with either of its elements, but they have changed the form of one of them and transferred the vertical movement of another to a third. I do not think that Schroeder's invention, so construed as to include defendants' construction, makes it broader than the terms of the claim permit. Retaining the cylinder, "hub," through which, in defendants' device, motion is alone communicated to the shaft, with teeth or cogs extending at an angle to the shaft, they combine it with a driving shaft having means for revolving it attached to one end, and a wheel for engaging the teeth or cogs on the cylinder, "hub," at the other; the driving shaft being driven continuously in one direction. The sliding movements of the cylinder, "hub," have nothing whatever to do with communicating motion to the operating shaft. That is done by the meshing of the cogs of the pinion on the driving shaft with those on the cylinder, or "hub," irrespective of any vertical movement. In defendants' device, the hub is attached at the upper end of the operating shaft, and through it motion is alone communicated to that shaft. That is the main and central idea of the claim as to the cylinder, and is so expressed. The sliding movement of the one set of cogs or of the other was and is necessary to give the necessary planetary motion, as it has been termed, and it was and is immaterial which set has this vertical movement. That movement in the cylinder is not an essential to the invention of Schroeder. Changing that movement from the one set of cogs to the other in this mechanical movement and operation of the combination does not change the principle or mode of operation of the combination, or avoid infringement, for the entire conception and principle and mode of operation of Schroeder are necessarily retained in the infringing device and used by defendants to accomplish the same result.

In *Wagner T. Co. v. Wyckoff, S. & B.*, 151 Fed. 585, 81 C. C. A. 129, Coxe, C. J., said:

"Courts look with favor upon patents for primary improvements which are novel and a manifest departure from the principles of prior structures, and which constitute the final step necessary to convert failure into success. \* \* \* A strict construction of the claims of a patent should not be resorted to, if the result would be a limitation on the actual invention, unless it is required by the language of the claim. \* \* \* Infringement is not avoided by changes in a patented machine which are nonessential, as by changing the positions of parts or transferring a function from one part to another, without affecting the principle or mode of operation."

This last clause quoted is specially pertinent here, as all the defendants have done is to make nonessential changes and transfer the function of the sliding movement of the cylinder to the floating driving shaft, where it accomplishes the same precise purpose in the combination. I do not think the central idea of Schroeder was to have his cylinder slide, to give it a vertical movement, but to have it carry the cogs; and, through it solely, to impart a rotary motion to the operating

shaft. That function is performed by the hub of defendants' device, but to the floating driving shaft has been transferred the work of giving the up and down movement to one set of cogs. Schroeder is presumed to have known of that old element, but he did not need to mention it as an alternative. *Machine Co. v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935.

While, as stated, I am not free from doubt, on the whole there should be a decree for the complainant.

I again quote from Judge Coxe in *Wagner, etc., v. Wyckoff, etc.*, 151 Fed. 591, 81 C. C. A. 129, as follows:

"That the claims of the first patent are entitled to the broadest range of equivalents cannot be successfully maintained, but we think they are entitled to liberal interpretation and cannot be evaded by one who uses the elements of the combination, or equivalents therefor, which a mechanic of ordinary intelligence would have wit enough to adopt if asked to substitute for the rods, lugs, and keys of the patent other elements to which, though differing markedly in appearance, accomplish the same result in substantially the same way. The claim should be as broad as the invention."

And again from *International Time R. Co. v. Dey et al.*, 142 Fed. 736, 744, 745, 74 C. C. A. 68, 76, 77:

"In short, the infringing devices have appropriated every element of the patented combination; the differences being of form, and not of substance. These consist of mechanical changes and the substitution of obvious equivalents well known to every skilled workman. Identity of detail in a combination, like the one under consideration, is not necessary in order to constitute infringement. The patentee took pains to point out that 'the specific construction of the mechanism shown \* \* \* is not essential.' This was an unnecessary precaution. The law gave him ample protection in this regard. *Machine Co. v. Murphy*, 97 U. S. 120, 125, 24 L. Ed. 935."

There will be a decree accordingly, with costs.

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#### LORAIN STEEL CO. v. PAIGE IRON WORKS et al.

(Circuit Court, N. D. Illinois, E. D. January 24, 1908.)

No. 27,972.

#### PATENTS—INFRINGEMENT—RAILWAY SWITCHES.

The Kress patent No. 633,723 and the Krauss patent No. 555,171, both for improvements in railway switches of the tongue type, most generally used on street railways, and each for means for preventing the kicking of the switch, if conceded validity, are each limited by the prior art to a very narrow scope, and closely to the devices shown and described. As so construed, *held* not infringed.

In Equity. On final hearing.

George H. Parmelee, Clarence P. Byrnes, and Knapp, Haynie & Campbell (Thomas W. Bakewell and Charles MacVeagh, of counsel), for complainant.

Peirce & Fisher (George P. Fisher, Jr., of counsel), for defendants.

KOHLSAAT, Circuit Judge. This is a suit for infringement of claims 1, 2, 3, 5, and 6 of patent No. 633,723, granted to the Johnson Company, as assignee of C. F. Kress, Jr., September 26, 1899, and

claims 1, 2, and 3 of patent No. 555,171, granted to the same company, as assignee of C. H. Krauss, February 25, 1896, both patents being for alleged improvements in railway switches. The title of complainant herein to both patents is admitted by stipulation. The claims of the Kress patent No. 633,723 alleged to be infringed are as follows:

"1. In a railway-switch, the combination of a foundation structure, a plate having a recess and secured to said structure, a tongue having a depending pintle at its heel end and seated at said end in the said recess, and an opening through the floor of said plate for the pintle, substantially as described.

"2. In a railway-switch, the combination of a foundation structure, a plate having a recess and secured to said structure, a tongue having a depending pintle at its heel end and seated at said end in the said recess, an opening through the floor of said plate for the pintle, and a guard for one side of the heel end of the tongue formed by one wall of the recess, substantially as described.

"3. In a railway-switch, the combination of a tongue having a depending pintle at its heel end, a member having a recess in which the heel end of the tongue is seated, and a portion of one wall of said recess taking the place of a portion of the tread-surface of the tongue from the heel end of the tongue to a point in advance of the axial line of the pintle, substantially as described."

"5. The combination, in a railway-switch, of a foundation structure, a plate secured therein and having a recess, a pivoted switch-tongue seated at its heel end in said recess, the walls of said recess taking the place of cut-away portions of the sides of the tongue, substantially as described.

"6. The combination, is a railway-switch, of a foundation structure having a recess, a plate removably secured in said recess and itself having a recess, and a switch-tongue seated in said last-mentioned recess at its heel end and having a depending pintle passing through the floor of said plate, substantially as described."

Those of the patent to Krauss, No. 555,171, are as follows:

"1. In a railway-switch, a tongue-fastening comprising a bolt extending vertically downward from the tongue, and a spring in the frame of the switch and adapted to exert a downward force upon the bolt.

"2. In a railway-switch, a tongue-fastening comprising a bolt passing through the tongue and removably secured therein, said bolt passing downward into a pocket in the switch-frame, and a spring encircling said bolt and adapted to exert a downward force thereupon.

"3. In a railway-switch having a vertically-pivoted tongue, a pocket in the frame of the switch and beneath the tongue, a spring in said pocket and a bolt depending from the tongue and engaging the spring."

The defenses are, first, the invalidity of the patents; second, noninfringement.

Defendants admit the manufacture and sale of two forms of switches which are charged by complainant to infringe the patents in suit. One of these is illustrated in letters patent No. 768,969, granted to the Buda Foundry & Manufacturing Company, as assignee of William S. Weston, August 30, 1904, and is referred to by counsel as "Defendants' Switch No. 1;" the other is shown in "Defendants' Exhibit Blue Print No. 12,900," referred to by counsel as "Defendants' Switch No. 2."

The devices of the patents in suit belong to a class commonly referred to as "tongue switches," most generally used on street railways, and seemingly the best form of switch for use in paved streets. This kind of switch in its simplest form consists of a tongue pointed at one end, and movably pivoted at its other or heel end to the underlying or foundation structure, so that its pointed end may be moved from



side to side, serving in one position as a tread for the car wheels, and in the other as a guide for the wheel flanges to deflect the car to another track. This general form of switch is admittedly old. Switches of this kind, although having the advantages of compactness and simplicity, have been a source of much annoyance, and require constant watchfulness and care to avoid derailments and other accidents which occur most frequently on these parts of the track. The cause of this, primarily, is the wear incident to the pounding of the car wheels. When the heel or its underlying foundation becomes worn, there is danger that the front wheel flange of a car coming point on to the switch, having reached the pivot on the course off the main track, will strike the heel at a point beyond the pivot, and by the leverage thus exerted will throw the switch, so that the rear wheels will be guided onto the main track after the front wheels have taken a course onto the switch track, this almost invariably causing derailment. A sudden blow on the tread side of the heel may also throw the switch, the dirt which collects about the heel forming a fulcrum on which the switch tongue may turn.

The objects of complainant's patents are to obviate all danger of the kicking of the switch—in the Kress patent by lessening the wear, and by making it impossible for the wheel flange to strike the heel of the tongue at a point beyond the pivot, and in the Krauss patent by holding the tongue firmly in place by means of a spring.

In the Kress device, the heel of the tongue is seated in a recess of a supplemental plate, which in turn is seated in the foundation structure. The pivot is located very near the extreme end of the heel of the tongue, where it extends through the floor of the underlying plate and into the foundation structure upon which the plate rests. This plate is recessed to receive the heel of the tongue, and the sides of the heel being cut away and the plate raised above the level of the upper surface of the tongue heel forms on each side walls or guards, thus protecting the heel from any contact with either the flange or the tread of the wheel.

The Krauss patent describes and claims a method for holding the tongue down in place by means of a bolt passing through a hole in the tongue and engaging a spiral spring placed in the frame of the switch, being so arranged that the spring exerts a downward pressure on the tongue.

Both of defendants' alleged infringing devices have the supplemental plate, with its recess for the heel of the tongue, seated in a pocket or depression in the foundation structure. The plate is a little larger than that of complainant's patent, and is slightly different in shape. It is recessed so as to protect only the guard or flange side, and not the tread side of the tongue.

The drawings of defendants' switch No. 1 (Weston patent No. 768,969) show a depending boss on the under side of the tongue heel, which fits into a corresponding depression in the floor of the supplemental plate. This, it is contended by complainant, performs the function of the depending pintle of the Kress patent in suit. It should be noted, however, that this boss does not extend through the floor of

the supplemental plate, nor have a bearing in the foundation structure, as in the Kress patent. In defendants' switch No. 2 it has been wholly eliminated. Passing through the heel of the tongue, the plate floor, and into the foundation structure, where its lower end engages with a nut, is a bolt, corresponding in function with the supplemental bolt of the Krauss patent, in that it is encircled by a spiral spring at its lower end, which, by compression between the nut and the under side of the floor plate, exerts a downward pressure on the tongue.

The validity of the patents in suit is denied, defendants contending that they cover an aggregation of elements, each long known and used in the prior art for purposes closely analogous to those of the patents in suit, requiring only the most ordinary mechanical skill in their combination.

It is abundantly shown in the record that it is old to employ hard interchangeable wear plates at points liable to excessive wear in railway track construction. Many prior patents have been introduced showing frogs and other crossing and switches utilizing separate pieces or plates readily removable so that they may be replaced when worn. It appears that as early as November, 1898, a tongue switch of the class here involved was manufactured and sold by the New York Switch & Crossing Company. This form of switch is shown in defendants' exhibit drawing No. 1,247, which discloses a hardened steel plate used in exactly the same position for the same purpose as in complainants' Kress patent. The principle of protecting the heel of the tongue against blows of the car wheel by cutting away sides of the heel near the pivot, and shaping the recess so that its sides adjacent to the heel will form walls, either to support the tread of the wheel or to prevent its flange from striking the heel, is disclosed in the Moxham patent No. 366,598 and in the Angerer patent No. 586,892. There also appears in the record testimony strongly tending to show that the Paige Iron Works, prior to the date of the patent in suit, made pivoted tongue switches, using a protecting side wall of the recess in which the heel of the tongue was pivoted to protect the guard side of the heel end of the tongue against kicking. It also appears in evidence that in 1892 the Lewis & Fowler Girder Rail Company made a switch (illustrated in defendants' exhibit drawings Nos. 420 and 508), containing a combination of elements very similar to that of the patent in suit.

Taking up the question of the validity of the Krauss patent: The Grigware patent No. 554,120 shows the heel of a switch tongue held down in place by a cotter-pin passed through the lower end of the pivot pin, there being a washer just above the cotter-pin. In the Moxham patent No. 388,994 is disclosed a pivoted switch tongue, the lower end of the depending pintle of which is held down in place by a washer and clamp. While such devices are not adapted to take up wear between the under side of the heel and the foundation on which it rests, the desirability of holding the heel of the switch tongue down in place is recognized and the principle applied in these two patents. In the Lewis patent No. 364,267 for railway crossing, we find a coil spring encircling a depending pintle or bolt passing through a floor plate exerting a downward pressure on the rail section of the device;

and an element of one of the claims of that patent is "a spiral spring adapted to hold said sections down in place." Inasmuch as the Supreme Court in the case of *Weir v. Morden*, 125 U. S. 98, 8 Sup. Ct. 869, 31 L. Ed. 645, has held that the use of a device in a railway frog and in a railway switch was analogous use, it becomes difficult to see how the replacing of the washer of the Grigware patent No. 554,120 or the Moxham patent No. 388,994 with the coil spring of the Lewis patent No. 364,267 can be held to rise to the dignity of invention.

The patents in suit do not belong to the pioneer class of patents, and I am of the opinion that if the validity of the Kress patent can be sustained, it must be confined closely to the device shown and described. Defendants' switches do not contain the depending pintle described and claimed by Kress, nor is complainant in a position to claim their arrangement as an equivalent, neither do they surround the guard side of the tongue by the walls of the supplemental plate.

If the Krauss patent has any patentable novelty, it must be found in features thereof not employed by defendant. At best it is a very narrow patent in view of the prior art. For these reasons, I am of the opinion that defendants' devices do not infringe. The bill will, therefore, be dismissed for want of equity.

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GREENE, TWEED & CO. v. MANUFACTURERS' BELT HOOK CO.

(Circuit Court, N. D. Illinois, E. D. June 1, 1906.)

No. 27,835.

1. TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION.

The name of a patentee of an article of a new and original type, by which such type becomes known or distinguished in the trade, after the expiration of the patent may lawfully be used by any maker or dealer to designate articles of that type, and such use is not within the rule of unfair competition.

[Ed. Note.—Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

2. SAME—MARKING OF PATENTED ARTICLE—EXPIRATION OF PATENT.

An arbitrary symbol or device stamped by the manufacturer only on articles made under certain patents on the expiration of such patents becomes public property, and its use by others does not constitute unfair competition.

3. SAME—DESCRIPTIVE NAME—"STUD."

The word "stud," used to designate a belt fastener which is in fact a stud, is descriptive merely, and cannot be exclusively appropriated by a single manufacturer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 6.]

In Equity. On motion for preliminary injunction.

Charles K. Offield, Arthur E. Parsons, Offield, Towle & Linthicum, and Hey & Parsons, for complainant.

Dyrenforth, Dyrenforth & Lee (Douglas Dyrenforth, of counsel), for defendant.

KOHLSAAT, Circuit Judge. Complainant seeks herein to restrain defendant from fraudulently appropriating its trade-name and other indicia attaching to its good will. It appears from the record that complainant and its predecessor, the firm of Greene, Tweed & Co., have for more than 30 years been engaged in the belt fastener or belt stud business, the term being used interchangeably. In connection with the business, complainant gradually came into the use of various trade terms and symbols which are claimed to have been accepted as designating its products. One of them was the word "Blake." Another consisted in the use of two stars stamped in the stud head, between which the number indicating the size was stamped. The fasteners were put up for sale in pasteboard boxes or cartons of ordinary sizes, forms, and colors, also, it is claimed, indicating sizes and styles of fasteners.

Among the fasteners handled by complainant were included the devices of several patents, viz., those of G. W. Blake patent No. 31,859; Weston patent No. 76,861; Henry Blake patent No. 282,258; and Henry Blake patent No. 396,528. All of these, save the last named, had expired prior to the beginning of this suit. Neither the name "Blake" nor the stars were used on the entire product handled by complainant. The record justifies the proposition that Blake was the original inventor of the double headed fastener, and that type of studs was generally called and known as "Blake Studs." Various improvements have been made in the studs whereby they have been strengthened, rounded off, and made to conform in shape to the belts upon which they were to be used, but the general double headed design of Blake's first patent is still found, so that they may justly be termed, generally, Blake fasteners or studs by any one handling the same. It therefore seems clear that the mere application of that term to any one of the Blake types of fasteners cannot bring the user within the rule of unfair competition. The name is as much descriptive with reference to fasteners as is the name "Singer" with reference to sewing machines. The embossed stars upon the head of the stud between which was stamped the size number of the fastener is of somewhat hazy origin. Complainant insists they have been in use by it or its predecessors for more than 30 years. The only manner of use seems to have been in stamping or embossing them upon the fastener head. They are not referred to in complainant's business literature or advertising media. They do not appear on the boxes or cartons in which the studs are packed, nor is there evidence satisfactorily showing that the trade, wholesale or retail, placed any construction upon the use thereof upon the studs. They did not indicate the size number because they did not vary in number. There were always but two. The only clearly defined purpose they seem to serve was to disclose a somewhat servile imitation by defendant. From the affidavit of complainant's witness E. W. Blake, it appears the studs made under Blake patents generally had the stars stamped upon them. Whatever of significance there may have been in this device is now, and was at the time this suit was begun, public property as an appurtenance to the Blake and Weston patents. If the stud was always so marked by the manufacturers while

they had a monopoly thereof, it may well be claimed now that the distinctive earmarks which entered into its trade success also became public. *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Centaur Co. v. Heinsfurter*, 84 Fed. 955, 28 C. C. A. 581. Moreover, it does not appear from the record that all the fasteners marketed by complainant had these stars stamped upon them, notably those made of steel and the smaller sizes. It is impossible to say from the record that they were so uniformly used as to impress upon the trade any special features, either of material or manufacture.

Some reference is made in the bill and affidavits to the appropriation of the words "stud" as a further distinguishing feature of complainant's goods. It can hardly be claimed seriously that there is anything arbitrary in the use of that term. In the ordinary meaning of the word, the article is a stud. It would seem as though one might on the same showing, appropriate the word "button." It is clearly descriptive, and not susceptible of exclusive use in the connection claimed. Neither would it seem that any trade designation could be attributed to the words "Blake's Belt Studs."

It fairly appears from the record that complainant is placing its product upon the market under its 1889 patent. This patent calls for a stud with a round shank, in cross-section. The exhibits in evidence disclose a stud not having a round or cylindrical shank. Indeed, it so closely resembles the stud of the 1883 patent as to pass for that device under ordinary scrutiny. Complainant insists the record does not disclose whether the contents of the carton exhibits had been tampered with or substituted for the original contents thereof. The evidence shows the exhibits were obtained upon the open market, and they must be deemed sufficient for the purposes of this hearing. It is idle for complainant to attempt to shield itself from the charge of bad faith by producing the opinion of its lawyers advising it that such a use of the 1889 patent was permissible. The question is one of fact and not of law. To make its counsel the keeper of its expert conscience considerably and unwarrantably enlarges the area of legal responsibility.

It seems clear that, for the purposes of a preliminary restraining order complainant does not commend itself to the protection of the court at this time. The motion for a preliminary injunction is denied.

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#### THE JOHN D. DAILEY.

(District Court, E. D. New York. December 31, 1907.)

#### ADMIRALTY—COSTS—PREMIUM PAID FOR BOND TO RELEASE VESSEL.

Where the claimant of a libeled vessel has prevailed on the trial, and the libel is dismissed, he is entitled to tax as a part of his costs the premium paid by him to a surety company for a bond to obtain the release of the vessel, where it is reasonable in amount.

In Admiralty. On exceptions to taxation of costs.  
See 157 Fed. 477.

Sutherland D. Smith, for libelant.  
Alexander & Ash, for claimant.

CHATFIELD, District Judge. The claimant has prevailed, and obtained the dismissal of a libel based upon a claim for alleged negligent towing. In taxing the claimant's costs, an item of \$100, premium upon the bond of the claimant, furnished by him in the form of a stipulation for value, in order to procure the release of his vessel after seizure by the United States marshal in obedience to the process of this court, has been disallowed. An exception to this disallowance having been noted, the attention of the court is called to the case of *The South Portland* (D. C.) 95 Fed. 295, in which the premium charged by a surety company was taxed, under somewhat similar circumstances. This case correctly states the law, and is in complete harmony with the provisions of Act Aug. 3, 1894, c. 282, 28 Stat. 279 [U. S. Comp. St. 1901, p. 2315], authorizing the acceptance of a bond of certain surety companies in any case where a bond or other undertaking "is by the laws of the United States required or permitted to be given."

The provisions of sections 940 and 941, Rev. St. [U. S. Comp. St. 1901, pp. 691, 692], rule 11 of the Supreme Court of the United States (3 Sup. Ct. ix), in admiralty, and rule 17 of the District Court of this district, provide for and permit the giving of a bond in cases like the present. This sufficiently shows the legality of the methods pursued in bonding the vessel after seizure. As stated in the case of *The South Portland*, *supra*, the benefit is not entirely to the claimant; but the charges for the care of the vessel, and the risk of loss during the holding by the marshal, are removed by the giving of a bond. The libelant, if unsuccessful, is thus saved an expense which would be a taxable disbursement in the case. Further, it seems no more than just that the claimant should, if possible, be allowed to avoid loss and damage to himself, by obtaining the use of his vessel during the life of the bond. The result is a benefit to the claimant, but not to the disadvantage of the libelant. On the contrary, it furnishes to him a certain and speedy guaranty of his claim if it be maintained, while giving to the claimant the future enjoyment of his property, which would be entirely taken away, with no corresponding advantage to the libelant, if a sale is had under the process by the marshal. The entire proceeding, therefore, seems to be justifiable and legal, and the premium paid for the bond should be taxed, if reasonable in amount. Discretion is vested in the court to prevent the payment of unwise and extravagant premiums, assented to upon the theory that they were taxable in any event. The burden rests upon the losing party to object, if an unconscionable agreement has been made for the payment of a premium, and the amount allowed to be taxed should be only such an amount as is customary or reasonable under the circumstances of the case.

The objection to the item in question, as raised by the exception of the libelant, will be overruled, and the item in this case ordered to be taxed.

## In re EURICH'S FT. HAMILTON BREWERY.

(District Court, E. D. New York. January 11, 1908.)

## 1. BANKRUPTCY—ATTORNEY'S LIEN—VACATION.

The institution of bankruptcy proceedings will not invalidate an attorney's lien on securities belonging to the bankrupt in possession of the attorney.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, §§ 286, 287.]

## 2. SAME—POSSESSION OF SECURITIES—RIGHTS OF RECEIVER.

Where certain chattel mortgages belonging to a bankrupt corporation were delivered to the corporation's attorney prior to the filing of a bankruptcy petition against the corporation, it was the duty of the attorney to turn over the securities to the bankrupt's receiver, though the attorney was entitled to have his alleged lien thereon determined either in the bankruptcy proceedings or in any court having jurisdiction of the subject-matter in which a lien arose, or in which the claim for services might be determined.

## 3. SAME—SUMMARY PROCEEDINGS.

Where a bankrupt's receiver asked to have certain chattel mortgages and assignments made to a creditor turned over to him but the creditor had possession and claimed title thereto, the receiver's right could not be determined in summary proceedings on affidavits, though the transfers might have constituted a preferential payment or might be set aside for fraud.

Thomas & Oppenheimer (Leo Oppenheimer, of counsel), for Apfel and Chieffo.

William V. Goldberg (Julius H. Cohen, of counsel), for receiver and petitioning creditors.

CHATFIELD, District Judge. The petitioning creditors and the receiver desire to have turned over to the receiver certain chattel mortgages, some of which are in the possession of one Charles L. Apfel, an attorney who had represented the bankrupt in certain transactions some time prior to the filing of the petition. He claims a lien for services upon these chattel mortgages which came into his hands prior to the filing of the petition. The exact date when Mr. Apfel received these mortgages is not shown; and it is claimed on the part of the receiver that the mortgages were not delivered to this attorney until it was known that the brewery was insolvent, when they were transferred to him for his previous services. It has frequently been held that bankruptcy proceedings will not invalidate an attorney's lien, and generally an attorney may have a choice of the forum in which he will seek to establish and to determine the amount of whatever lien he may have; but the possession of the property pending such determination does not necessarily follow.

Under the present circumstances, it seems to this court that the chattel mortgages and the assignments should be turned over to the receiver, to be held by him subject to whatever lien Mr. Apfel may have as attorney; and, if it seems to the best interest of all concerned to dispose of these chattel mortgages, that the funds realized therefrom should be held by the receiver and by the trustee, when elected, subject to the same lien. The attorney, Mr. Apfel, may pro-

ceed to have the amount of his lien admeasured either in the bankruptcy court or in any other court where jurisdiction of the matter in which the lien arose or of the claim for services may be had, and the receiver and this attorney should confer, with a view to realizing upon the chattel mortgages or selling the same in such a way as to bring the greatest return for all parties concerned.

The receiver has also asked to have turned over to him certain chattel mortgages and assignments made to one Chieffo, a creditor of the alleged bankrupt. The allegations with respect to these transfers indicate that there may have been a preferential payment, and it is possible that circumstances could be shown under which the transfer could be set aside for fraud. But this cannot be determined upon affidavits. There is a clear claim of title, united with possession, and the appropriate action should be brought by the trustee when elected, if he considers that the bankrupt estate is entitled to recover these mortgages.

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UNITED STATES v. HENSEL, BRUCKMANN & LORBACHER.

(Circuit Court, S. D. New York. February 11, 1896.)

No. 1,800.

1. CUSTOMS DUTIES—GOODS IN EXCESS.

Section 2901, Rev. St. [U. S. Comp. St. 1901, p. 1921], provides that, if appraisers find in an imported package "any article not specified in the invoice," its value shall be added to the entry. *Held*, that this did not apply to an importation of framed paintings invoiced as "paintings," where it appeared that the invoice value was sufficient to include the frames, and that it was customary so to describe paintings with frames.

2. SAME—INVOICE VALUE.

Customs Administrative Act June 10, 1890, c. 407, § 7, 26 Stat. 134 [U. S. Comp. St. 1901, p. 1892], forbids the assessment of duty "on less than the invoice \* \* \* value." *Held*, as to an importation of framed paintings which were invoiced as "paintings," that it would not be in violation of this law to treat the invoice value for this item as including the frames, where it appeared that such value was sufficient, and that it was customary so to describe paintings with frames.

On Application for Review of a Decision of the Board of United States General Appraisers.

The case involves consideration of the following provisions of law:

"If any package be found by the appraisers to contain any article not specified in the invoice, and they \* \* \* shall be of opinion that no \* \* \* fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly." Extract from section 2901, Rev. St. (U. S. Comp. St. 1901, p. 1921).

"The duty shall not, however, be assessed in any case upon an amount less than the invoice or entered value." Extract from Customs Administrative Act June 10, 1890, c. 407, § 7, 26 Stat. 134 (U. S. Comp. St. 1901, p. 1892).

The opinion of the Board of General Appraisers reads as follows:

SHARRETT, General Appraiser. We find as facts in this case:

1. That the appellants imported into the port of New York certain oil paintings in frames, contained in 12 cases covered by three invoices and one entry.



2. That the frames were not separately specified in the invoices, but were included in the term "paintings;" and the invoice value of the paintings included the value of the frames.

3. That the local appraiser valued the oil paintings at the invoice value of the oil paintings and frames, and returned the frames as articles in excess of the invoice quantity, and placed a value thereon.

4. That the appellants made application for reappraisement of the merchandise, in accordance with the provisions of section 13, Act of June 10, 1890, c. 407, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932], which application was granted as to the merchandise covered by two of the invoices but denied as to that covered by the third invoice.

5. That the General Appraiser holding the reappraisement (except as to some few articles of little value in excess of invoice quantity and not covered by protest) found the invoice value of the merchandise correct, and segregated the value of the paintings and frames for purposes of classification and assessment of duty.

6. That the collector declined to accept the decision of the General Appraiser on reappraisement as conclusive, for the reason, as stated by him, that the value specified in the invoices was for the oil paintings alone, and that in accordance with the provisions of section 7, act of June 10, 1890, c. 407, 26 Stat. 134 [U. S. Comp. St. 1901, p. 1892], duty could not be assessed on less than the invoice value thereof.

7. That, although oil paintings and frames are separate articles of merchandise in trade, it has long been the practice, both in this country and abroad, to include both paintings and frames in the term paintings, and also to include the value of the frames in the selling price of oil paintings framed.

8. The packages in question contained no articles subject of protest not specified in the invoices.

On these findings we think that the importers are entitled to the relief asked for. If the local appraiser intended to advance the value of the merchandise and added a sum equal to the estimated value of the frames to make market value, then the importers properly asked for reappraisement of the merchandise, in accordance with the provisions of section 13, and the decision of the General Appraiser (no appeal having been taken therefrom) was final and conclusive against all parties.

Regarding the merchandise covered by the third invoice, reappraisement of which was not allowed by the collector, we find that the local appraiser did not add to it an amount to make correct market value thereof, but he added to the invoice value the value of goods alleged by him to be in excess of the invoice quantity. Inasmuch as the packages contained no articles not specified in the invoices, duty was, in our opinion, improperly exacted on the alleged excess.

The principle upon which we base our conclusions herein would seem to be approved by the United States Circuit Court of Appeals for the Second Circuit in *Re Crowley* (55 Fed. 283, 5 C. C. A. 109), wherein the court decided that the value of certain merchandise invoiced as an entirety, but found to consist of two distinct articles separately provided for in the tariff, should have been segregated by the appraiser and duty assessed on the value of the several kinds of goods by the collector at the respective rates applicable thereto.

Following the ruling of the court in that case, we hold the claim of the appellants in this case to be well founded. The protest is sustained, and the collector's decision is reversed.

James T. Van Rensselaer, Asst. U. S. Atty.

Curie, Smith & Mackie (W. Wickam Smith, of counsel), for importers.

COXE, District Judge. In this cause, which was argued on the first day of the term, I have examined the record with care and have reached the conclusion that the decision of the Board of General Appraisers

is correct. I do not think it necessary to add anything to their decision. It seems to me that it covers fully all the issues in controversy and in principle is in entire accord with the decision in the Crowley Case (55 Fed. 283, 5 C. C. A. 109). The decision of the Board is affirmed.

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In re McKANE et al.

In re IMPERIAL AMUSEMENT CO.

(District Court, E. D. New York. April, 1907.)

**BANKRUPTCY—JUDGMENT AVOIDED BY PROCEEDINGS—ENJOINING SALE—SALE UNDER FORECLOSURE DECREE.**

Where foreclosure proceedings were instituted prior to the bankruptcy of the mortgagor on a mortgage given more than four months before, and a receiver was appointed who was in possession of the property at the time of bankruptcy, a sale of the property under the decree in such suit cannot be stayed by the bankruptcy court.

In Bankruptcy. On motion for stay of sale under foreclosure decree.

See 152 Fed. 733; 155 Fed. 674.

Lyman W. Redington, for petitioning creditors.

F. W. Sparks, for mortgagee.

CHATFIELD, District Judge. An additional order to show cause, returnable forthwith, having been obtained in this matter upon further affidavits, from which affidavits it appears that the mortgages under process of foreclosure were given upon a leasehold for a period of five years, therefore being what is known as a "chattel real," and also upon certain personal property, including the building which the mortgagor had the privilege of removing at any time during the lease by a clause inserted in the said lease, and the fixtures and certain furniture contained in the said building, and it appearing that there are certain mirrors, typewriter, chairs, etc., which the mortgagor claims were not included in the mortgage, and that the said mortgages were recorded and also filed as chattel mortgages in Kings county upon the 26th day of December, 1905, and that the foreclosure suits were instituted in or about July, 1906, and a receiver actually placed in possession—it seems to the court that the sale in foreclosure, in so far as the property of the bankrupt is covered by the foreclosure judgment, cannot be stayed. If any of the personal property was not covered by the mortgage, and therefore has not been directed to be sold, the referee in foreclosure would have no authority over that personal property, and, if a receiver in bankruptcy is appointed, it would pass to him upon qualification.

Inasmuch as the appointment of a receiver has been requested, to that extent the motion will be granted upon the terms indicated in the former opinion; and an order to that effect may be presented.

## A. D. SHAW &amp; CO. v. UNITED STATES.

(Circuit Court, S. D. New York. November 14, 1907.)

No. 5,067.

## 1. CUSTOMS DUTIES—LEAKAGE OF WINE—ALLOWANCE.

In an importation of 3,660 gallons of wine there was a shortage of 12.17 gallons in excess of the normal leakage. *Held*, that no allowance for this shortage was permissible, under Tariff Act July 24, 1897, c. 11, § 1, Schedule H, par. 296, 30 Stat. 174 [U. S. Comp. St. 1901, p. 1654], forbidding "constructive or other allowance for \* \* \* leakage \* \* \* on wines."

## 2. SAME—RECIPROCAL COMMERCIAL AGREEMENTS—SUSPENSION OF TARIFF PROVISION.

Tariff Act July 24, 1897, c. 11, § 3, 30 Stat. 203 [U. S. Comp. St. 1901, p. 1690], and the reciprocal commercial agreement with Spain (34 Stat. 3227), suspending "the imposition and collection of the duties mentioned in" said act on wines, etc., has only the effect of reducing the duty on wines provided in section 1, Schedule H, par. 296, of said act (30 Stat. 174 [U. S. Comp. St. 1901, p. 1654]), but does not supersede the further provision in said paragraph that there shall be no allowance for leakage of wines.

On Application for Review of a Decision by the Board of United States General Appraisers.

The decision below affirmed the assessment of duty on an importation into the port of New York, on the authority of *U. S. v. Shaw*, 144 Fed. 329, 75 C. C. A. 291, *U. S. v. Wile*, 130 Fed. 331, 64 C. C. A. 577, and *Richard v. U. S.* (C. C.) 151 Fed. 954.

Hatch & Clute (Walter F. Welch of counsel), for importers.  
J. Osgood Nichols, Asst. U. S. Atty.

MARTIN, District Judge (orally). Appeal by importers from a decision of the Board of United States General Appraisers. The merchandise in controversy is wine, the product of the soil and industry of Spain, imported directly from that country to the port of New York, at which port it was entered September 11, 1906. The collector imposed duty on said wine at the rate of 35 cents per gallon, the rate provided for such merchandise by the reciprocal commercial agreement between Spain and the United States, which was negotiated under the provisions of Tariff Act July 24, 1897, c. 11, § 3, 30 Stat. 203 [U. S. Comp. St. 1901, p. 1690], was proclaimed by the President August 27, 1906 and became operative September 1, 1906. 34 Stat. 3227. The importers claim (1) that duty should be assessed only on the quantity actually found by the gauger; and (2) that according to the commercial agreement with Spain the operation of paragraph 296 and the proviso thereto has been suspended, and is therefore of no force or effect in this case.

The proviso in said Act July 24, 1897, c. 11, § 1, Schedule H, par. 296, 30 Stat. 174 [U. S. Comp. St. 1901, p. 1654], to the effect "that there shall be no constructive or other allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits," is simply a regulation of procedure as to ascertaining the quantity upon

which duty is to be assessed. If the amount found wanting in the cask is simply a matter of leakage, no deduction is to be made therefor. The importer is presumed to understand this provision; and, if he uses barrels or casks that may leak, he takes his chances as to this regulation. The facts show that out of 3,660 gallons there were 12.17 gallons of leakage beyond the ordinary normal amount. This I do not deem to be anything more than the ordinary leakage that was contemplated by the act; and for such a leakage the officers of the government are not required to measure it.

It is claimed here that under section 3 of said act the President has power to suspend by proclamation "the imposition and collection of the duties in this act on such article or articles so exported to the United States from such country or colony"; that by reason of a treaty with Spain the President did make proclamation, the effect of which suspends the proviso above quoted. I do not concur in this. The effect of the President's proclamation was to reduce the rate of duty, but in no way to interfere with the modes of procedure which are prescribed by law.

The decision of the Board of General Appraisers is affirmed.

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### SMELTZER v. ST. LOUIS & S. F. R. CO.

(Circuit Court, W. D. Arkansas, Ft. Smith Division, February 29, 1908.)

#### 1. COMMERCE—REGULATION OF INTERSTATE COMMERCE—POWER OF CONGRESS.

The power of Congress under the interstate commerce clause of the Constitution is plenary, and without limitations other than those prescribed in the Constitution itself.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Commerce, § 3.]

#### 2. STATUTES—CONSTITUTIONALITY—BURDEN OF PROOF.

The burden of proof is upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the Constitution; it is not sufficient to merely raise a doubt.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 10, Constitutional Law, § 46.]

#### 3. CONSTITUTIONAL LAW—INTERSTATE COMMERCE ACT.

The provision of section 20 of the Interstate Commerce Act of Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169], as amended by the Hepburn Act of June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1907, p. 909], which makes a common carrier receiving property for transportation from a point in one state to a point in another liable for all loss or damage to such property whether it occurred on its own line or on connecting lines, and provides that no contract, receipt, rule, or regulation shall exempt it from such liability, is not unconstitutional as interfering with the liberty of contract, or as depriving the carrier of its property without due process of law, but is within the power of Congress under the commerce clause of the Constitution.

#### 4. SAME—COMMON-LAW LIABILITY—CONTRACT FOR THROUGH CARRIAGE.

Under the common law, independently of statute, where a common carrier receives property for carriage beyond its own line, issuing a through bill of lading therefor, specifying the freight for through carriage, it makes its connecting carriers its agents, and is responsible to the shipper for any loss or damage to such property either on its own or the connecting lines, which liability it cannot limit by contract.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, § 817.]

At Law. On motion to strike out paragraph of complaint.

Sam R. Chew, for plaintiff.

B. R. Davidson, for defendant.

ROGERS, District Judge. This is a motion to strike out the following paragraph of the complaint:

"And as such corporation and common carrier it became and is liable for all damages done or caused to be done to freight or property it received for transportation over its said line of railroad to points beyond and off its said line of railroad, whether such damages occurred on or off the said line of railroad."

The language quoted is based on the last two paragraphs of section 7, of what is known as the "Hepburn Act," passed June 29, 1906, c. 3591, 34 Stat. 595 [U. S. Comp. St. Supp. 1907, p. 909], which provide:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

The purpose of the suit is to hold the St. Louis & San Francisco Railroad Company, as the initial carrier, for losses sustained beyond the terminus of its line, upon a bill of lading which contained a provision distinctly limiting the liability of the initial carrier for losses which occurred on its own line. Clearly the paragraph should not be struck out if the first paragraph of section 7 of the Hepburn act quoted, *supra*, is constitutional; for, in that event, the provision in the bill of lading limiting the defendants' liability to losses sustained on its own line must be disregarded, because against public policy; it being in conflict with the statute. *Calderon v. Atlas Steamship Co.*, 170 U. S. 272-277, 18 Sup. Ct. 588, 42 L. Ed. 1033; *The Southwark*, 191 U. S. 1-17, 24 Sup. Ct. 1, 48 L. Ed. 65; *McMullen v. Hoffman*, 174 U. S. 648, 19 Sup. Ct. 839, 43 L. Ed. 1117.

The question is thus clearly presented whether the Congress had the power under the interstate commerce clause of the Constitution to enact the statute quoted. No tribunal can approach the consideration of that question without a full sense of its importance, both to the people and the railroads. If upheld, the limits of its far-reaching effects are scarcely to be comprehended in advance, and, of necessity, must result in a reconstruction of the methods employed in the conduct of the stupendous volume of commerce it

so radically affects. It is a matter of public history, and was admitted by counsel for the defendant at the argument, that abuses have for years been practiced by those in the control and management of the great transportation business of the country. The Congress, recognizing the oppressive conditions resulting from such abuses, determined upon a course of remedial legislation, and began tentatively, step by step, to exercise its constitutional power of regulation. The questions which have grown out of this legislation were new, complex, intricate, and difficult, always bordering close by the line of constitutional power, and the decisions of the great court of last resort upon these questions have been, if not obscure, exceedingly perplexing and difficult to reconcile with each other, and the judges themselves, oftener than otherwise, have been almost equally divided upon them, and not unfrequently those concurring or dissenting have reached their conclusions upon distinctly different lines of reasoning. This was, perhaps, to be expected. As far back as *Gibbons v. Ogden*, 9 Wheat. 1, 236, 6 L. Ed. 23, Mr. Justice Johnson, in his separate opinion, said that:

"It would be in vain to deny the possibility of the clashing and collision between the measures of the two governments. The line cannot be drawn with sufficient distinctness between the municipal power of the one and the commercial powers of the other. In some points they meet and blend so as scarcely to admit of separation. Hitherto the only remedy has been applied which the case admits; that of a frank and candid co-operation for the general good."

Confronted by these perplexing conditions, the question stated, involving, indirectly, at least, immense interests, has been met with that deep sense of responsibility it deserves, and has not been disposed of until it has been carefully and patiently considered. Before entering upon the consideration of the question, it is perhaps well to say that no evil results that might follow from the enforcement of any legislative act are, in any sense, a test of its constitutionality. They involve questions of expediency only, which may be properly addressed to the legislative body which enacted the statute, but are to be disregarded by the courts unless they involve the power of such body to pass the act.

The grant of the commerce power found in the Constitution is couched in these words:

"Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

The power to enact the statute under consideration must be found, if it exists, in that language. What is the "power to regulate commerce among the several states"? Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 196, 6 L. Ed. 23, answered the question, and the answer has always been acquiesced in by the courts to this day. He said:

"It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution. \* \* \* If, as has always been understood, the sovereignty of Congress, though limited to specific objects, is plenary as to those objects, the power over commerce with

foreign nations, and among the several states, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of power as are found in the Constitution of the United States."

This definition was accepted by that great court in a very recent case of the utmost importance. *Howard v. Illinois Central Railroad Company et al.*, known as the "Employer's Liability Decision" (not yet officially reported) 28 Sup. Ct. 141, 52 L. Ed. —. It is thus seen that there are no limitations to this commerce power except such as are found in the Constitution itself. To illustrate: This power to regulate commerce cannot be exercised so as to deprive one of his property without due process of law, because that would violate the fifth amendment to the Constitution, which provides, among other things, that no person shall be "deprived of life, liberty, or property without due process of law." Again, it cannot be exercised so as to invade the reserved powers of the state, because that would violate article 10 of the Constitution, which provides that:

"The powers not delegated to the United States by the Constitution, nor inhibited by it to the states, are reserved to the states respectively, or the people."

The recent decision upon the employer's liability act (Act July 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. p. 891]), *Howard v. Illinois Central R. R. Co.*, supra, is an illustration of this. There, in legislating under the commerce power, Congress invaded the municipal powers reserved to the states; and hence the act was unconstitutional. Numerous other illustrations might be suggested, but they must find their origin always in the Constitution, and nowhere else.

In considering this statute it must be kept in mind that the rule is settled by a long and unbroken line of decisions, commencing shortly after the adoption of the Constitution, and always consistently followed, that no statute shall be declared unconstitutional except in a clear case; that every possible presumption is in favor of its validity; that if a statute is susceptible of two constructions, one of which brings it within, and the other forces it beyond, the constitutional power of Congress, the former should be adopted; and that the burden of proof is upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the Constitution. It is not sufficient for them to merely raise a doubt. *Hylton v. U. S.*, 3 Dall. 175, 1 L. Ed. 556; *Legal Tender Cases*, 12 Wall. 531, 20 L. Ed. 287; *The Trade-Mark Cases*, 100 U. S. 96, 25 L. Ed. 550; *Nicol v. Ames*, 173 U. S. 514, 19 Sup. Ct. 522, 43 L. Ed. 786; *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *The Sinking Fund Cases*, 99 U. S. 718, 25 L. Ed. 496; *U. S. v. Coombs*, 12 Pet. 76, 9 L. Ed. 1004. In *Interstate, etc., R. R. v. Mass.* (decided November 4, 1907, and not yet officially reported) 28 Sup. Ct. 26, 52 L. Ed. —, the court said:

"It is not enough that the statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained."

Moreover, the rule must always be borne in mind that by the very letter of the Constitution "Congress may make all laws which shall be necessary and proper for carrying into execution" these granted powers. The commerce power is one that is expressly granted, and Congress therefore has constitutional authority expressly conferred to make all laws necessary and proper for carrying it into execution. Mr. Chief Justice Marshall said, in *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, that:

"If the act be legitimate and within the scope of the Constitution, all means which are appropriate and which are, consequently, adapted to the end, which are not prohibited, may constitutionally be employed to carry it into effect."

It is important to note, also, that while decisions relating to the constitutionality of state statutes may throw much light on the subject now to be considered, nevertheless they do not determine the limitations of the commerce power under the Constitution. On the contrary, many state statutes are held unconstitutional for the very and sole reason that they conflict with the commerce power under the Constitution.

Let us first examine critically the bill of lading sued on. For convenience these bills of lading are printed with blanks to be filled in, and at the end is a long blank in which such notations as are necessary to complete the contract are made. This bill of lading, or so much of it as is pertinent to the matter under consideration, when read as the contracting parties intended, is as follows:

"Smeltzer, Ark., July 19th, 1907.

"Received from M. F. H. Smeltzer the following described packages in apparent good order: 525 six-basket crates peaches—O. R. loaded on car F. G. E. 14,442, refrigerator charges \$74.25, consigned and marked to Robert T. Cochran & Co., New York, N. Y., to be transported over the line of the St. Louis & San Francisco Railroad Company to St. Louis station, and delivered in like good order to the care of the Big 4 and Empire Line, which line is a part of the route to the place of destination of said freight, it being distinctly understood; that the responsibility of each carrier shall not begin until it receives the freight from the consignor or from a connecting carrier and shall cease when it delivers the same to a connecting carrier or to the consignee.

"The St. Louis & San Francisco Railroad Company guarantees that the rate of transportation from the place of shipment to ——— shall not exceed the rate noted on this bill of lading and charges advanced by them, provided contents of said packages are correctly stated in the receipts (original and duplicate) on which this bill of lading is issued. This contract is subject to the following conditions: \* \* \* When the words "Owner's Risk" or the letters "O. R." are noted on this bill of lading, the shipper assumes the risk of all loss or damage to the property in the course of transportation, except that arising from carelessness of the carrier, its agents or employes. \* \* \*

"No carrier shall be responsible for loss or damage of any of the freight shipped, unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this, notice must be given within thirty hours after the arrival of same, at destination. \* \* \*

"All freight shall be subject to transfer en route, as the necessities or convenience of any carrier requires. \* \* \*

"The owner or consignee shall pay charges as per specified rates upon the goods as they arrive."

On the face of this bill of lading it is clear that the defendant received "property for transportation from a point in one state to a point in another state," i. e., from Smeltzer, Ark., to St. Louis, Mo.



After so receiving it, the merchandise, eo instanti, became the subject of interstate commerce, and, as such, subject to the regulating power of Congress. When it was so received the act of June 29, 1906 (the Hepburn act), was in full force and effect, and both contracting parties are conclusively presumed to have been acquainted with its provisions. If valid, it became incorporated into the contract as fully as if it had been written into the contract itself, and of necessity had the effect of striking down all provisions in the contract in conflict with it. It would be a waste of time to cite authorities on this point.

Bearing in mind, then, what has been said as to rules governing the courts in construing statutes with reference to the Constitution, the inquiry is how, or in what respect, is the provision of the act of June 29, 1906, quoted above, unconstitutional? This question involves an examination of that act. Defendant's counsel points to the first section of the act, where it is said:

"And it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

Also to section 2 of said act, which is as follows:

"That every common carrier subject to the provisions of this act shall file with the Commission created by this act and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between different points on its own route, and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rates have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print, and keep open to public inspection, as aforesaid, the separately established rates, fares and charges applied to the through transportation. \* \* \* The provisions of this section shall apply to all traffic, transportation, and facilities defined in this act. \* \* \*

"No carrier, unless otherwise provided by this act, shall engage or participate in the transportation of passengers or property, as defined in this act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act. \* \* \*

Also to section 4 of this act, which is as follows:

"The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line."

It is urged that the parts of the act quoted above, when taken in connection with the last two paragraphs of section 7 of the act quoted supra, operate to compel a common carrier to enter into contracts with other connecting common carriers, and then holds the former liable for such losses as occur on the line of the latter, and that such compulsion is an invasion of the liberty to contract, which is guaranteed to all persons under the Constitution.

All these provisions must be considered together. All that can be said of the first clause quoted is that it requires common carriers subject to the provisions of the act "to establish through routes and just and reasonable rates applicable thereto." In doing this, the largest liberty of contract is left by this section, unrestricted both as to rates to be established and as to the through routes, and the terms of the routing the carriers are required to make. This is made clearer by the paragraph from section 6 quoted supra, whereby it is required of all railroads subject to the provisions of the act to file with the Interstate Commerce Commission, and print and keep open to public inspection schedules showing all rates between points on its own route, and between points on its own route and points on the route of any other carrier by railroad where a through route and joint rates have been established; and, if no joint rate or through route has been established, the several carriers in such through route are required to print, file, and keep open to public inspection the separately established rates applying to the through transportation; the effect of which is that where the carrier fails for any reason to make joint rates over a through route all carriers on the through route can comply with the law by printing, filing, and publishing their separate rates over their own line, and no joint rates are required to be published unless through routes have been made. It must be said, therefore, that all this paragraph of section 6 amounts to is to require the publication of rates, the constitutional power to do which I do not think is now disputed by any one.

The paragraph quoted above from section 7 must be considered in connection with its context. In that section provision is made for the Commission to fully hear on complaint and fix the maximum rates to be charged by any road subject to the provisions of the act, where it is found by the Commission that any regulation or practice of a carrier or carriers affecting such rate are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise violative of the act. It then provides that when it has made an order fixing the maximum rate for a joint route, and the carriers interested cannot agree as to how the rates should be proportioned between them, the Commission may, after a hearing, determine and fix such proportion as each carrier should receive.

But the same paragraph, continuing, provides that when it may be necessary to give effect to any provision of the act, a carrier having refused or neglected to voluntarily establish through routes or joint rates, the Commission may, on complaint, "establish through routes and joint rates as a maximum to be charged, and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which said through route shall be operated"; but the exercise of this authority conferred on the Commission is subject to the provision that "no reasonable or satisfactory through route exists." Can it be fairly said that these provisions of the act of June 29, 1906, do anything more than require of carriers engaged in interstate commerce to make through routes

and joint rates, and in the event they neglect or refuse to do so, confers power on the Commission to establish, after hearing, through routes, and fix maximum rates, subject, of course, to be reviewed by the courts? In this case, it does not appear that the Commission has ever established through routes or fixed any rates; and hence the last paragraph is not applicable, and nothing is decided in regard thereto.

It is so much a matter of railroad history that through routes and joint rates have for a long time obtained among all the great interstate railroads that the court might well take judicial knowledge of it. The commerce of the country cannot be safely and expeditiously carried on without them. They were the outgrowth of conditions that made them a logical necessity. The Congress have given expression to that fact by the provisions referred to. And can it be fairly said that in doing so it invaded the liberty of contract guaranteed to all persons under the Constitution?

What is this liberty of contract? In *Patterson v. Bark Eudora*, 190 U. S. 176, 23 Sup. Ct. 821, 47 L. Ed. 1002, the act of Congress passed December 21, 1898, 30 Stat. 763, c. 28 [U. S. Comp. St. 1901, p. 3079], was under consideration. It provided "that it shall be and is hereby made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages to any other person," and a violation of this act was made a misdemeanor, and the law was made to apply to foreign vessels. The British bark *Eudora* violated this statute by paying its seamen wages in advance. After the voyage it was sued by the seamen for such wages as had been paid them in advance. Their libel was dismissed by the District Court in Pennsylvania. On appeal, the Circuit Court of Appeals certified two questions raised on the record to the Supreme Court of the United States. That court said:

"But the main contention is that the statute is beyond the power of Congress to enact, especially as applicable to foreign vessels. It is urged that it invades the liberty of contract which is guaranteed by the fourteenth amendment to the federal Constitution, and reference is made to *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. 427, 431, 41 L. Ed. 832, in which we said: 'The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.' Further, that even if the contract be one subject to restraint under the police power, that power is vested in the states, and not in the general government, and any restraint, if exercised at all, can only be exercised by the state in which the contract is entered into; that the only jurisdiction possessed by Congress in respect to such matters is by virtue of its power to regulate commerce, interstate and foreign; that the regulation of commerce does not carry with it the power of controlling contracts of employment by those engaged in such service any more than it includes the power to regulate contracts for service on interstate railroads, or for the manufacture of goods which may be intended for interstate or foreign commerce, and, finally, that the validity of a contract is to be determined by the law of the place of performance, and not by that of the place

of the contract; that the contract in this case was not one entered into in the United States, to be performed on board a British vessel, which is undoubtedly British territory, and therefore its validity is to be determined by British law, and that, as conceded in the question, sustains its validity. We are unable to yield our assent to this contention. That there is, generally speaking, a liberty of contract which is protected by the Fourteenth amendment may be conceded, yet such liberty does not extend to all contracts. As said in *Frisbie v. United States*, 157 U. S. 160, 165, 15 Sup. Ct. 586, 588, 39 L. Ed. 657: 'While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted power of government to restrain some individuals from all contracts as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations, except for the necessities of existence; to the common carrier the power to make any contract releasing himself from negligence; and, indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services, or property.' \* \* \* Contracts with sailors for their services are, as we have seen, exceptional in their character, and may be subjected to special restrictions for the purpose of securing the full and safe carrying on of commerce on the water. Being so subject, whenever the contract is for employment in commerce, not wholly within the state, legislation enforcing such restrictions comes within the domain of Congress, which is charged with the duty of protecting foreign and interstate commerce."

It is thus seen that while the last sentence was obiter in that case, yet the Supreme Court gave its sanction to the doctrine that Congress has the power, under the commerce clause, to enact like legislation applicable to those engaged in interstate commerce. In *U. S. v. Col. & Northwestern Railroad Company* (not yet officially reported) 28 Sup. Ct. 321, 52 L. Ed. —, the Eighth Circuit Court of Appeals asserted the same doctrine. It said:

"The power to regulate interstate commerce is as complete upon the land as upon the navigable waters of the nation, and congressional regulation upon the former must be interpreted by the same rules and enforced with the same efficiency as like regulations upon the latter. In *re Debs*, 158 U. S. 564, 590, 591, 15 Sup. Ct. 900, 39 L. Ed. 1092." See, also, *Buttfield v. Stranahan*, 192 U. S. 492, 24 Sup. Ct. 349, 48 L. Ed. 525.

In *Frisbie v. U. S.*, 157 U. S. 160, 15 Sup. Ct. 586, 39 L. Ed. 657, *Frisbie* was indicted under an act of Congress which made it a misdemeanor to contract for, demand, receive, or retain for services rendered in procuring a pension any sum in excess of \$10. It was contended the act was unconstitutional, because interfering with the price of labor, and the freedom of contract. The court said:

"Congress being at liberty to give or withhold a pension may prescribe who shall receive it, and determine all the circumstances and conditions under which any application therefor shall be prosecuted. No man has a legal right to a pension, and no man has a legal right to interfere in the matter of obtaining pensions for himself or others. The whole control of that matter is within the domain of congressional power. *United States v. Hall*, 98 U. S. 343, 25 L. Ed. 180. Having power to legislate on this whole matter, to prescribe the conditions under which parties may assist in procuring pensions, it has the equal power to enforce by penal provisions compliance with its requirements. There can be no reasonable question of the constitutionality of this statute. See, also, *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed.

136, where it is said: 'Under the grant of power to Congress, contained in section 8 of article 1 of the Constitution, "to regulate commerce with foreign nations and among the several states, and with Indian Tribes," that body may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract shall be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any extent interstate or foreign commerce.'

One can scarcely read the Lottery Case (*Champion v. Ames*, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. Ed. 492), where many cases are collated illustrating the extent to which Congress has gone in restraining and regulating interstate commerce, and been sustained by the Supreme Court, without the conviction that the act of June 29, 1906, so far as the question now being discussed is concerned, is not open to the objection that it invades the liberty of contract guaranteed under the Constitution. In that case an absolute embargo was laid on the transportation of lottery tickets from one state to another state. The same power has been frequently exercised as to foreign nations, as in the matter of the prohibition of the importation of adulterated tea (192 U. S. 492, 24 Sup. Ct. 349, 48 L. Ed. 525); and also as to the Indian tribes, as in the matter of the introduction and sale of liquors and the prohibition of white persons trading with the Indians unless licensed to do so (93 U. S. 194, 22 L. Ed. 846); and also among the states, as in the case of the prohibition of the introduction of diseased cattle from one state to another state. Other instances might be given, but these serve the purpose in view. If it be said that these cases relate to the health, morals, and welfare of the people, and are in the nature of police regulations, the answer has already been given, that the commerce power is plenary, is not confined or limited by the scope of the ordinary police powers as they are exercised by the state, but is restrained and limited only by the Constitution itself. The sovereignty of the United States, within the powers enumerated and delegated to them by the Constitution, is as complete, plenary, and absolute as the same power was in the states before it was delegated by them, and is therefore not limited to the enactment of mere police regulations affecting the health, morals, and welfare of the people.

In *Buttfield v. Stranahan*, 192 U. S. 492, 24 Sup. Ct. 349, 48 L. Ed. 525, Mr. Justice White, speaking for an undivided court, said:

"The power to regulate commerce with foreign nations is expressly conferred upon Congress, and being an enumerated power is complete in itself, acknowledging no limitations other than those prescribed in the Constitution. Lottery Case, *Champion v. Ames*, 188 U. S. 321, 353-356, 23 Sup. Ct. 321, 47 L. Ed. 492; *Leisy v. Hardin*, 135 U. S. 100, 108, 10 Sup. Ct. 681, 34 L. Ed. 128. Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power, resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly by the enactment of embargo statutes, but indirectly as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff legislation, exerted a police power over foreign commerce by provisions which in and of themselves amounted to the assertion of the right to exclude merchandise at discretion. This is illustrated by statutory provisions which have

been in force more than fifty years, regulating the degree of strength of drugs, medicines and chemicals entitled to admission into the United States, and excluding such as did not equal the standards adopted. Act June 26, 1848, c. 70, 9 Stat. 237; Rev. St. § 2933 et seq. [U. S. Comp. St. 1901, p. 1936 et seq.].

"The power to regulate foreign commerce is certainly as efficacious as that to regulate commerce with the Indian tribes. And this last power was referred to in United States v. 43 Gallons of Whisky, 93 U. S. 188, 22 L. Ed. 846, as exclusive and absolute, and was declared to be 'as broad and free from restrictions as that to regulate commerce with foreign nations.' In that case it was held that it was competent for Congress to extend the prohibition against the unlicensed introduction and sale of spirituous liquors in the Indian country to territory in proximity to that occupied by the Indians, thus restricting commerce with them. We entertain no doubt that it was competent for Congress, by statute, under the power to regulate foreign commerce, to establish standards and provide that no right should exist to import teas from foreign countries into the United States, unless such teas should be equal to the standards."

In the Lottery Case, *supra*, the court said:

"The act of July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], known as the 'Sherman Anti-Trust Act,' and which is based upon the power of Congress to regulate commerce among the states, is an illustration of the proposition that regulation may take the form of prohibition. The object of that act was to protect trade and commerce against unlawful restraints and monopolies. To accomplish that object Congress declared certain contracts to be illegal. That act, in effect, prohibited the doing of certain things, and its prohibitory clauses have been sustained in several cases as valid under the power of Congress to regulate interstate commerce. *United States v. Trans-mission Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; *United States v. Joint Traffic Association*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259; *Addyston Pipe & Steel Company v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136. In the case last named the court, referring to the power of Congress to regulate commerce among the states, said: 'In *Gibbons v. Ogden*, *supra*, the power was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. Under this grant of power to Congress, that body, in our judgment, may enact such legislation as shall declare void and prohibit the performance of any contract between individuals or corporations where the natural and direct effect of such a contract will be, when carried out, to directly, and not as a mere incident to other and innocent purposes, regulate to any substantial extent interstate commerce. (And when we speak of interstate we also include in our meaning foreign commerce.) We do not assent to the correctness of the proposition that the constitutional guaranty of liberty to the individual to enter into private contracts limits the power of Congress and prevents it from legislating upon the subject of contracts of the class mentioned. The power to regulate interstate commerce is, as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution which provides that no person shall be deprived of life, liberty or property without due process of law.' Again: 'The provision in the Constitution does not, as we believe, exclude Congress from legislating with regard to contracts of the above nature while in the exercise of its constitutional right to regulate commerce among the states. On the contrary, we think the provision regarding the liberty of the citizen is, to some extent, limited by the commerce clause of the Constitution, and that the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially, and not merely indirectly, remotely, incidentally, and collaterally, regulate to a greater or less degree commerce among the states.' See, also, *Minn. Iron Co. v. Kline*, 199 U. S. 593, 26 Sup. Ct. 159, 50 L. Ed. 322.

The next contention is that the first paragraph of section 7, *supra*, from the act of June 29, 1906, is in violation of the fifth

amendment to the Constitution, which prevents any person from being deprived of his property without due process of law, in that it makes the initial carrier liable for any loss that may occur on the line of the connecting carrier on a through route. Assume that it makes the initial carrier liable for losses which occur by reason of the negligence of connecting carriers, and that the initial carrier is deprived of the right to contract against the negligence of the connecting carrier. This being so, does this statute go any further than the statute known as the "Employer's Liability Act"? Before the passage of that act the carrier could not be held liable for an injury to an employé engaged in interstate commerce, resulting from the negligence of a fellow servant. But that act changed the rule in that respect, and gave the injured employé a right of action against the master, although the master was free from any negligence that contributed to the injury. Although that act was held void, because it blended interstate with intrastate commerce so that the two were inseparable, yet six of the nine judges held (the very point suggested being under consideration) that, if the act had been confined to employés engaged in interstate commerce, it would have been constitutional. The same rule has been changed in the same way in almost all of the states, and is upheld without question. *Minn. Iron Co. v. Kline*, 199 U. S. 593, 26 Sup. Ct. 159, 50 L. Ed. 322; *Mo. Pac. Ry. Co. v. Mackay*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107. In these cases state statutes were under consideration, and a priori an act of Congress of like purport would be upheld under the commerce clause. But at most the act under consideration is only declaratory of what the law was already, as it had been interpreted by the courts of many jurisdictions before the passage of the act of June 29, 1906, as we shall see later.

But it is urged that the last paragraph of section 7, quoted above, is open to the same objection, i. e., that it violates the fifth amendment, because it makes the "receipt, judgment, or transcript" of the case in which payments made by the initial carrier to the shipper for property that is lost on the connecting carrier's line conclusive of the right to recover against the latter. It will be time enough to consider that question when presented in some case where it is necessarily involved. It is not involved in this case, and can never be, for the reason that this case is brought against the initial carrier. It may, however, be remarked in passing, that the right of action over against the connecting carrier, by the initial carrier, for losses on the former's line existed, as we shall see later, in many jurisdictions before the passage of the act of June 29, 1906. The courts, when called upon to construe that paragraph, may conclude that it only created a rule of evidence, at most *prima facie*. *Winton v. State*, 77 Ark. 143, 91 S. W. 7; *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575. In the last case it was held that it is "within the statutory power of the state to prescribe the evidence which is to be received in the courts of its own government." Nothing, however, is decided on the question, for the reasons already stated. I may add, in passing, that if the courts

should hold the last paragraph of section 7 of the act of June 20, 1906, void because it violates the fifth amendment to the Constitution, still, the preceding paragraph of that section (now in question) would not, necessarily, fall, because the two paragraphs are separable, the validity of the former in no sense depending upon the validity of the latter.

But there is another aspect of this case that cannot be overlooked in considering this motion. Suppose it should be admitted that the contention of defendant's counsel is sound, and that the provisions of the statute quoted, when considered together, operate to compel defendant to enter into the contract for the shipment of the fruit over through routes upon joint rates established by or under compulsion of law, and that it is prohibited by that law from contracting against liability beyond its own line, and that this was a violation of its liberty to contract! How is the compulsion in this case made to appear? It does not appear in the complaint or bill of lading. As to whether the contract for the shipment was voluntarily made or made under compulsion is a question of fact, upon which both parties are entitled to be heard. It cannot be presumed that it was made under compulsion, because there is nothing unusual in through-routing or joint rates. Substantially this form of contract was in use long before the act of June 29, 1906, was passed, and containing, as in this case, provisions against the liability of the initial carrier beyond its own line. The books are replete with such cases, construing such contracts, and conflicting conclusions have been reached as to the liability of the initial carrier. 48 N. H. 339, 2 Am. Rep. 242. For aught that appears, how can the court know that the arrangement for through routes and joint rates in this case was not made, between the initial carrier and the connecting carriers, long before the act of June 29, 1906, was passed, and this very contract made under such an arrangement? In that event the only question would then be, whether the provision in the act of June 29, 1906, striking down the right of a railroad to contract against loss beyond its own line, was valid. To state the matter in another form, this contract, we will assume, was made voluntarily and not under compulsion; it was to transport freight from a point in one state to a point in another state; the Hepburn act in such case made the initial carrier liable for all loss or damage to the freight, whether it occurred on its own line or connecting lines. Is such an act, in such a case, void? To state the question, it seems to me, is to answer it, for the simple reason that the Hepburn act, being in force, became a part of the contract, and all other parts of the contract in conflict with it were stricken down by the act.

But let us look further as to what obligations were assumed in the bill of lading sued on. Did this bill of lading obligate the initial carrier to deliver the shipment of fruit to the consignee in New York, or was it discharged from all responsibility when it delivered the fruit to the Big 4 railroad at St. Louis station? If its obligation required it to deliver the goods to the consignee at New York, is it not responsible to the shipper, independent of the Hep-



burn act without regard to where the loss occurred? It is a principle of law that no one can contract against his own negligence, and the carrier is the insurer of the goods in transit against everybody, except the act of God and the public enemy. 17 Wall. 357-381, 21 L. Ed. 627. If the carrier undertakes to deliver the goods at a point requiring them to pass over connecting lines, are not such lines the carrier's agents, and why is not the carrier as much bound for its agent's negligence as for its own? The complaint and the bill of lading taken together show that the shipment of peaches was received by the defendant at Van Buren, Ark., consigned to Robert T. Cochran & Co. of New York, care of Big 4 and Empire line; that the freight and icing charges were agreed upon covering the shipment to the point of destination; that the fruit was to pass over defendant's line to St. Louis station, and there to be delivered to the Big 4 railroad, the initial carrier guaranteeing the rates and charges to point of destination. The right to transfer the fruit en route, when the necessities of any carrier required was reserved in the contract made with the initial carrier; the charges were to be paid by the consignee on arrival at New York. Let us examine this contract in the light of the adjudicated cases, and see what construction shall be placed upon such a bill of lading, and how the questions above suggested should be answered.

In *Taylor, Cleveland & Company v. L. R. Miss. River & Texas R. Co.*, 32 Ark. 393, 29 Am. Rep. 1, the court said that the initial carrier can stipulate against liability for loss beyond its own line. *R. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627. The facts in that case were very similar to those in this case. The common-law rule is exactly the reverse. *R. R. Co. v. Lockwood*, supra. In *Railroad Co. v. Lockwood*, Mr. Justice Bradley, whose erudition enabled him to adorn any subject he treated, reviewed the decisions of a large number of the states, as well as the decisions and the course of legislation in England on this subject, and deduced therefrom, among other things, the following principles of law: First, a common carrier can stipulate against its common-law liability as long as the stipulations are reasonable and just, but it cannot stipulate against its own negligence, or that of its servants or agents; second, a common carrier cannot, by stipulation, lose its character generally as such and become a mere bailee; third, the federal courts are not bound by state decisions in this class of cases, it being a commercial question. That case did not involve the liability of an initial carrier beyond its own line; but the case of *R. R. Co. v. R. R. Co.*, 110 U. S. 688, 4 Sup. Ct. 185, 28 L. Ed. 291, does involve that very question, and the court said:

"At common law, a carrier is not bound to carry except on his own line, and we think it right clear that if he contracts to go beyond he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. His contract is equivalent to an extension of his line for the purposes of the contract, and if he holds himself out as a carrier beyond the line, so that he may be required to carry in that way for all alike, he may nevertheless confine himself in carrying to the particular route he chooses to use. He puts himself in no worse position, by extending his route with the

help of others, than he would occupy if the means of transportation employed were all his own. He certainly may select his own agencies and his own associates for doing his own work."

In *Railroad Co. v. Pratt*, 22 Wall. 123, 22 L. Ed. 827, the suit was brought in Massachusetts by attachment, against the Ogdensburg & Lake Champlain R. R. Co., a New York corporation, which was the initial carrier, to recover from that company damages for the loss of certain horses shipped by plaintiff, who had put them in two cars of defendant company in New York, and which were burned to death, not on the defendant's road, but on the Vermont Central Railroad, a Vermont corporation connecting with the former, but not belonging to the same corporation. The Vermont railroad, near the southeastern boundary of Vermont, connected with another road which entered Boston. The horses were shipped from Potsdam, N. Y., to Boston, over these three roads. The contract price was \$85 per car to Boston, and the contract itself is substantially the same as the one in this case, except there seems to have been no express contract limiting the liability to the road on which the loss occurred. The fire which burned the cars resulted from a defective roof on the cars, which permitted the sparks to ignite the hay placed in them for the horses to stand on. The court said:

"First. As to the power of the railroad company to contract as a common carrier for the transportation of property beyond the terminus of its own road. The distinction between the liability of a carrier, in carrying goods upon its own line, and in forwarding them when the duty to carry is at an end, is well defined. In the language of Mr. Justice Davis, in *Railroad Company v. Manufacturing Company*, 'it is the duty of the carrier, in the absence of any special contract, to carry safely to the end of his line, and to deliver to the next carrier in the route beyond. \* \* \*' The fair result of the American cases limits the carrier's liability as such, when no special contract is made, to his own line, although there are cases which hold the liability as continuing the same throughout the whole route, and such is the English doctrine. A discussion on this point is unnecessary, as the judge on the trial held the rule as we have stated it, and as was most favorable to the defendants. He charged the jury that the defendants were only liable upon a contract to be proved that they had assumed a liability beyond that imposed by law. \* \* \* Assuming the case to stand upon the general principles applicable to the question, the doctrine that a railroad company may subject itself to the obligations of a carrier beyond its own line has been distinctly held in the state of New York, where this contract was made; in the state of Massachusetts, where its performance was to be completed; and in the state of Vermont, where the alleged injury occurred. In the case of *Burtis v. Buffalo & St. Lawrence Railroad*, 24 N. Y. 269, it was held that this principle applied to connecting roads extending beyond the limits of the state. The single exception to this holding, so far as we are aware, is in the state of Connecticut, where the contrary has been held by its Supreme Court. This case, however, does not stand upon the general principle only. By the statutes of New York it is enacted as follows: 'Any railroad company receiving freight for transportation shall be entitled to the same rights and subject to the same responsibilities as common carriers. Whenever two or more railroad companies are connected together, any company owning either of said roads receiving freight to be transported to any place on the line of either of said roads so connected shall be liable as common carriers for the delivery of such freight at such place. In case any such company shall become liable to pay any sum by reason of the neglect of any other company or companies, the company paying such sum may collect the same of the company by whose neglect it became so liable.' This statute is declared by *Rapallo, J.*, in *Root v. Great Western Railroad*, 45 N. Y. 524, to

be declaratory merely. We do not see that there is room to doubt the power of the company to make the contract in question."

So here, I think the act declaratory merely, as to this precise point. The court then considered the question whether there was evidence to show that the initial carrier contracted to transport the horses beyond its own terminus, and over other roads, to Boston. There was oral evidence, and the waybill was also introduced. The court said:

"This evidence shows that the oral engagement was 'to carry his horses to Boston,' not to carry to Rouse's Point and thence to forward to Boston, but 'to carry' as well and as fully over the Vermont and Massachusetts roads as over the Ogdensburg road. Again, a specific price was agreed upon for transportation over the whole route. This was in accordance with the practice, and whether paid at Potsdam or at Boston was unimportant. This practice had been continued for years, and the jury had the right to hold the contract to be the same, without reference to prepayment or postpayment. The jury were justified in inferring that where a carrier fixes a price for transportation over the whole route, that he makes the entire contract his own. One who carries simply over his own line, and thence forwards by other lines, would ordinarily, the jury may say, make or collect his own charges and leave the remaining charges to be collected by those performing the remaining service. Receipt of the entire pay affords a fair presumption of an entire contract. The language of the waybill is quite expressive. It describes 'merchandise transported \* \* \* from Potsdam to Boston.' 'Transported' or 'carried' are equivalent terms, and quite distinct from the idea of forwarding. Whether looked upon as a contract, or as a declaration, or as an admission simply, the waybill furnishes evidence that the Ogdensburg Company undertook to carry the horses to Boston. In *Root v. Great Western*, in speaking of the contract to transport as a common carrier over other lines, the court say: 'Such an undertaking may be established by express contract, or by showing that the company held itself out as a carrier for the entire distance, or received freight for the entire distance, or other circumstances indicating an understanding that it was to carry through.' We think there was competent evidence before the jury that the company undertook to carry this property to Boston, and the jury having found such to be the fact, the other companies are to be deemed the agents of the defendants, for whose faults they are responsible."

The question is considered, then, whether the Vermont road was the agent of the initial carrier, and the court said:

"The authorities sustain the position taken by the judge at the trial. In *New Jersey Steam Navigation Company v. Merchants Bank*, 6 How. 344, 12 L. Ed. 465, Mr. Justice Nelson says: 'If it is competent at all for the carrier to stipulate for the gross negligence of himself and servants or agents in the transportation of goods, it should be required to be done at least in terms that would leave no doubt as to the meaning of the parties.' To this effect are the *New York and Massachusetts* cases before cited. In *Railroad Company v. Manufacturing Company*, 16 Wall. 318, 21 L. Ed. 297, it was declared that the court did not intend to relax the rule by which the liability of carriers was established. In *Railroad Company v. Lockwood* the following, among other propositions, were reiterated and established by the unanimous judgment of the court: (1) That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. (2) That it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. The judge at the trial of this case might have gone much further than he did, and have charged that if the jury found the company to have been negligent and careless in furnishing cars, they would not be relieved from responsibility, although there had been an agreement that they should not be liable therefor."

*Bank of Kentucky v. Adams Express Company*, 93 U. S. 174, 23 L. Ed. 872, is a case strongly in point. The Southern Express Company had received in New Orleans, La., two packages of money to be delivered to certain banks in Louisville, Ky. That company conveyed the packages to Humbolt, Tenn., and delivered them to the Adams Express Company, which was also the agent of the Southern Express Company between Humbolt and Louisville. By reason of the negligence of the railroad company over which the packages were being carried, a trestle gave way, the car was precipitated below, the messenger disabled, and the packages burned by fire which started from the locomotive. The ordinary agreement between the express companies and the railroad company for transporting express matter subsisted, and the two express companies were shown to be engaged in transporting the packages from New Orleans to Louisville, Ky. The question was whether the railroad company was the agent of the express company and therefore the express companies liable, or was the railroad liable because of its own negligence to which the loss was directly attributable. The court said:

"The railroad company, in transporting the messenger of the defendants and the express matter in his charge, was the agent of somebody; either of the express company, or of the shippers or consignees of the property. That it was the agent of the defendants is quite clear. It was employed by them and paid by them. The service it was called upon to perform was a service for the defendants; a duty incumbent upon them, and not upon the plaintiffs. The latter had nothing to do with the employment. It was neither directed by them, nor had they any control over the railroad company or its employés. It is true the defendants had also no control over the company or its servants; but they were its employers, presumably they paid for its service; and that service was directly and immediately for them. Control of the conduct of an agency is not in all cases essential to liability for the consequences of that conduct. If any one is to be affected by the acts or omissions of persons employed to do a particular service, surely it must be he who gave the employment. Their acts become his, because done in his service and by his direction. Moreover, a common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ a subordinate agency; but it must be subordinate to him, and not to one who neither employs it nor pays it, nor has any right to interfere with it."

The court held the express companies liable, saying:

"Public policy demands that the right of the owners to absolute security against the negligence of the carrier, and of all persons engaged in performing the carrier's duty, shall not be taken away by any reservation in the carrier's receipt, or by any arrangement between him and the performing company."

This doctrine is ably fortified by the case of *Nashua Lock Company v. Worcester and Nashua Railroad Company*, 48 N. H. 339, 2 Am. Rep. 242. The opinion was delivered in 1869. In that case the authorities in England and America are collated, considered, and weighed in the light of reason and authority, and the convenience and necessities of commerce at that day, and the conclusion is this:

"Where several common carriers are associated in a continuous line of transportation, and, in the course of the business, goods are carried through the connected line for one price under an agreement by which the freight money is divided among the associated carriers, in proportions fixed by the agreement; if the carrier at one end of the line receives goods to be transported

through marked for a consignee at the other end of the line, and on delivery of the goods takes pay for transportation through, the carrier who so receives the goods is bound to carry them, or see that they are carried to their final destination, and is liable for an accidental loss happening in any part of the connected line."

I need not multiply authorities, or take up further time in this matter. This court is bound by the cases in 110 U. S. 688, 4 Sup. Ct. 185, 28 L. Ed. 291, and 22 Wall. 123, 22 L. Ed. 827, and the case in 48 N. H. 339, 2 Am. Rep. 242, has his unqualified approval.

In the case at bar the bill of lading contains this provision:

"When the words 'Owner's Risk' or the letters 'O. R.' are noted on this bill of lading, the shipper assumes the risk of all loss or damage to the property in the course of transportation, except that arising from carelessness of the carrier, its agents or employes."

It will thus be seen that there was no effort in this case on the part of the initial carrier to contract against its own carelessness, or that of its agents or employes. I conclude that *prima facie* the Big 4 and the Empire lines where, under this contract as it now appears of record, the agents of the defendant, and that it could not contract against its liability for the negligence of its own agents, and that the seventh section of the act of June 29, 1906, strikes down the provision in the bill of lading exempting the defendant from liability for loss occurring on the lines of its agents or connecting carriers.

In *Minnesota Iron Co. v. Kline*, 199 U. S. 593-598, 26 Sup. Ct. 159, 50 L. Ed. 322, that court said:

"It was not argued that the statute was bad as interfering unduly with freedom of contract. There is no doubt that that freedom may be limited where there are visible reasons of public policy for the limitation. *Holden v. Hardy*, 169 U. S. 366-391, 18 Sup. Ct. 388, 42 L. Ed. 780."

Instances of this may be found under the decisions based on state statutes. *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 388, 42 L. Ed. 780. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Ozan Lbr. Co. v. Union Co. Nat. Bank of Ind.* (not yet officially reported) 28 Sup. Ct. 89, 52 L. Ed. —.

The Congress recognize the difficulty shippers, especially small shippers, had when goods were lost, and especially when they were damaged, to trace the goods and fix the liability and recover their loss. Not unfrequently the effort to do so involved more time and expense than the value of the goods damaged or lost. It recognized the additional fact that the facilities of the initial carrier were much greater than those of the shipper to locate the goods and fix the liability for loss or damage, and that it was, at all events, easily within the power of the carriers to adopt methods by which it could be done; methods, too, which were absolutely denied the shippers by reason of manifestly insuperable obstacles and conditions. The evident purpose of Congress in the enactment of the statute under consideration was to enable the shipper to have recourse to the receiving carrier, and leave it to its recourse upon the particular company which inflicted the injury. The act, I

think, rests on a substantial and visible reason of public policy, which must address itself to every fair mind cognizant of the conditions which inspired this remedial legislation regulating the immense volume of interstate commerce in this vast country. I do not share the evil forebodings of the learned counsel for defendant in respect to this statute, if upheld by the court; but, if I did, the result could not be otherwise. The question is not one of policy; it is one of law. I do not think it is in conflict with the Constitution for any reason; but clearly within its constitutional purview.

The motion is overruled.

WAILES v. DAVIES et al.

(Circuit Court, D. Nevada. December 23, 1907.)

No. 814.

1. MINES AND MINERALS—LOCATION OF MINING CLAIMS—NECESSITY OF RECORDING CERTIFICATE.

Comp. Laws Nev. 1900, § 210, providing for the recording of certificates of location of mining claims, is directory only, and, where the doing of the acts required to make a valid location is fully proved by other testimony, it will not be invalidated by a failure to record a certificate thereof.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, §§ 45-50.]

2. SAME—FORFEITURE OF CLAIMS—BURDEN OF PROOF TO ESTABLISH.

The burden of proof is always upon the party seeking to establish the forfeiture of a mining claim, and the proof must be clear and convincing that the owner has failed to comply with the law.

3. SAME—ASSESSMENT WORK—CHARACTER OF WORK REQUIRED.

Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426], which requires that not less than \$100 worth of labor shall be performed or improvements made on a mining claim during each year, does not specify the kind of labor, and labor expended in extracting ore from the claim is within the requirement. It is only when labor is performed without the boundaries of the claim that its character becomes material, and in that case it must tend to the development or improvement of the claim or it will not count.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Mines and Minerals, §§ 51-55.]

4. SAME—CLAIM OWNED BY CORPORATION—WORK DONE BY STOCKHOLDER.

A stockholder in a mining company has such a beneficial interest in the corporate property that any mining work done by him on unpatented claims of the company must be counted as representation work, and if sufficient in amount, and done at the proper time, will prevent a forfeiture of the claims.

5. FRAUDULENT CONVEYANCES—SUFFERING LOSS OF PROPERTY—MINES—RELOCATION TO DEFRAUD CREDITORS—EFFECT IN EQUITY.

On December 29th, defendant obtained a judgment against a mining company, and on the next day an execution was issued and levied on unpatented mining claims of the company, under which the claims were sold and purchased by defendant. On January 1st, following the levy, complainant, at the instance of one of the stockholders of the company and with the connivance and assistance of others, relocated such claims, claiming that they had been forfeited by the failure of the company to do the required assessment work for the preceding year. In fact a sufficient amount of work had been done on some of the claims by the stockholder procuring the relocation, and his purpose was to defeat the collection of defendant's judgment, of which purpose complainant had actual or con-

structive knowledge. *Held* that, under Comp. Laws Nev. § 2708, which provides that all conveyances with intent to hinder, delay, or defraud creditors are void as against such creditors, as well as under the common law, the attempted relocation was fraudulent, and that a court of equity would not grant complainant relief by quieting his title as against defendant.

In Equity.

Henry K. Mitchell, for complainant.

Alfred Chartz, for defendants.

FARRINGTON, District Judge. This is a suit to quiet title to certain mining claims in Eureka county, Nev. Prior to January 1, 1905, the entire property, consisting of 11 claims, known as the Amazon, Prince of Wales, Copper Glance, Jefferson, Copper Nut, Copper King, Copper Bolt, Daisy, St. Denis, Blue Jay, and Black Bird, belonged to the Whalen Consolidated Copper Mining Company, an Illinois corporation. December 29, 1904, the defendant Davies obtained a judgment in the District Court of the Third Judicial District of the state of Nevada, in and for the county of Eureka, against said company, for the sum of \$1,792.77. December 30, 1904, execution was issued, and on the following day it was levied on the mining claims just mentioned. February 18, 1905, all of these mining claims were purchased on execution sale by defendant Davies. It is alleged that complainant Wailes relocated each of said mining claims January 1, 1905; also, that each claim so relocated had been abandoned by the Whalen Consolidated Copper Mining Company.

1. No issue has been raised as to the regularity of the execution sale, and although there has been some contention as to the time when the relocations were made, and the discovery work done, still the weight of testimony is to the effect that stakes were erected, monuments placed, corners marked, and the discovery work done on each claim alleged to have been relocated by Wailes, in strict accordance with law. Whether the statute relating to the certificates of location (Comp. Laws Nev. § 210) was observed with equal strictness is open to question; but any discussion of that subject, under the recent decision of this court in the case of *Zerres v. Vanina* (C. C.) 134 Fed. 610, and under the still more recent decision of the Supreme Court of the state of Nevada in the case of *Ford v. Campbell*, 92 Pac. 206, would be unprofitable. The doing of the acts required by law has been established by testimony of men actually employed in the work, and the additional proof which might have been afforded by properly drawn and recorded certificates of location is unnecessary. The locations also appear to have been based upon a discovery of valuable mineral within the limits of each claim.

2. The next questions bring us to the real issue in the case. Was the mining ground so relocated open to relocation? Had the Whalen Consolidated Copper Mining Company forfeited or abandoned its claims by failing to do the annual labor required by law for the year 1904? If the answer is in the negative, the mines were the property of the company, and defendant must prevail by virtue of the execution sale. On the other hand, if the annual labor was not performed, complainant

must prevail by virtue of his relocations, unless it should appear that he obtained the property in such a manner that a court of equity can afford him no relief. The burden of proof is always upon the party seeking to establish the forfeiture of a mining claim. Courts have always been very reluctant to enforce forfeitures; "they have settled the doctrine that a forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law." 2 Lindley on Mines, §§ 643, 645; *Hammer v. Garfield M. & M. Co.*, 130 U. S. 291, 301, 9 Sup. Ct. 548, 32 L. Ed. 964.

3. The evidence shows that no work was performed on the Copper Glance, Copper Nut, Daisy, St. Denis, Blue Jay, or Black Bird claims for the year 1904; and it also shows that the requisite amount of labor was not performed on the Jefferson or the Copper Bolt for that year. Nor is there any evidence in the record showing that work performed on other mines tended to develop or benefit the eight claims last mentioned. Consequently, as between the parties to this suit, I shall hold that the representation work for the year 1904 was not performed on the Copper Glance, Copper Nut, Daisy, St. Denis, Blue Jay, Black Bird, Jefferson, or Copper Bolt.

4. The testimony in relation to the amount of work done on the Copper Nut, Amazon, and Prince of Wales for the year 1904 is not entirely harmonious. All the witnesses on this subject say that work was done on the Prince of Wales and Copper Nut, but do not agree as to the amount. Mr. Leighton, a witness for complainant, testifies that two men worked on the Copper Nut not more than two or three days, at \$3 per day; on the Prince of Wales, two boys worked four or five days getting out waste, at a cost of \$2 per day each; and three men and two boys, with a horse, were engaged five or six days getting out ore from the Prince of Wales—for three or four days there were four men instead of three—the men were paid \$3 per day. Mr. Shaw testifies that there was fully \$100 worth of work done on each of said mines, namely, the Prince of Wales, Amazon, and Copper Nut. Nine men worked on the Copper Nut for four or five days. On the Prince of Wales seven men worked continuously for three weeks, then two men were taken away, and Mr. Shaw continued to work there two weeks longer, with two horses, hoisting waste. The Prince of Wales and Amazon were worked through the same shaft. James Mackey, a miner, and apparently a disinterested witness, testifies that he worked on the claims of the Whalen Consolidated Copper Mining Company 31 days, beginning May 23, 1904. At the time he commenced there were eight or nine men at work, and when he quit there were four or five persons still at work. He began work on the Copper Nut, then went to the Prince of Wales and worked about three weeks. The Amazon and Prince of Wales are practically the same mine, he worked on both. He also worked five or six days on the new shaft on the Prince of Wales. Frank C. Lewis, a witness for defendant, also a miner, and apparently disinterested, testified that he commenced work on the mines about May 1, 1904, and worked until August 2, 1904. There were nine or ten men working part of the time, and four all of the time. Two hundred dollars' worth of work was done on the Prince of Wales, \$100



worth on the Amazon, and \$120 worth on the Copper Nut for the year 1904. Charles Lay for the complainant, testifies, as follows:

"We took out the ore from the Prince of Wales, and some from the Copper Nut, on the dumps, and in the meantime Mr. Leighton and I had taken up some other claims, and we took ore from them, and I shipped that ore, twenty-three tons of it, to California, and twelve tons of it to Salt Lake City. \* \* \* There was no work done except the ore that I shipped away from there. That was on three, and maybe, perhaps, four, claims; not more than that."

Only 14 sacks of this ore was taken from mines not owned by the company. As the ore was sorted, and only the most valuable shipped, it is safe to assume that much more than 35 tons was extracted. Complainant's contention that \$100 worth of labor was not performed on each of the three claims is not supported by that clear and convincing evidence which is essential to establish such a fact in cases of this character. I must therefore hold that the labor performed in 1904 on the Prince of Wales, the Copper Nut, and the Amazon amounted to more than \$100 worth for each claim.

5. The objection that extracting ore is not development work is entirely immaterial. The language of the statute is "on each claim located after the 10th day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year." Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426]. Obviously the purpose of this statute is to require the mine owner to evidence his good faith by performing \$100 worth of labor on each claim each year until patent issues. The statute does not require any particular character of labor; it does not require that the work shall be wisely and judiciously done; nor does it say how the work shall be performed. The fact is, the better the mine, the greater the portion of labor which is devoted exclusively to the extraction of ore; and the ideal mine is one in which no prospecting or development work is necessary, where no work is required except the extraction of ore, and the depletion of the treasure, which is the sole value of the mine. If \$100 worth of labor in the nature of mining is performed on a claim by the owner, whether the work is beneficial or not, there can be no forfeiture. The character of labor becomes material when it is performed without the boundaries of the claim. In that event, the labor must tend to the development or improvement of the mining claim for which it is designed, otherwise it will not count.

6. Complainant earnestly contends that this work was not done by or under the authority of the company; that Mr. Lay, in 1904, was neither an agent nor an officer of the company; that he had no intention of doing the assessment work, and consequently the work on the three claims cannot inure to the benefit of the company or defendant Davies. Mr. Lay testifies that he was neither an officer nor an agent of the Whalen Consolidated Copper Mining Company during 1904 and the three preceding years; that he had no authority from the company, and was on the ground simply as a stockholder representing himself. He resigned his office as secretary in 1900, but "still continued to be the chief man in interest, or in attempting to get others to

put their money in there to keep this thing alive," and was "the principal man interested in the Whalen Consolidated Copper Mining Company in looking after the work during all of the years." He was the owner of more than 22,000 out of a total of 100,000 shares of the capital stock of the company. His expenses incurred in performing the work on the mines for the years 1901, 1902, and 1903 amounted to about \$2,700, and, in addition to this, there was the expense of his trip to Carson in 1904 to attend the trial of a case in which that company was interested.

Charles Lay also testifies:

"We tried to keep the old company alive by doing the work in each year. In 1901 I asked a number of people to join me that were owners of the stock, and only one would do so."

Mr. Lay claims that in 1901 he advanced half the money, and the Billings estate the other half, and with this the assessment work for that year was done. In 1902, according to his testimony, all the other stockholders refused to contribute, and he and the Billings estate again paid for the work. In 1903 Mr. Lay paid for the work with money which he borrowed for that purpose. During these years the annual labor was performed under the direction of Mr. Lay, and at such times it appears that he was neither a director nor an officer of the company. The testimony shows no direct action by the company or its officers, authorizing, directing, or providing for the assessment work in 1904, and the same may be said as to the years 1901, 1902, and 1903. Mr. Lay may have been on the ground in 1904 simply as a stockholder representing his own interest. There is substantially nothing to indicate that he was on the ground in any different capacity in the three preceding years, or that, during the three previous years, he was clothed with any larger or different authority from the company than he had in the year 1904.

Special stress is laid upon the testimony of Mr. Lay that, at the time the work was being done, he had no intention that it should apply as annual labor, and that his object in doing the work in 1904 on the three mines mentioned was to reimburse himself for the moneys he had spent on the mines of the company during the previous years. This testimony was given in March, 1906—almost two years after the event. There is much in the contemporaneous transactions which fails to corroborate this testimony. The words and conduct of Mr. Lay in 1904 are much more persuasive testimony as to his purposes and intentions. The stockholders of the company met in January, 1904, and they also held a second meeting in March, 1904. The directors had a meeting in April, 1904. February 26, 1904, 18,040 $\frac{2}{3}$  shares of the capital stock of this company were issued to Mr. A. E. Baldwin, 2,130 shares to Thomas C. McMillan, 600 shares to Charles H. Brennan, 23,181 $\frac{1}{3}$  shares to Charles Lay, 2,000 shares to Mary Shaffer, and 251 shares to Thomas A. Olney. Some time in April of that year Charles Lay went to the mines, and remained there until the following July. These facts indicate no intention to abandon the company or its property. On his arrival at the mines in May, Mr. Lay had a few hundred dollars; with this money he employed a small force of men, and

took out ore from the Prince of Wales, the Amazon, and the Copper Nut. This work was done under practically the same authority, and with the same tools, as in previous years.

Mr. Lay, on his direct examination, testifies as follows:

"Q. What, if any, efforts did you make in 1904 to induce the company, or the stockholders of the company, to do the assessment work for the year 1904? A. I went to all the large stockholders and asked them to pay me back some of the money I had paid, and if they did I would continue to do the work. \* \* \* Q. What time of the year in 1904 was it that you had these talks with the stockholders which you have testified to? A. Here [Chicago], in October and November. I first had talk with two of them before I went out there in May, and I was trying to get them to put up money."

It is thus evident from his own statement that Mr. Lay was trying to raise money for the assessment work before he set out for the mines in May, 1904. After doing the work to the amount of at least \$300, on 3 of the 11 claims belonging to the company, he returned to Chicago, and in October and November of that year he asked all of the large stockholders, except the two spoken to in May, to pay him back a portion of the money he had expended, and promised if they would do so to continue the work. It is inconceivable that Mr. Lay was asking all the large stockholders to reimburse him for trespassing on the company's property. A promise by a trespasser to continue trespassing could not be a very strong inducement to the stockholders to pay for previous trespasses. The only reasonable interpretation to be placed on this statement of Lay is that he had done the assessment work on three of the claims, and, if a part of his disbursements were repaid, he would continue the work on the other eight claims. The fact that he interviewed all the large stockholders does not indicate that he was acting in hostility to the company, nor is there any testimony which indicates that the stockholders at that time regarded the act as a trespass. Furthermore, the fact that he was not taking out and shipping the ore for his own exclusive benefit adversely to the interests of the company, but with a view of paying the debts due from the company to himself, not only precludes the idea that he was a trespasser, but indicates that he was acting for the benefit of the company.

The federal act in relation to the performance of annual labor says nothing as to the person by whom it shall be performed. The obvious purpose of the law is to exact work as an evidence of good faith on the part of the owner, and also to discourage the holding of mining claims without development or intention to develop, to the exclusion of others who could and would improve such ground if they had opportunity. Manifestly, the annual work must be performed by the owner, at his instance, by some one in privity with him, or by some one who holds an equitable or beneficial interest in the property. Work by such a person will inure to the benefit of the claim. 2 Lindley on Mines, § 666; *Jupiter Mg. Co. v. Bodie Con. Mg. Co.* (C. C.) 11 Fed. 666; *Book v. Justice Min. Co.* (C. C.) 58 Fed. 106; *Godfrey v. Faust*, 18 S. D. 567, 571, 101 N. W. 718; *Eberle v. Carmichael*, 8 N. M. 169, 42 Pac. 95; *Anderson v. Caughey*, 3 Cal. App. 22, 84 Pac. 223, 225; *Dye v. Crary* (N. M.) 85 Pac. 1038, 9 L. R. A. (N. S.) 1136.

In *Jupiter Mfg. Co. v. Bodie Con. Mfg. Co.* (C. C.) 11 Fed. 666, Judge Sawyer charged the jury:

"That work done by any of the grantors of defendant while holding the legal or equitable title during the performance of the labor, or work done in the interest of the claim, is available to preserve the claim."

In *Godfrey v. Faust*, 18 S. D. 567, 571, 101 N. W. 718, the mine in dispute belonged to the defendant Faust. The superintendent of the Boston & South Dakota Company had a contract in his own name with Faust for the purchase of the property. The contract had not been assigned to the company, but the company furnished the money for the representation work. It was held that this was sufficient evidence that the superintendent was holding the contract in trust for the company, and that the company had the right to do the assessment work.

In *Book v. Justice Min. Co.* (C. C.) 58 Fed. 106, the mines in question were located by an employé in his own name, but for the benefit and at the expense of the company. The company being thus the equitable owner of the property, it was held that work performed by the company should be counted as representation work.

In *Dye v. Crary* (N. M.) 85 Pac. 1038, 9 L. R. A. (N. S.) 1136, it was held that one who bought an interest in an unpatented mining claim at a void judicial sale could pay that portion of the cost of the representation work which was due from the judgment debtor, and that such a payment on forfeiture proceedings by a co-owner would prevent a forfeiture as against the judgment debtor.

It is undoubtedly the law, as complainant contends, that a corporation is an entity distinct from its stockholders, and holds its property absolutely as a natural person may. The stockholder by virtue of his ownership of the stock has no legal title to any of the property of the corporation. The deduction which complainant makes from this is that assessment work on corporate property cannot be performed except by corporate action; that there can be no corporate action except by the trustees or directors acting formally as such, or by action of the officers of the company; that Lay, Shaw, and Leighton, when they performed work on the Prince of Wales, Amazon, and Copper Nut in 1904, though stockholders, were strangers to the title, and therefore trespassers, and consequently their work cannot inure to the benefit of the corporation. I cannot concur in these conclusions. There can be corporate action which is not formal corporate action. Corporate action may occur in other ways than by the formal proceedings of officers and boards of directors. It may arise from a long course of dealing which estops the corporation from denying that mode of conduct, or it may arise by acquiescence or acceptance by the corporation of the benefits of a transaction. While a corporation owns the legal title to all its property, and there is absolutely no legal title therein vesting in any of its stockholders, still each stockholder has an interest in the property of the corporation. *Bridgman v. City of Keokuk*, 72 Iowa, 42, 33 N. W. 355. If the directors and officers of a mining company, holding and owning unpatented mining claims, fail and neglect to do the annual labor necessary for the protection of such property, and, in consequence, the claims are lost, the loss is practically and ul-

timately the loss of the stockholders of the company. It has frequently been held that a stockholder, merely as a stockholder in a corporation, has such an interest in the corporate property that he may take out a policy of insurance for the protection of that interest. This rule is based on the theory that the beneficial interest in the property of the corporation is in the stockholders. *Seaman v. Enterprise Fire & Marine Ins. Co.* (C. C.) 18 Fed. 250; *Mannheim Ins. Co. v. Hollander* (D. C.) 112 Fed. 549, 552; *Warren v. Davenport Fire Ins. Co.*, 31 Iowa, 464, 468, 7 Am. Rep. 160; *Riggs v. Commercial Mut. Ins. Co.*, 5 N. Y. Supp. 183; *Id.*, 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716. Where the property of a corporation has been sold under execution, and no steps taken by the corporate authorities to redeem the property within the period limited by law, a stockholder has been permitted, in California, to redeem the property for the benefit of the corporation, and hold the corporation liable for moneys advanced for that purpose. *Wright v. Oroville Mg. Co.*, 40 Cal. 20.

In *Miner v. Belle Isle Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412, 418, the court says:

"Although stockholders are not partners, nor strictly tenants in common, they are the beneficial joint owners of the corporate property, having an interest and power of legal control in exact proportion to their respective amounts of stock. The corporation itself holds its property as a trust fund for the stockholders, who have a joint interest in all its property and effects, and the relation between it and its several members is, for all practical purposes, that of trustee and cestui que trust. *Peabody v. Flint*, 6 Allen (Mass.) 52-56; *Hardy v. Metropolitan Land & F. Co.*, L. R. 7 Ch. App. 427; *Stevens v. Rutland & B. R. Co.*, 29 Vt. 550."

A stockholder is not altogether a stranger to the title to the corporate property. He has an equitable or beneficial interest therein. It is unnecessary to define that interest. It is sufficient to say the ownership of such an interest predicates a right in the owner to protect that interest; from this it follows that he has also the right to insist that the corporate property shall be protected from fraudulent, tortious, and wrongful injury, conversion, misappropriation, or destruction. *Dodge v. Woolsey*, 18 How. 331, 341, 15 L. Ed. 401; *Wright v. Oroville Mg. Co.*, 40 Cal. 20, 27; 4 *Thompson on Corp.* § 4520; *Helliwell on Corp.* § 411. If the directors and officers of a mining company negligently or fraudulently failed to do the requisite representation work on the company's unpatented claims, and thereafter relocated the property for themselves, a court of equity at the instance of a stockholder would undoubtedly compel restitution of the property. It is difficult to see why work performed upon such claims by a stockholder who had peaceably entered thereon prior to forfeiture should not be counted as representation work, if performed at the proper time. These considerations lead me to conclude that a stockholder in a mining company has such a beneficial interest in the corporate property that any mining work done by him on the unpatented claims of the company must be counted as representation work. The work done by Mr. Lay on the Prince of Wales, Copper Nut, and Amazon in 1904 was sufficient to protect those claims from forfeiture and relocation.

December 29, 1904, the defendant Davies obtained his judgment for \$1,792.77 against the company. The evidence does not show just when

the action was commenced which terminated in the judgment for Davies, but it is safe to assume that it was some time in the fall of 1904, perhaps about the time when Mr. Lay wrote to complainant Wailes that the company was "up against it" financially; that they were afraid of losing the property; that Benson would try to get hold of the property, and if Wailes would put up some money and get in touch with Benson there might be something in it for him. It is clear that Mr. Lay's purpose—and he seems to have been the moving spirit in the whole transaction—was to defeat this judgment. Lay testifies that he furnished Wailes with the information about the mines, and urged him to relocate them. January 30, 1905, in the same month that the relocations were made, Lay wrote to Shaw, one of the men who assisted in doing the discovery work for Wailes, and also in doing the work on the three claims in June and July, 1904:

"I want you to go into Eureka, if you are willing, and be a witness for Wailes that the Whalen Company had not done the assessment work in 1904, I wish Mr. Trimboth could be induced to be also a witness; talk with him quietly; write me. Of course we can get Olney, but I would like also to have Trimboth. Don't let on to any one that I have written to have you ask him—Trimboth. \* \* \* If you will be one of his, Mr. Wailes', witnesses as to the assessment work not having been done, I want you to go in Friday 17th so as to swear and file your affidavit with Spinner. \* \* \* Let me know if you are willing to be one of Mr. Wailes' witnesses so I can have the papers prepared."

Later Mr. Shaw made an affidavit, as requested, in which he says:

"That he is well acquainted with the several claims named above, having lived within a mile and a half of each of them for more than eight months, and he knows well their boundaries, and he knows that from May, 1904, to December 31, 1904, there was no work done on either of the said claims named above by the Whalen Consolidated Mining Company, or any agent or stockholder for the same, and such work could not have been done in that time without his knowledge."

Mr. Lay denies in his testimony that he ever had any negotiations with Mr. Wailes looking towards inducing him to relocate the claims of the Whalen Consolidated Copper Mining Company, but in a letter to Mr. Shaw, dated August 6th, 1905, he says:

"Don't do anything that will jeopardize my [interest] for yours are identical with mine—the plan of having Mr. Wailes was mine, and not Mr. Benson's, and you and the old stockholders of the old company will yet be taken care of as I promised you, if it takes all the stock I have."

In December, 1904, Lay told Shaw, according to the testimony of the latter, that he and Benson had decided to jump the property, that he had a good man in view whom he could trust, an old friend of his named Wailes. "I don't want a man," he said, "to jump the property, who, when the proper time comes to turn it over, will tell me to go to hell." In his letter of February 22, 1905, to Mr. Shaw, Lay says:

"Mr. Wailes has sent Mr. Leighton, in all, to be filed as the development work is done, 21 claims, 10 of which have been filed and recorded, and Mr. Wailes has them, and Leighton is to have the work done in the other 11, and at the proper time Mr. Wailes will deed them over."

It is also in evidence that in April, 1904, Mr. Lay requested Mr. Shaw to write the Grand Rapids stockholders in the company "that their

interest in the company was well taken care of by Charles Lay." Mr. Lay's own testimony, however, indicates clearly what his intentions were. He testifies:

"I meant that I wanted to defeat Mr. Davies in his judgment suit against the company. \* \* \* I was a stockholder in the old company, and I didn't want to see Mr. Davies, who had been jumping this property and assisting in jumping it and bringing false claims against it, to get a judgment on it to get the advantage of it."

Mr. Shaw and Mr. Leighton, both of whom were stockholders in the company, had assisted Mr. Wailes to relocate the claims, and Mr. Benson furnished a portion of the money to pay for the relocation work. Mr. Benson at the time was one of the trustees of the Billings estate, which owned a large block of stock in the company, and, as trustee, held in his own name stock of the company. Mr. Lay himself was at the time the owner of some 22,000 shares of the stock.

It is difficult to escape the conclusion that the stockholders who had been most interested in doing the assessment work for the company in the three years previous to 1904, were also deeply interested in the relocation of these claims. It is equally difficult to escape the conclusion that the idea that the work performed on the three claims in 1904 was not annual labor, but was the work of a mere trespasser, was an afterthought, and that the whole scheme of forfeiture and relocation was devised by Mr. Lay, and other stockholders of the Whalen Consolidated Copper Mining Company, with Mr. Wailes in order to defeat the Davies judgment. It does not appear that there was any appeal from the judgment, or that any effort was ever made to set it aside. This court, therefore, can indulge no presumptions of any character whatever against that judgment.

Mr. Wailes testifies that in the fall of 1904 Mr. Lay wrote him stating that they were very much "up against it"; that the company had practically gone out of business; that they were afraid of losing the property; that there was a man in Chicago named Robert L. Benson, whom he thought would try and get hold of the property, and there would probably be something in it for Wailes if he could get in touch with Benson, put up some money with Benson, and get hold of the property. December 30, 1904, Wailes went to the mines by special train from Palisade—this train had previously been arranged for by Mr. Lay. Mr. Wailes also testifies that he had never seen the property before, knew nothing about it except from Lay's description, and the "main factor" inducing him to relocate the claims "was that Mr. Benson thought it was proper to put money into it." Wailes was on the ground at the very time that the execution to enforce the Davies judgment was being levied by the sheriff. He testifies that he "heard them talking of it in the camp." Mr. Shaw testifies that on Mr. Wailes' arrival at the mines December 30th, Mr. Wailes asked Mr. Lay, "What do you want of me, Colonel, to do?" He says: 'I want you to jump this property.' 'Well, now,' Mr. Wailes says, 'I am perfectly willing to help you in any manner I can.' Mr. Lay replied, "All I ask of you to do is to sign these papers that I have written out, put your foot on the property, and that is all." Wailes answered, "I am your man." Mr. Wailes then

signed the relocation papers, and employed Trimbath and Ollie Leighton to do the discovery work, and Leighton to post the notices on the mine. Mr. Shaw also testifies that on the same evening he heard Lay say to Wailes, "Now, Wailes, after you do that, Mr. Benson and I have talked it over, and you will get a good block of stock for your trouble." The following day, December 31st, Wailes left the mines, and, so far as the evidence shows, he has never returned. These facts lead me to conclude that Mr. Wailes was not only acting a part which had been assigned to him in this scheme, but that he knew the scheme was intended and designed to transfer the mining claims of the Whalen Consolidated Copper Mining Company to complainant Wailes, in order to hinder, delay, and defeat the judgment of the defendant Davies. But, whether he did or not, Wailes had sufficient knowledge to put a prudent man upon inquiry. Possessed of this knowledge, he was bound to inquire, and, if he neglected to do so, he is bound by such knowledge as he might on inquiry have discovered. *Walker v. Collins*, 50 Fed. 737, 1 C. C. A. 642; *Brittain v. Crowther*, 54 Fed. 295, 298, 4 C. C. A. 341; *Greenwell v. Nash*, 13 Nev. 287.

The statutes of Nevada relating to fraudulent conveyances of real estate, provide, in substance, that all conveyances made with intent to hinder, delay, or defraud any creditor or creditors of the vendor, are, as against such creditor or creditors, absolutely null and void. *Cutting's Comp. Laws Nev.* § 2708; *Thomson v. Crane* (C. C.) 73 Fed. 327, 328. Such conveyances are fraudulent in favor of the creditor and as against the purchaser, even when the latter has paid full consideration for the property, provided he had actual or constructive knowledge of the fact that the property was being transferred to hinder, delay, or defraud creditors of the grantor. *Means v. Montgomery* (C. C.) 23 Fed. 421; *Means v. Dowd*, 128 U. S. 273, 9 Sup. Ct. 65, 32 L. Ed. 429; *Bank v. Trebein*, 59 Ohio St. 316, 325, 52 N. E. 834; *Ivancovich v. Stern*, 14 Nev. 341, 347. This statute did not establish a new rule; it was merely expressive of the ancient doctrines of the common law, which, when applied to such transfers of property, declared them fraudulent. For, as Lord Mansfield, in speaking of the early English statutes on this subject, said:

"The principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape that the common law would have attained every end proposed by the statutes." *Cadogan v. Kennett*, 2 Cowp. 432.

The law and the statute prohibit every disposition of property which is designed and intended to hinder, delay, or defraud creditors. It is immaterial by what instrument, proceedings, or means the alienation or transfer may be accomplished. That which cannot be done directly cannot be done indirectly. A court of equity will cut its way through the process by which a debtor's property was transferred, no matter how novel and unprecedented the arrangement may be, and lay its hands upon the fraudulent purpose which was designed to be accomplished, if such a purpose appears, and declare the transaction fraudulent. *Bank v. Trebein*, 59 Ohio St. 316, 325, 52 N. E. 834. Here there was no formal conveyance of the mines by cor-



porate action. Wailes knowingly acquired a title to the property which had been owned by the corporation, through the negligence of the corporation itself, the connivance of a portion of its stockholders, and with the active assistance of others. The purpose was clearly fraudulent. The complainant now comes into a court of equity asking that his title to the mines so acquired be confirmed and established, and that the title of defendant Davies be adjudged invalid and void. The maxim "that he who comes into equity must come with clean hands" forbids the complainant any relief in this court.

Let a decree be entered dissolving the injunction heretofore issued in this suit, and awarding defendants their costs.

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In re DAVIDSON.

(District Court, D. Massachusetts. March 26, 1907.)

No. 11,992.

**BANKRUPTCY—EXAMINATION OF A BANKRUPT PRIOR TO ADJUDICATION.**

Where an alleged bankrupt answered, denying that he had committed an act of bankruptcy, and the issues so raised were referred to the referee for examination and report, but there had been no adjudication, the estate was not in process of administration under the Bankrupt Act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], so as to authorize the court to order an examination of the bankrupt to determine the necessity for the appointment of a receiver, and for the enforcement of the provisions of the act, under section 21a (30 Stat. 552 [U. S. Comp. St. 1901, p. 3430]), authorizing the court to order the examination of the alleged bankrupt if his estate is in process of administration.

On Application by Petitioning Creditor for an Order for Examination of Alleged Bankrupt.

James, Schell & Elkins and A. K. Cohen, for creditor.

William Charak, for debtor.

DODGE, District Judge. The adjudication in this case has not yet been made, and is contested. The alleged bankrupt has answered the petition, and the questions thus raised are before the referee for examination and report. Meanwhile, one of the petitioning creditors has presented this application, which is that the court will order an immediate examination of the alleged bankrupt, "for the purpose of determining the necessity for the appointment of a receiver, and for the enforcement of the provisions of the acts of Congress relating to bankruptcy." It is alleged among other things that the bankrupt has been collecting debts due him for goods sold, and converting the same to his own use, that the books of account are under his sole control, that the petitioners cannot get any information about said debts, and that the assets of which they have any knowledge amount only to about \$750.

There is no doubt that the court may order examination of the alleged bankrupt under section 21a of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3430], if his es-

tate can be said to be in process of administration under the act. But the administration of this estate by the court can hardly be said to have begun. The court has been asked to administer it under the act, and has summoned the bankrupt to answer this application. But until these preliminary steps have resulted in establishing the power of the court to institute its administration, I do not see how that administration can be regarded as in process. Should the result of the contest regarding adjudication be in the bankrupt's favor, no step will be or will have been taken by the court in such administration. There is an attempt pending to have such administration ordered, but that is all that can be said.

The court has not in this case assumed, nor is it asked to assume, even that temporary and provisional control of the estate which it sometimes exercises through a receiver while adjudication is pending. In a very recent decision by Judge Hough, in the New York Southern District, to which I am referred (In the matter of Fleischer [Feb. 7, 1907] 151 Fed. 81), it is held that such an examination as is here asked for may be ordered, before adjudication, upon the application of a receiver. The court thought it not open to doubt that the moment a receiver is appointed for the purpose of making fruitful the attachment, and enforcing the injunction effected by the filing of an involuntary petition, the administration of the estate has begun. There is nothing, however, in this decision which requires the conclusion that the estate of the alleged bankrupt in this case must be regarded as in process of administration. I am unable to believe that it is the intent of the bankruptcy act to invest a petitioning creditor, for no other reason than that his petition has been filed, and that such an examination might assist him, with the same right to examine the debtor whose bankruptcy he undertakes to establish which he will possess after he has succeeded in establishing it. Without deciding that such an examination could never be ordered before adjudication, I must decline to order it under circumstances such as are now shown. The application is denied.

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In re BACK BAY AUTOMOBILE CO.

(District Court, D. Massachusetts. October 28, 1907.)

No. 12,784.

**1. BANKRUPTCY—COMPOSITION—SCHEDULE—FILING — EXAMINATION OF BANKRUPT—TIME.**

Bankr. Act July 1, 1898, c. 541, § 12a, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], provides that a bankrupt may offer a composition after, but not before, he has been examined in open court or at a meeting of his creditors, and has filed in court the required schedule and list of creditors. *Held*, that the examination contemplated is not an examination of the bankrupt as a witness on the issues of insolvency and the commission of acts of bankruptcy charged, but the examination to which the bankrupt is required to submit by section 7a, subd. 9 (30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]), when present at the first meeting of his creditors, and at such other times as the court may order, which meeting cannot be held until after adjudication as expressly provided by section 55a (30 Stat. 559 [U. S. Comp. St. 1901, p. 3442]).

## 2. SAME—REFERENCE—TIME.

Bankr. Act July 1, 1898, c. 541, § 22, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], providing for reference of bankruptcy proceedings, permits no such reference until after adjudication.

## 3. SAME—SCHEDULE—FILING—TIME.

The schedule contemplated by Bankr. Act July 1, 1898, c. 541, § 12a, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426], providing that a bankrupt may offer a composition after he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and list of creditors, etc., is the schedule required by section 7a, subd. 8 (30 Stat. 548 [U. S. Comp. St. 1901, p. 3425]), to be filed within 10 days after adjudication, and not schedules filed prior to adjudication.

## 4. SAME—CLAIMS—ALLOWANCE—MEETING OF CREDITORS.

Under Bankr. Act July 1, 1898, c. 541, § 55b, 30 Stat. 559 [U. S. Comp. St. 1901, p. 3442], providing that the court shall allow or disallow the claims of creditors presented at the first meeting before proceeding with other business, claims cannot be allowed without a meeting of creditors.

## 5. SAME—"WHENEVER."

The word "whenever," used in Bankr. Act, July 1, 1898, c. 541, § 55e, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3442], providing that the court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect, etc., should be construed to mean "whenever after the first meeting," previously required to be held by section 55a (30 Stat. 559 [U. S. Comp. St. 1901, p. 3442]), which can only be held not less than 10 nor more than 30 days after adjudication.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7441, 7442, 7835.]

## 6. SAME—APPOINTMENT OF TRUSTEES—TRUST ESTATE.

Under Bankr. Act July 1, 1898, c. 541, § 44a, 30 Stat. 557 [U. S. Comp. St. 1901, p. 3438], providing that the appointment of a trustee in bankruptcy shall be made at the creditors' first meeting after adjudication, there can be no trust estate for administration under the act prior to adjudication.

## 7. SAME—PROOF OF CLAIMS—"PROVEN."

Bankr. Act July 1, 1898, c. 541, § 55e, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3442], provides for the calling of meetings of creditors whenever one-fourth or more in number who have "proven" their claims shall file a written request therefor. *Held* that, though the term "proven" does not necessarily mean allowance, a claim cannot be regarded as "proven," within such section, until the written proof required by section 57a (30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]), shall have been filed or lodged with the court or some officer thereof.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, p. 5747.]

## 8. SAME—"FIRST MEETING."

The term "first meeting of creditors," used in Bankr. Act July 1, 1898, c. 541, § 55b, 30 Stat. 559 [U. S. Comp. St. 1901, p. 3442], providing that at the first meeting of creditors the judge or referee may allow or disallow claims then presented, means the first meeting after adjudication provided for in section 55a.

## 9. SAME—COMPOSITION—ALLOWANCE.

A composition with the creditors of an alleged bankrupt cannot be allowed pending determination of the issues raised by the answer to the bankruptcy petition, prior to adjudication and before the first meeting of creditors provided for by Bankr. Act July 1, 1898, c. 541, § 55a, 30 Stat. 559 [U. S. Comp. St. 1901, p. 3442].

On Request by Certain Creditors for the Call of a Meeting to Consider Acceptance of a Composition Offer.

Bates, Nay & Abbott, Edwin N. Hill, A. K. Cohen, and Henry W. Beal, for creditors.

Arthur Lord, for bankrupt.

DODGE, District Judge. There has as yet been no adjudication in this case. The involuntary petition filed August 15, 1907, is contested by the debtor, which denies the commission of the act of bankruptcy alleged. On September 3, 1907, a reference to ascertain and report upon the facts was ordered. No report under this reference has yet been filed. The alleged bankrupt has, however, filed in court an offer of composition and what is stated to be a majority in amount of the known creditors request that the court call a meeting of creditors under section 55e of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3442], to consider its acceptance. These creditors insist that a composition may be offered and accepted, under the act, before adjudication. The learned referee, to whom the question of adjudication was sent by the order of September 3, 1907, has filed a preliminary report upholding this view, and recommending such a composition as the most expedient course under the circumstances. A considerable minority of the known creditors oppose the request, and insist that no composition before adjudication is possible under the act.

Due weight must of course be given to the opinion of the referee, whose knowledge and experience in bankruptcy matters are well known to be such as entitle any opinion of his upon a question of this kind to respect. Due attention is also to be paid to the considerations of expediency suggested in his report. They are sufficient to incline the court in favor of the course suggested, if the bankruptcy act permits it to be taken. It cannot be denied, however, that the difficulties in the way of believing that the act does so permit are many and serious. They may be stated as below; the word "bankrupt" being understood to include a person against whom, as against this debtor, a petition has been filed, according to section 1 (4).

1. By section 12a, a bankrupt may offer composition after, but not before, he has been examined in open court or at a meeting of his creditors, and filed in court the required schedule of his property and list of creditors.

The report states that the bankrupt "does not object to examination, has been already examined in open court under the present issue, and has filed his schedules of assets and liabilities."

The examination contemplated in 12a can only be the examination to which the bankrupt is required to submit by section 7 (9), "when present at the first meeting of his creditors and at such other times as the court shall order." The first meeting of this bankrupt's creditors has not been held. It cannot be held until after adjudication, according to section 55a. The court has never ordered any examination of this bankrupt. Examination as a witness upon the issues of insolvency and the commission of the acts of bankruptcy charged, under the pending reference, is plainly not the examination referred to in section 7 (9), whose scope as there defined is far wider than could be that of any examination possible under such a reference, and whose purpose

is to assist that administration of a bankrupt's property which the court undertakes only after adjudication. If the court had ordered or should at this stage of the case order the bankrupt to submit to an examination under section 7 (9) or to appear for examination under section 21 (a), there would still be a doubt too strong to be dismissed as unreasonable whether such examination would be the examination contemplated by section 12a. And the power of the court to order such an examination before adjudication is at best doubtful. *Re Davidson*, in this court, opinion dated March 26, 1907, 158 Fed. 678. A reference to the papers in *Re Dubinsky* and *Re Rathman* seems to show that the referee was mistaken in supposing that such an examination was ordered in those cases.

If, as the referee states, the bankrupt has filed its schedule of assets and liabilities, the filing has been with the referee only. At present there has been no reference under section 22, and that section permits no such reference until after adjudication. Before such reference it seems to me doubtful whether "court" can include the referee according to section 1a (7). The bankrupt must file his schedules in court, according to section 7a (8) within 10 days after adjudication. It may be true, as the referee says, that there can be no objection to the bankrupt voluntarily filing them at any time. But the filing contemplated in section 12a must, I think, if the most natural and reasonable construction is sought, be the filing required by section 7a (8).

2. By section 12b the court may be asked to confirm a composition "after, but not before, it has been accepted in writing by a majority in number of all creditors whose claims have been allowed, which number must also represent a majority in amount of such claims."

No claims have yet been allowed. None can be allowed without a meeting of creditors. By section 55b the court is to allow or disallow the claims of creditors presented at the first meeting, before proceeding with the other business. There must be an opportunity for objections to allowance by parties in interest under section 57d. The first meeting of creditors cannot be had until after adjudication. The terms of section 55a make this clear beyond doubt, and no dispute on this point is attempted. It is said however, that a meeting of creditors may be had at any time under section 55e, that at such a meeting, if now had, creditors' claims may be allowed, and that the required majority of all claims so allowed may make the acceptance required for confirmation by section 12b.

It is clear that a meeting of creditors now had could not be the first meeting of creditors provided for by the act, although in point of fact it would be the first meeting held. The act providing for a "first" meeting at a given time, there is difficulty in believing that a meeting now had would be in any sense a meeting under the act. That it was intended that there might be a meeting before the first meeting, is hardly a natural supposition. The supposition that "whenever" in section 55e means "whenever after the first meeting" previously provided for in 55a is one which it is certainly less difficult to accept.

The referee has suggested in his report that at such a meeting as is proposed a trustee should be appointed. This, I am satisfied, would

be impossible in any event. Section 44a is express to the effect that the appointment of a trustee is to be made at the creditors' first meeting after the adjudication. Before adjudication there can be no trust property. Section 70a. The language of section 44a seems to me to afford additional support to the supposition that the true meaning of section 55e is as above stated.

There are difficulties in the way of sanctioning the proposed meeting other than those depending upon the provisions regarding the first meeting. By section 55e there must be a written request for a meeting under it from one-fourth or more in number of those creditors who have proven their claims. "Proven," it is true, does not necessarily mean "obtained the allowance of" their claims. But before a claim can be regarded as proven, the written proof called for by section 57a must at least have been filed or lodged with the court or some officer thereof. That such written proof has been completed is not enough so long as the proof remains in the hands of the creditor or his attorney. *J. B. Orcutt Company v. Green*, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390. Since no trustee has been or can yet be appointed, proofs could not be delivered to him as in the case cited. Possibly delivery to the referee might be enough, although no general reference of the case to him has been or can yet be made. But even if written proofs were now filed in court, they would be proofs of creditors who had chosen to file them now for their own purposes, in the absence of any general notice to all creditors that proofs of claims might now be filed. It would not naturally occur to a creditor to prove his claim at present, because at present there is no bankrupt estate. I find it difficult to believe that the act can intend that any action by the court is to be obtained by the request of one-fourth of the owners of such claims as may be thus filed.

3. If a meeting were called as proposed, the first step toward acceptance of the composition offer would necessarily be the allowance of such claims of creditors as had been then proved. The judge or referee may allow or disallow claims at the first meeting of creditors, according to section 55b; and it seems to me impossible to say that "first meeting" here means anything different from the first meeting after adjudication, spoken of immediately before, in section 55a. In view of this provision and of the connection in which it stands, and of the fact that from no provision contained in the act can it be gathered that allowance of claims is to be permitted before the first meeting with which sections 55a and 55b deal, I am obliged to hesitate before the conclusion that claims may be allowed in bankruptcy before it is ascertained that there is an estate to be distributed.

To pass from examination of the terms of our present act to more general considerations: It appears that under other bankruptcy systems to which reference has been made composition before adjudication has been allowed, but when allowed it has been done by express and unmistakable statutory provisions. This is true of the English statutes now in force, and it was true of the amendment to our act of 1867, in force from 1874 to the repeal of the entire act in 1878. No provisions for any composition whatever were contained in the original act of 1867. By the

provisions of the amendment as they stood from 1874 to 1878—"whether an adjudication shall have been had or not"—the creditors might, at a meeting to be called upon notice to every known creditor, accept an offered composition. The question of acceptance was settled by the votes of the creditors present at the meeting in person or by proxy. Confirmation of an acceptance by signatures of the debtor and of a fixed proportion of all the creditors was required. The debtor had to be present at the meeting, answer any inquiries made of him, and submit a statement showing the whole value of his assets and debts, with the names and addresses of all his creditors. If accepted, the composition bound all creditors named in the statement submitted by the debtor at the meeting, but no others.

These provisions are clear and definite. They leave nothing essential to the plan open to question, or to be gathered only by implication from language which may or may not mean the same thing. They raise no questions as to "proof" or as to "allowance" of creditors' claims. They avoid the difficulties which I have found to beset the attempt to make sections 12 and 13 of the present act provide for and permit a similar result. If the intent of Congress in 1898 was to provide for composition without adjudication, it is difficult to imagine how it could have omitted to say so in plain words, in view of the language which had been used for the purpose in 1874.

The report of the Judiciary Committee which accompanied the Torrey Bill when introduced in 1892, quoted by the referee, seems to show that the Committee then supposed that the section of that bill which corresponds to section 12 of the present act would permit composition without adjudication. They were clearly wrong, however, in anticipating that there would be "a greater number of compositions than administrations," if, by "compositions," they meant compositions without adjudication. There has been in this district no instance of such a composition under the present act, and the present case is the first in which any attempt has been made to accomplish one. Nor has such a composition ever been made or attempted in any other district, so far as can be gathered from the sources of information available.

Having to decide whether or not the act as I find it permits a composition without adjudication, and in view of the fact that no precedent for an affirmative decision can be found, although nine years have passed since the act went into effect, I find the difficulties in the way of such a construction too serious to be disregarded. Even under the provisions of 1874, I find no reason to believe that a debtor could make a composition offer and procure its acceptance while in the attitude of denying before the court that he was a bankrupt at all, which is what is attempted in this case. While the bankrupt's denial stands, it seems to me that the issue raised by it must be decided before there can be such proceedings in bankruptcy as would vest the court with power to compel a minority of creditors to accept a composition at the will of the majority. All things considered, I am unable to satisfy myself that a composition offered in the manner now proposed could be safely confirmed by the court; and I am therefore obliged to deny the request for a meeting.

The following is the opinion of OLMSTEAD, Referee:

This involuntary petition was referred to me as referee under Rule 12 of the General Orders (32 C. C. A. xvi, 89 Fed. vii). The issue was as to whether an adjudication should be recommended. At the hearing in court before me, counsel for the corporation called the referee's attention to a desire and purpose on the part of the respondent corporation to make a composition offer of 25 cents on the dollar to its creditors. This proposition was resisted by counsel for various creditors, on the ground that the only issue before the referee was that of adjudication, and that he had not sufficient authority to pass upon the question of composition under the reference. This case involves, therefore, and squarely presents, the question as to whether a corporation may make a composition offer under the present law before an adjudication. If a debtor has this right before adjudication, the referee is of the opinion that, as an incident to the reference to him of adjudication, he has authority in connection therewith to call the court's attention to the desire and purpose of the respondent wishing to make such an offer before the question of adjudication is passed upon. In this case there were peculiar reasons advanced by Arthur Lord, Esq., as counsel for the respondent why an adjudication should not be had. The assets of the estate amounted to about \$11,000, and the secured creditors to the same amount. The liabilities were about double the sum of the assets. There was, however, a valuable lease which had an important bearing on the good will of the concern and the continuance of its business, which, if retained by the respondent, might form the basis or means under which a satisfactory composition offer could be effected with its creditors. The referee's attention was called to the fact that the lease contained a clause that it would be avoided and forfeited if an adjudication in bankruptcy was had. The reasons, therefore, for making a settlement and adjustment with creditors under the beneficent provisions of composition before an adjudication were urged with peculiar force in this case.

That a composition before adjudication could be effected under the Act of June 22, 1874, c. 390, § 17, 18 Stat. 182, is clear. The provision of this section is that such a composition could be effected "whether an adjudication in bankruptcy shall have been had or not," and this procedure of a composition effected before an adjudication was had in the following cases: *In re Scott*, Fed. Cas. No. 12,519, where a comparison is made in parallel columns of the English and U. S. composition law; *In re Reiman*, Fed. Cas. No. 11,673, s. c. 17 Ben. 455, and 505, where the opinion was written by Judge, afterwards Justice, Blatchford, and on review was affirmed by Mr. Justice Hunt, Fed. Cas. No. 11,675, 12 Blatchf. 562. The case of *Reiman* presents an elaborate justification and exhaustive explanation of the theory and constitutionality of composition. Cf. *Farwell v. Raddin*, 129 Mass. 8; *Sage v. Heller*, 124 Mass. 214; *In re Alsberg*, 9 Ben. 17, Fed. Cas. No. 260; *In re Shields*, 15 N. B. R. 532, Fed. Cas. No. 12,784; *Mudge v. Wilmot*, 124 Mass. 493, 494, affirmed in 103 U. S. 217, 26 L. Ed. 536. Such an offer under the English statutes can certainly



be made before an adjudication. Collier on Bankruptcy (6th Ed.) page 157. So much for prior legislation.

Coming now to the requirements of the present act, the question arises, are there any provisions which require that an adjudication should be had before a composition offer can be entertained? Section 12 contains three conditions precedent to a composition: First, that the debtor shall be examined "in open court or at a meeting of his creditors;" second, "filed in court the schedule of his property and list of his creditors required to be filed by bankrupts;" third, that the assents of a majority in number and amount of all creditors whose claims have been allowed should be filed in the court of bankruptcy.

It is to be observed that the word "bankrupt" includes the respondent in an involuntary petition. Section 1 (4). As to the provision that the debtor shall be examined in open court or at a meeting of his creditors, this provision appears to be met by section 55e, of the present bankruptcy act, which provides as follows:

"The court shall call a meeting of creditors whenever one-fourth or more in number of those who have proven their claims shall file a written request to that effect. If such a request is signed by a majority of such creditors, which number represents a majority in amount of such claims, and contains a request for such meeting to be held at a designated place, the court shall call such meeting at such place within thirty days after the date of the filing of the request."

The first four clauses of section 55 undoubtedly relate to a meeting after an adjudication. Subdivision "e" was intended to provide for meetings either before or after an adjudication. In this connection it is interesting to compare this provision with section 22a:

"After a person has been adjudged a bankrupt, the judge may cause the trustee to proceed with the administration of the estate or refer it (1) generally to the referee, or specially with only limited authority to act in the premises, or to consider and report upon specified issues;" etc.

It is apparent from this clause, therefore, that a trustee must have been appointed at some meeting before the adjudication and reference. There is no provision for the appointment of a trustee by the judge. Such appointment is made by the creditors. Sections 38a (4), 44, 55a, 55b, 58c, General Order 12 (1) (32 C. C. A. xvi, 89 Fed. vii).

The language of the act in relation to the distinction between the allowance of claims and the proof of claims is carefully observed throughout sections 55, 57, and elsewhere. This distinction was lucidly maintained and emphasized by Judge Ray in *Re Hornstein* (D. C.) 122 Fed. 266, 274. Cf. *Orcutt v. Green*, 204 U. S. 96, 27 Sup. Ct. 195, 51 L. Ed. 390. The proof of a claim is one thing; its allowance by the court is quite a different step. When the act refers to a proof of a claim it means the deposition or statement of the creditor. When it refers to its acceptance by the court, it uses the word "allowed" or "allowance." Section 55e provides that one-fourth or more in number of those who have proven their claims shall file a written request. This means that the creditors before any first meeting has been called, as in such a contingency as is herein presented, may ask the court to call a meeting for the

purpose of considering the allowance of their claims. There are certain expressions in the General Orders which militate against this view. It is, however, to be borne in mind that the General Orders were largely made up from the former orders under the act of '67, and the language of those orders was retained, and in several instances the word "proved" is undoubtedly equivalent to "allowed." See Collier's Notes on the General Orders.

That such a meeting can be held for the allowance of claims under this provision of the act is apparent. At such a meeting, the condition precedent of examination in open court or at a meeting of his creditors can also be complied with. In the ordinary course of procedure, such a meeting would be held before the referee under a special reference. That such a hearing before the referee is also in "open court" may be gathered from the following provisions of the act. Sections 1 (7), 21a, 38a (2), 39a (5), 39a (9), 41a (3), 41a (4); General Order 12 (3) (32 C. C. A. xvi, 89 Fed. vii), and Forms 29 to 30 (32 C. C. A. lxv, lxvi, 89 Fed. xli, xlii). That a trustee should be appointed in all cases of composition is apparent from section 48a, of the act as amended, in order that the trustee may require the employment of a stenographer under section 38 (5) of the act, and make a report to the judge through the referee as to the advisability of the composition.

That this procedure before an adjudication is due administration is evident from the following provisions of the law (sections 3e, 9b, and 59, Collier's Notes on the General Orders, General Order 12, page 550), and includes the right to examine before an adjudication. Under the former provisions the court appoints receivers or marshals in certain specified cases. As to examination it has been determined that an examination could be made in the due course of administration before adjudication in the following cases: In re Fellerman (D. C.) 149 Fed. 244; In re Fleisher (D. C.) 151 Fed. 81, and cases cited; In re Herskovitz (D. C.) 152 Fed. 316.

In this district, in the case of Davidson, relied upon by counsel for the objecting creditors as a bar to an examination, no receiver had been appointed, and the debtor opposed the examination. In the present case a receiver has been appointed, the debtor does not object to the examination, has been already examined in open court under the present issue, and has filed his schedules of assets and liabilities. In the cases of In re Dubinsky [no opinion filed], and In re Rathman [no opinion filed], examinations were held in this district by the authority and order of the Honorable District Judge before an adjudication. Section 7a, subd. 9, as to the examination of the debtor, provides that the debtor shall be examined at the first meeting of his creditors, "and at such other times as the court shall order submit to an examination," etc.

The requirement of the act as to the schedule is contained in section 7a, subd. 8. This is an imperative provision as to the filing of the schedules. Certainly there can be no objection to the respondent voluntarily filing schedules at any time or at any meeting. Section 59d.

The words "adjudication" and "adjudged" occur in the act as amended 51 times in the following sections: 1a (2), 1a (4), 2 (1), 3a (5), 3e, 4b, 5a, 5h, 7a (8), 11a, 11c, 14a, 18d, 18e, 18g, 22a, 25a, 38a (1), 44a, 47c, 50c, 52b, 55a, 57n, 59a, 59b, 60b, 60c, 64c, 65b, 65d, 67e, 67f, 69a, 70a, 70e; Amend. § 19. An examination of the sections already considered and those just enumerated discloses, as the referee believes, no requirements of the act opposed to or inconsistent with the policy of the act to allow a composition before an adjudication; and the referee has not been able to discover any decisions to the contrary under the present act. As to text-writers, Loveland and Brandenburg are noncommittal, while Collier leans to the view that an adjudication must precede a composition, but some of the considerations advanced in this report, and some of the sections reviewed, do not appear to have been carefully considered by them. Certainly the origin, growth, and development of the law were not considered in this connection.

But, fortunately, as a reference is made to the original sources of the law and its evolution, to wit, the bills introduced in Congress, the reports of the Judiciary Committee accompanying them, and the debates in Congress, the policy of the law and of Congress to allow a composition before an adjudication is to the mind of the referee made clear beyond any doubt.

In the original bill introduced by Representative Ezra S. Taylor of Ohio in the Fifty-First Congress, H. R. 3,316, on Dec. 20, 1889, the requirements of the present act are substantially the same. Section 48, which became section 12 of the present act, reads in part as follows:

"Whenever a bankrupt shall have offered terms of compromise to his creditors, and the same shall have been accepted in writing by a majority in number of all known creditors who have proved their claims, representing a majority in amount of all known debts, if the offer shall have been for fifty per cent. or more," etc.

This language of the original provision is strikingly similar to that of the present act, except that creditors who had only proved their claims before their allowance could avail themselves of it.

Section 62 of this original act provides for meetings of creditors. At its end, after the clause relating to the closing of the estate, occurs the following:

"The court shall call a meeting of creditors whenever one-fourth in number of the known creditors of a bankrupt shall file a written request to that effect. Such meeting shall be called for a date within thirty days after the filing of the request."

This provision became section 55e of the present act.

In the Fifty-Second Congress, the same bill, to wit, the "Torrey Bill," was introduced on June 27, 1892, by Representative William C. Oates of Alabama, H. R. 9,348, which bill contained an analysis of the act. In the analysis occurs the following as explanatory of section 11, which then corresponded to section 12 of the present act:

"In most cases of honest failure, a composition or compromise can be effected between the debtor and his creditors. In order to enable the creditors

to pass upon the honesty of a debtor, and to calculate the worth of their claims, it has been provided, that the debtor shall be examined in open court or at a meeting of his creditors, and file his schedule of property and list of creditors before the creditors shall be petitioned to accept the compromise which he offers. The offer shall not be filed in court until it has been accepted by a majority in number and amount of the creditors, and whatever is to be paid has been deposited subject to the order of the court. It is not intended that any offer shall be made except in good faith, and not unless it can be complied with upon its acceptance by the creditors."

In the report of the Judiciary Committee accompanying this bill, H. R. 9,348, the Judiciary Committee, on page 12, state emphatically that a composition can be made either before or after the adjudication. The clause is as follows:

"A composition may be promptly made by the debtor with his creditors, when it is desired by the former and a majority of the latter. A minority of the creditors will not be able to either prevent the composition as a matter of spite, or enforce the payment of their claims in full by interposing obstacles to the composition. It may be made either before or after the adjudication. If fraudulently procured, it may be set aside upon application made within six months after the adjudication. It seems probable that under these provisions there will be a greater number of compositions than administrations."

In this form this provision of the bill remained down to the Fifty-Fifth Congress, and passed Congress in the identical form in which it now appears. When the "Torrey Bill" in the Fifty-Fifth Congress went to a Conference Committee, no change was made in sections 11 and 12, now sections 12 and 13 of the act. "Congressional Record," volume 31, part 7, page 6429, June 28, 1898. It would, therefore, seem to be clear beyond any manner of doubt that the contemporaries, who have cast this powerful sidelight upon the construction of the act, were clearly of the opinion that a composition could be effected before an adjudication. *Contemporanea expositio est optima et fortissima in lege.*

The referee would, therefore, submit that he has authority under the present reference to call the Honorable District Judge's attention to the situation as it exists in this case, but that if he has exceeded his powers the order of reference could be very easily enlarged granting him the authority to present this interesting and important question of procedure. The course of procedure which he would, therefore, recommend, if his views as before set forth are correct, would be that on the request of the requisite number of creditors whose claims have been proven (section 55e), or upon a petition as set forth in Form No. 60 (32 C. C. A. xxxii, 89 Fed. viii), a meeting should be called to consider the composition, on the analogy of the meeting as it was required under the act of 1874, to consider and pass resolutions as to a composition offer. This meeting could be held, and notices sent to creditors in accordance with the schedules already filed, an examination of the debtor renewed or confirmed as the creditors may desire, and a trustee also chosen for the reasons already stated. This procedure is plain and simple, and enables creditors to accomplish the purposes of effecting a composition before an adjudication. The question of compensation of officials and counsel is naturally included in a composition effected before, as well as after, an adjudication.

## AMERICAN TIN PLATE CO. v. LICKING ROLLER MILL CO.

(Circuit Court, E. D. Kentucky. April 1, 1902.)

## 1. TRADE-MARKS AND TRADE-NAMES—"INFRINGEMENT"—COPYING ESSENTIAL FEATURE OF TRADE-MARK.

About 1840 a firm in Wales adopted as a trade-mark for terneplate manufactured by it, by a secret process, the letters of "M. F." in monogram inclosed within a circle. They subsequently granted a license to use the process and trade-mark to a manufacturer in the United States, which was afterward acquired by complainant, and the trade-mark was registered in this country. The plate so made was specified by architects, and ordered and designated by dealers as "M. F." terneplate. *Held* that, while the letters were used by the proprietors on their goods only in monogram inclosed within a circle, which constituted the technical trade-mark, they were its essential feature, and that any use of such letters by another to designate a different plate, either alone or in connection with other letters or words constituting a different dress, was an infringement, and clearly so where such use was calculated or likely to deceive purchasers or users.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 64.]

## 2. SAME.

Where, by the use of a trade-mark, the goods of a manufacturer have come to be known by a particular name, the adoption by a rival manufacturer of any mark or device which causes his goods to become known in the market by the same name may be an infringement of the trade-mark.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 66, 67.]

## 3. SAME—EVIDENCE TO ESTABLISH INFRINGEMENT.

To establish infringement of a trade-mark, it is not essential to show that any one has actually been deceived, or an intent to deceive, although proof that persons have been deceived is pertinent and persuasive evidence that the mark complained of is calculated and was intended to deceive.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, § 64.]

## In Equity. Suit for infringement of trade-mark.

This was a proceeding in equity brought to restrain infringement of trade-mark and unfair competition. About 1840, R. B. Byass & Company, at Port Talbot, Wales, while engaged in the business of manufacturing terneplate, devised a secret process for its manufacture, and adopted for terneplate made by them under this process a trade-mark consisting of the letters "M. F." in monogram inclosed within a circle as follows:



R. B. Byass & Company continued the manufacture of this terneplate at Port Talbot and its sale under the trade-mark "M. F." both in England and the United States until August 30, 1897, when they licensed the Elwood Tin Plate Company, of Elwood City, Ind., to use the secret process and the trade-mark upon terneplate made by that company according to the process. A plant for the manufacture was erected by the Elwood Tin Plate Company under the supervision of R. B. Byass & Company, and workmen from their establishment skilled in the manufacture under the process were employed. R. B. Byass & Company became stockholders in the Elwood Tin Plate Company and one of the firm a director. On January 1, 1900, the Elwood Tin

Plate Company went out of business, surrendered its license to R. B. Byass & Company, and on January 4, 1900, transferred all its remaining assets, including the plant at Elwood City to the American Tin Plate Company, the complainant in this cause. In March, 1900, the complainant purchased from R. B. Byass & Company the secret process, the good will of the business of making terneplate under it, and the exclusive right to the trade-mark "M. F.," and thereafter employed the process in making terneplate at the Elwood City plant of the American Tin Plate Company, and marked the product so manufactured with the trade-mark. It was shown that the terneplate of the American Tin Plate Company was ordered, specified, and referred to by architects, dealers and users as "M. F. terneplate" though the form in which these letters were used upon the product was always as a monogram inclosed in a circle. Defendant, Licking Roller Mill Company, was a Kentucky corporation with a rolling mill at Covington, Ky. Shortly before the institution of the suit it began the manufacture of terneplate, which it marked as

I. C. I. C.

follows: M. F. H., M. F. H., and M. F. H. Defendant contended that it had  
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acquired the right to use the letters "M. F. H." from a man named Murray F. Herman, of Dayton, Ky., whose initials they were. It appeared that there was a Martin Herman, who was a hardware dealer and cornice maker at Dayton, but who had never manufactured tin or terneplate. Complainant contended that his name was Martin Herman and not Martin F. Herman. It was shown that the sign over his place of business was "Martin Herman," that his name given in the city directories was Martin Herman, and that property was transferred by him under the name "Martin Herman," and that he was known as Martin Herman and not Martin F. Herman. Exceptions to the bill and a general demurrer filed by the defendant were overruled. The cause came on for hearing upon pleadings and proof. It was contended by defendant that it had acted in good faith, that it had a right to use the mark, and that, since the form in which complainant had used the trade-mark was the letters "M. F." as a monogram inclosed in a circle, the use by defendant of the letters "M. F. H." without the circle did not amount to an infringement.

Mackoy & Lowman (Frank F. Reed and Edward S. Rogers, of counsel), for complainant.

S. D. Rouse, for defendant.

COCHRAN, District Judge. Counsel for defendant emphasizes the fact that the design which the complainant and its predecessor in title have always used to mark the terneplate manufactured and sold by them has been the letters "M. F." in monogram inclosed within a circle; and that they have never used those letters for that purpose, except in that way. He draws the conclusion from this circumstance that complainant's trade-mark is those letters so disposed and accompanied, and not those letters differently disposed or accompanied. In other words, his position is that its trade-mark is to be determined by what has been used by complainant and its predecessor, and not by what they have claimed was the trade-mark, and, so determining it, it must be held that its trade-mark is those letters with such disposition and accompaniment, and not those letters without either. According to this view of the matter, the letters "M. F." not in monogram and without any accompaniment is not complainant's trade-mark.

It seems to be true that the mark which has always been used is, as claimed, the letters in question in monogram within a circle. Those letters seem never to have been used upon the goods in marking them

in any other way. At least there does not seem to be any evidence in this record of such use. It may also follow from this, that, strictly speaking, complainant's trade-mark is those letters in monogram within a circle, and not otherwise arranged or associated. But conceding all this to be true, what follows from the concession? It does not follow from this that in order for the trade-mark to be infringed it is necessary that the mark used by the infringer should be exactly the same as the trade-mark, and that it cannot be infringed by the use of those letters not in monogram and not within a circle. Their use in any way that is calculated or likely to deceive a purchaser of the infringer's goods into believing that he is purchasing complainant's goods is all that is necessary to constitute an infringement. I doubt whether those letters can be used to mark terneplate in any way without their use being an infringement. The letters "M. F." are the essential features of the trade-mark, and it is so claimed in the registry thereof in the Patent Office. All else is mere dress, if used not in monogram and unassociated, i. e., if all that is used is the plain English capitals in a straight line, they may be said to be used nakedly or without dress. If used, as defendant has been using them, i. e., accompanied with other letters, or with certain words, they may be said to be used with a different dress from that used by complainant. Can it be said then that the fact that those letters have been used without dress or with a different dress from that used by complainant prevents their use from being an infringement? I hardly think so; and that without any specific consideration of whether or not, in such form, they are calculated to deceive the purchasers of terneplate. The fact that the alleged infringer has made use of the essential feature of complainant's trade-mark which is, as conceded above, the letters "M. F." in monogram within a circle, characterized by defendant's counsel as its "technical" trade-mark, though in an entirely different form, would seem to be sufficient. The question whether the mark used by the alleged infringer was calculated to deceive the public would not cut any figure in determining whether there had been an infringement if the mark so used were identically that which is claimed to be the trade-mark. So, if the mark so used contains the essential feature of the trade-mark, but in a different form, that question should not cut much, if any, figure in the case. Would counsel contend that a manufacturer or seller of terneplate could mark his goods with the English capitals "M. F." in a straight line without any accompaniment with impunity, or that the owner of the trade-mark would have to show that some one had been deceived by such use before he would be entitled to an injunction? It would seem not. Yet in such case the monogram and the circle both are gone, and one looking at the two marks would not have the slightest difficulty in saying that the two marks were not the same. Does it make any difference then that the letters are so used with an accompaniment, as in this case, with additional letters or words? I think not.

But if we take into consideration the element of being calculated or likely to deceive, such use of the essential feature of complain-

ant's trade-mark in a different form must be condemned; and for the reason, if none other, that it will have a tendency to cause the goods so marked to be known in the market by the same name identically as that by which complainant's goods are known. It is shown by the evidence in this case that when complainant's goods are spoken or written about they are called "M. F." terneplate. They have acquired that name in the market. When the letters are used in this way, it is not in monogram or inclosed within a circle. They cannot be so used when spoken, and it is useless labor when written. They are only so used when stamped upon the goods. The use by defendant of the same letters accompanied with other letters or with certain words will have a tendency to cause their goods to be known by the same name as complainant's. The fact that there is no evidence in the record that in the short time they have been used they have acquired that name is not sufficient to rebut this inference. That, if such is the case, there has been an infringement because of likelihood of deception in this way is well put in the following quotation from the opinion of Lord Cranworth in the case of *Seixo v. Provezende*, L. R. 1 Ch. App. 192, to wit:

"If the goods of a manufacturer have, from the mark or device he has used, become known in the market by a particular name, I think that the adoption by a rival trader of any mark which will cause his goods to bear the same name in the market may be as much a violation of the rights of that rival as the actual copy of his device."

And this statement of the law is borne out by many authorities cited by counsel for complainant.

Then, as to the fact that there is no evidence that any purchaser of terneplate has been deceived, and the further fact that according to defendant's claim there was no intent on its part to deceive and to get a part of complainant's trade, both of which facts are also emphasized by counsel for defendant. To this it is perhaps sufficient to answer that it is not an essential part of complainant's case, in view of the positions heretofore taken, that any one should actually have been deceived, or that there was an intent on defendant's part to deceive. Such facts are mainly, if not exclusively, pertinent in this sort of case in their having a tendency to show that the particular mark used and complained of is calculated to deceive. The fact that persons have been deceived, and that in the user's judgment they will be deceived, is quite persuasive, if not conclusive, of the fact that the mark in question is calculated to deceive. And yet such conclusion may be reached without the aid of such significant circumstances. As to the matter of intent on defendant's part, in view of the value of complainant's trade-mark, and defendant's knowledge when it adopted the marks complained of, of those marks embodying the essential feature of complainant's trade-mark; of the explanation as to why defendant came to adopt them being open to question, to say the least; and of the fact that when complaint of their use was made, though seemingly not much value or importance is attached to them by defendant, it refused to abandon all claim or right to use them, though, possibly, the court may be in error in this particular—it seems to be more reasonable from the evidence to con-



clude that the defendant was not entirely free from a desire to get the benefit of complainant's trade by the use of the marks adopted by it.

What I have said in this opinion is entirely informal. It is devoted to a consideration of the positions advanced by defendant's counsel, because I announced at the conclusion of the argument that I felt quite sure that complainant is entitled to the injunction it seeks, and only took it under advisement, in order that I might consider those positions, which have been advanced with earnestness and sincerity, more carefully. Such consideration has resulted in a deepening of my conviction that the injunction should be granted.

### THE RAGNAROK.

(District Court, E. D. New York. January 11, 1908.)

1. **SALVAGE—SUIT FOR COMPENSATION—EFFECT OF EXCESSIVE CLAIMS.**

False allegations in a libel for salvage as to the service rendered and excessive claims for compensation may determine a doubtful case against the libellant, or may justify the denial of any compensation for services rendered, or the reduction of the amount.

2. **SAME—TOWING VESSEL FROM FIRE AT WHARF—ABSENCE OF MASTER.**

A tug tendered a line to a steamship which was lying at a wharf and in imminent danger of taking fire from a burning building near by, and such line was accepted by those on board in the absence of the master, and the vessel towed out of danger. *Held*, that the action of the tug was meritorious and proper, and she was entitled to a salvage award therefor, and that the master of the steamer on arriving and terminating the service could not repudiate that already rendered on the ground that it was not requested nor desired.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, § 28.]

3. **SAME—AMOUNT OF AWARD.**

A tug which towed a steamship worth \$65,000 from a wharf when she was in danger of fire with apparently no other means of assistance at hand, the service lasting about 20 minutes, *held* entitled to a salvage award of \$1,200.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Salvage, § 76.

Award in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

In Admiralty. Suit for salvage.

Foley & Martin (William J. Martin, of counsel), for libellants.

Wallace, Butler & Brown (Howard S. Harrington, of counsel), for claimant.

CHATFIELD, District Judge. Services were rendered by the tug Henry Gillen and her crew to the steamer Ragnarok, upon the occasion of an exceedingly fierce and troublesome fire at Miller's plaster mill, on Newtown creek in this district, upon the morning of August 23, 1906. The Ragnarok is a steel freight steamer, worth some \$65,000, and the claimant's stipulation for value in this action was fixed at \$5,000. The Gillen was a tug of average capacity, and worth at the time perhaps some \$18,000. At the time the fire broke out, the Ragnarok was lying at a wharf immediately adjacent to the building on fire. The channel to the wharf was such that the steamer could neither pro-

ceed to or away from the wharf under her own steam. A wind was blowing directly toward the face of the wharf, and carrying the flames out to and over the steamer. Under such circumstances, the Gillen left a tow with which she was proceeding up the river, made fast to the bow of the Ragnarok with the Gillen's own hawser, and in the course of some 20 minutes succeeded in removing the Ragnarok from the immediate point of danger. Inasmuch as the tide was running flood, the stern of the Ragnarok, then some distance below the fire, was not carried out into the stream an equal distance with the bow, the effect of the hawser attached to the bow of the vessel also increasing the tendency to swing. During the period in which the vessel was in tow of the tug, the captain of the Ragnarok, who was not on board at the time the fire broke out, succeeded in reaching his vessel, and after getting to the bridge, not only refused further assistance, but ordered the termination of the efforts of the Gillen. There is some dispute as to when the captain's orders were made known to the officers of the tug (inasmuch as the captain's first directions seem to have been given in Norwegian), but at about the time the Gillen left the bow of the Ragnarok and proceeded toward the stern, in order to draw the stern out even with the bow, the captain of the Ragnarok sent out a small boat to carry a line from the stern of the vessel to the opposite shore of Newtown creek. Some misunderstanding occurred in reference to this small boat, the men in the small boat at first attempting to give their line to the Gillen, and, under the orders of the captain, then leaving the Gillen and proceeding across the creek. In any event, the services of the Gillen ceased at this point, and the repudiation of the offer of further assistance resulted in her ceasing further efforts. The Gillen then backed away, and later returned to her tow. The Ragnarok was successfully warped across the stream by the stern line and by a second bow line subsequently led out by this same small boat. The assistance given by the Gillen was timely, valuable, and of a character which ordinarily should be rewarded. The value of those services and the amount of the remuneration, which in part should be based upon the idea of rewarding the Gillen for her prompt action, and for the willingness of her officers to assist in a situation of possible danger, would be the whole question for consideration in this case, if the claimant had not interposed two questions of law, which must be considered in reaching a determination.

The first of these objections is based upon a claim set forth in the libel that the Gillen rendered services to the Ragnarok, in towing the vessel across Newtown creek, and landing her along the wharf upon the opposite shore, upon which claim salvage was demanded to the extent of \$5,000. It is undoubtedly true that, where a libelant shows such unconscionable greed and such inaccurate or false claims as to throw doubt upon the entire matter, such conduct may resolve a doubtful case in favor of the claimant, render it impossible to place credence in the story of the libelant, or even be a basis for holding that no compensation should be allowed for whatever services were rendered. *The Barefoot*, 1 Eng. Law and Eq. 661; *The Dorothea Foster*, Fed. Cas. No. 429; and *The Chouteau*, *infra*. But in the case at bar, the facts shown by the testimony concerning the transaction, the services ren-

dered, and the circumstances surrounding the filing of the libel, all indicate a proper case for the allowance of some compensation, and the exaggeration should have the effect merely of lessening the amount of the award.

The other proposition advanced by the claimant to defeat any recovery is that the libelants can recover no compensation, inasmuch as the assistance offered and extended was neither accepted nor desired by the captain of the Ragnarok. It appears from the testimony that the line which was passed by the Gillen was taken by some stevedores or common sailors, who were running around upon the deck of the vessel giving evidences of fright and panic. The captain, as has been stated before, at some time during the course of the towing, endeavored to repudiate the actions of these men, and ultimately terminated the efforts of the Gillen.

In the early case of *New Harbor Protection Co. v. Steamer Charles P. Chouteau* (D. C.) 5 Fed. 463, the court used the following language:

"If the master of a burning vessel prefers to allow her to burn rather than to permit outside parties to extinguish the flames, he may do so. He has a perfect right to decline any assistance that may be offered him; he should not be assisted against his will."

This broad proposition has, however, not been followed in the literal sense of the language quoted. In the case of *Spreckels v. The State of California* (D. C.) 45 Fed. 649, the court expressly states that the doctrine in the *Chouteau* Case is too broad. Certain other considerations in that case entered into a determination by the court that the libellant was entitled merely to a contract price for the services which it had rendered, and a prior refusal by the owner of the State of California to make use of the services of the tug *Relief* was held sufficient to defeat a claim for salvage for those services which were actually subsequently rendered by that tug, for the following reasons:

"But where the owners of a vessel in peril have taken all measures in their judgment necessary to insure her safety, and those measures are adequate, and all that prudence requires, other parties have no right to obtrude their services, and anticipate the employment of the means adopted by the owners, and then, if successful, claim a salvage recompense."

This principle of the *Spreckels* Case is also recognized in the case of *The Bolivar v. The Chalmette*, 1 Woods, 398, Fed. Cas. No. 1,611; *The Pohatcong* (D. C.) 77 Fed. 996; *Baker v. The Tros*, Fed. Cas. No. 783; and various others. It was further said in the case of the *Pohatcong*, *supra*, that the acceptance of a line by a seaman, after a refusal by the master, could not bind the ship. None of these cases, however (except the general statement in the *Chouteau* Case), meets the situation now under consideration. To say that services offered and rendered in a situation of danger, when no adequate or reasonable means of assistance or protection exist at the time (other than those offered by the vessel tendering assistance), can be repudiated and terminated when the immediate danger has passed, is to give to any owner or captain of a vessel in distress an opportunity to relieve himself from salvage charges, which would lead to utterly unjust results.

During the time that assistance is being rendered, the officers of a

vessel in distress are certainly at liberty to determine when the assistance rendered should be terminated, and such assistance cannot be forced upon them beyond that point, if the vessel in distress is then in a position where nothing but the property rights of the owners of the vessel are at stake. Upon reaching such a point, or at any time subsequent, if the officers of the vessel are able to think of some course of action which might have been taken in the emergency, and which if fortunately carried out might have resulted in saving their vessel, such an afterthought would almost always be interposed as a defense to a recovery for the assistance which had been rendered and acquiesced in up to that point, provided the courts sanction such a proposition.

Upon the record in this case it is impossible to determine what would have been the effect of an utter repudiation by the Ragnarok of the Gillen's services, and of a refusal to accept the hawser proffered by the Gillen. It is believed that the Gillen took a proper course, and rendered valuable assistance, at a time when such an offer should have been accepted and the proffered aid taken advantage of, with the expectation of paying therefor a suitable award. For the payment of this suitable award the Ragnarok is liable, and is bound by the action of the Gillen and of the men on the Ragnarok prior to the time when the captain determined that the services of the Gillen would not be required, and directed the Gillen to cease her efforts. As to the value of these services, considering that the time of performance was short, that no particular hardship was involved, and that the danger while imminent was not likely to be extreme, it would seem that an award of \$1,200, to be distributed according to the usual rules, is sufficient, and the libelants may have a decree accordingly.

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#### CARPENTER v. WILLARD CASE LUMBER CO.

(Circuit Court, S. D. Iowa, C. D. January 23, 1908.)

No. 3,789.

#### 1. CORPORATIONS—ACTIONS AGAINST FOREIGN CORPORATIONS—VALIDITY OF SERVICE.

A firm of lumber commission merchants domiciled in Iowa, who took orders from persons desiring lumber, and forwarded the same to lumber companies for acceptance, receiving a commission from the sellers in case a sale was made, and who in such manner sent orders to defendant, a Missouri corporation, having its principal place of business in St. Louis, which were accepted, did not thereby become agents for defendant in Iowa, within the meaning of Iowa Code, § 3529, so that jurisdiction could be acquired in a suit against defendant in the state by service on such firm, defendant having no property or place of business in Iowa.

[Ed. Note.—Service of process on foreign corporations, see notes to *El-dred v. American Palace Car Co.*, 45 C. C. A. 3; *Cella Commission Co. v. Bohlinger*, 78 C. C. A. 473.]

#### 2. APPEARANCE—PROCEEDINGS CONSTITUTING "GENERAL APPEARANCE"—REMOVAL OF CAUSE.

The appearance of a nonresident defendant in a state court for the sole purpose of removing the cause does not constitute a "general appearance" which precludes it from moving to quash the service in the federal court.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 4, pp. 3051, 3052.]

On Motion to Quash Service of Summons.

Parker, Hewitt & Wright, for plaintiff.

Dunshee & Dorn, for defendant.

POLLOCK, District Judge. The sole question arising for decision on this record relates to the validity of the service of the summons made in this case. The facts gleaned from the record necessary to a decision of this question, briefly stated, are as follows: Plaintiff, a citizen of this state, doing business under the name and style of the "Iowa Bridge Company," in the year 1906 purchased from the defendant, a lumber corporation organized under the laws of the state of Missouri, domiciled in the city of St. Louis in that state, 58 cars of lumber. The defendant delivered plaintiff 33 cars of this lumber under its contract, but failed and refused to deliver the remaining 25 cars, hence, this action was brought by plaintiff to recover the sum of \$3,500 damages for breach of such contract. The action was originally brought in the district court of Polk county, this state. The summons issued in the action was served on Moetzel & Tobin, a firm of lumber commission merchants domiciled in the city of Des Moines, Polk county, this state. This summons commanded the defendant to appear and answer in the state court on the 6th day of May, 1907. This it did not do, but on May 16th thereafter appeared in the state court, filed its petition and bond for removal into this court, and in this court has filed its motion to quash and set aside the service of the summons thus made. On the face of this record, as well as by stipulation of parties, the case must go back to the state court if the service made is sustained.

From the evidence submitted by way of affidavits for and against this motion to quash, it appears Moetzel & Tobin are lumber commission merchants domiciled in the city of Des Moines. As such commission merchants they take orders from persons desiring to purchase lumber, and forward the same to lumber companies having lumber of the character ordered for sale. In this case, as shown by the correspondence, the orders made by plaintiff were addressed to Moetzel & Tobin, and by them forwarded to the defendant company in St. Louis for acceptance. In pursuance of these orders accepted by defendant the lumber was to be delivered to the plaintiff at certain figures therein specified f. o. b. the cars at such point of destination as the plaintiff might designate, he being permitted, after the making of the orders, to specify the sizes of the lumber. The defendant company owned lumber mills in the northwest. The lumber ordered was to be shipped over the Northern Pacific Railway Company's line. It did not own any lumber or other property of any character in this state, and it was not necessary in the fulfillment of the orders thus taken that the lumber or any part thereof should be delivered in this state. Defendant did not have any lumber yard, warehouse, office, or place of business in this state, and did not have any agent or representative in this state other than as the above-stated facts constituted the firm of Moetzel & Tobin its representatives. And it is not shown from the testimony that defendant transacted any business in this state except that above specified. Moetzel & Tobin, as lumber commission mer-

chants, rented their own office, paid their own expenses, and received their compensation on orders for lumber filled through them, based on the amount of such orders filled by lumber dealers. The commission in this case was \$5 per car to be paid by defendant to Moetzel & Tobin. The arrangement to thus represent defendant was made in St. Louis by Mr. Tobin.

Under this state of facts, is the relation existing between Moetzel & Tobin and defendant of such nature in law as to constitute them the representatives of the defendant company in this state to such extent that valid personal service of process may be made upon defendant through them? The answer to this question must depend upon what provision the lawmaking power of this state has lawfully enacted for obtaining personal service on a foreign corporation by the service of process upon those representing or claiming to represent such corporation in this state. At the common law there was no method by which process could be served on a foreign corporation in an action at law binding the person of the corporation. As said by Mr. Justice Field in *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222:

"Formerly, it was held that a foreign corporation could not be sued in an action for the recovery of a personal demand outside of the state by which it was chartered. The principle that a corporation must dwell in the place of its creation, and cannot, as said by Mr. Chief Justice Taney, migrate to another sovereignty, coupled with the doctrine that an officer of the corporation does not carry his functions with him when he leaves his state, prevented the maintenance of personal actions against it. There was no mode of compelling its appearance in the foreign jurisdiction. Legal proceedings there against it were, therefore, necessarily confined to the disposition of such property belonging to it as could be there found; and, to authorize them, legislation was necessary. *McQueen v. Middletown Manufacturing Co.*, 16 Johns. (N. Y.) 5; *Peckham v. North Parish in Haverhill*, 16 Pick. (Mass.) 274; *Libbey v. Hodgdon*, 9 N. H. 394; *Moulin v. Trenton Insurance Co.*, 24 N. J. Law, 222."

Therefore, it is only by virtue of statutory authority that such service can be made, the statutory method must be followed, and the method adopted and followed must constitute due process of law. The lawmaking power of this state has provided a method of obtaining service on foreign corporations, as follows: Section 3529 of the Code of Iowa provides:

"If the action is against any corporation or person owning or operating any railway or canal, steamboat or other river craft, or any telegraph, telephone, stage coach or car line, or against any express company, or against any foreign corporation, service may be made upon any general agent of such corporation, company or person, wherever found, or upon any station, ticket or other agent or person transacting the business thereof or selling tickets therefor in the county where the action is brought; if there is no such agent in said county, then service may be had upon any such agent or person transacting said business in any other county."

Section 3532 of the Code provides:

"When a corporation, company or individual has, for the transaction of any business, an office or agency in any county other than that in which the principal resides, service may be made on any agent or clerk employed in such office or agency, in all actions growing out of or connected with the business of that office or agency."

A state is powerless to provide any method of obtaining personal service binding upon a natural personal citizen of a foreign state unless such person comes within the territorial boundaries of such state so that the law may become operative upon him. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. A state may subject its citizens to the jurisdiction of courts created under its Constitution and laws in any manner it may deem proper, so long as the method provided constitutes due process of law. A corporation can act and be bound only through its constituted officers, agents, and servants, therefore a domestic corporation may be required by the laws of the state of its creation to answer personally in any court of the state by the personal service of notice of the pendency of an action against it therein, served upon any officer, agent, or other representative of the company within the state, as the lawmaking power in its wisdom may provide, unless prohibited by its Constitution. A corporation is in law conclusively presumed to be a citizen of that state under whose laws it is organized, and it cannot, as an individual, remove from such state, and thus change its citizenship. It therefore becomes material to inquire what lawful authority a state has to provide for the obtaining of jurisdiction by its courts to pronounce judgment binding personally upon a foreign corporation, and what limitations are placed upon the exercise of such right by the state, for it is self-evident that an act of the Legislature of a state, providing the service of process upon A., a citizen of the state, shall bind B., a corporate citizen of another state, without regard to any relationship existing between A. and B. or the consent of B. to such arrangement, would be entirely nugatory and void, because not constituting due process of law. And this without regard to the fact that A. may notify B. of the service made or the pendency of the action. It is therefore apparent the person on whom the process is served within the jurisdiction of the court, to bind the foreign corporation, must stand as the representative of the foreign corporation. Not in a special or restricted sense, but in such measure that, if instead of the process being served upon him he should accept service of the writ, his acceptance would bring his principal, the foreign corporation, personally before the court, and when brought in the corporation would be estopped from denying the authority of its agent to bind it by the act of acceptance of the service. That this is the true rule, I think, is made clear by reference to a few of the many adjudicated cases.

In *St. Clair v. Cox*, supra, Mr. Justice Field, delivering the opinion, says:

"The state may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits that it shall stipulate that, in any litigation arising out of its transactions in the state, it will accept as sufficient the service of process on its agents or persons specially designated; and the condition would be eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a state permits a foreign corporation to do business within her limits, and at the same time provides that, in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they

had specially authorized their agents to receive service of the process. Such condition must not, however, encroach upon that principle of natural justice which requires notice of a suit to a party before he can be bound by it. It must be reasonable, and the service provided for should be only upon such agents as may be properly deemed representatives of the foreign corporation. \* \* \* The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient prima facie evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company, that his duties were limited to those of a subordinate employé, or to a particular transaction, or that his agency had ceased when the matter in suit arose."

In *Mutual Life Insurance Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569, Mr. Justice Peckham quotes the following from the opinion in *St. Clair v. Cox*, supra:

"In the state where a corporation is formed, it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the state will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as, also, the officers appointed by them to manage its business. But the moment the boundary of the state is passed difficulties arise. It is not so easy to determine who represents the corporation there, and under what circumstances service on them will bind it."

And then says:

"This language does not confine the service to an agent who has been expressly authorized to receive service of process upon him in behalf of the foreign corporation. If that were true, it would be easy enough to determine whether the person represented the corporation, as unless he has been so authorized he would not be its agent in that matter. In the absence of any express authority, the question depends upon a review of the surrounding facts, and upon the inferences which the court might properly draw from them. If it appear that there is a law of the state in respect to the service of process on foreign corporations, and that the character of the agency is such as to render it fair, reasonable, and just, to imply an authority on the part of the agent to receive service, the law will and ought to draw such an inference and to imply such authority, and service under such circumstances, and upon an agent of that character, would be sufficient."

In *Green v. Chicago, Burlington & Quincy Ry.*, 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916, Mr. Justice Moody, delivering the opinion of the court, says:

"The business done in this case was, in substance, nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will construe 'doing business' in the sense that liability to service is incurred, we think that this is not enough to bring the defendant within the district so that process can be served upon it. This view accords with several decisions in the lower federal courts. *Maxwell v. Atchison, etc., Railroad* (C. C.) 34 Fed. 286; *Fairbank & Co. v. Cincinnati, etc., Railroad*, 54 Fed. 420, 4 C. C. A. 403, 38 L. R. A. 271; *Union Associated Press v. Times-Star Co.* (C. C.) 84 Fed. 419; *Earle v. Chesapeake, etc., Railroad* (C. C.) 127 Fed. 235."

Tested by the rule announced in these cases, is the service here relied upon by plaintiff sufficient? That is to say, suppose Moetzel & Tobin had accepted the service of process in this case on behalf of defendant company instead of being served with the process. Would defendant be bound thereby, and estopped to deny the authority so exercised?



I think not. As has been seen from the facts stated Moetzel & Tobin were not held out to the public by defendant as its agents to transact its business. They were transacting their own business. They did not occupy an office of the defendant company in this state, they occupied their own office. They were not in possession of or exercising dominion or control over any property of the defendant in this state. In the line of their business they took orders for lumber, had such orders accepted, filled, or agreed to be filled by defendant company for plaintiff. In so doing defendant was not bound by any act of Moetzel & Tobin, but by its own act of acceptance. Moetzel & Tobin were transacting the business of lumber factors or brokers in this state, but the business transacted by them was their business. The defendant was transacting business in St. Louis through Moetzel & Tobin in the manner stated. In such case the principal is not bound by the service made. For a lengthy discussion of the general principles involved, see the opinion of Judge Sanborn in *Butler Bros. Shoe Co. v. United States Rubber Co.* (C. C. A.) 156 Fed. 1, recently decided.

Again, it is not thought the appearance by the defendant in the state court for the purpose of filing its petition and bond for removal to this court constituted a general appearance to the merits of the case, or a waiver of the invalidity of the attempted service because of the statute of this state. The service being invalid, no duty rested on defendant to obey the command of the summons issued from the state court. It could have permitted judgment to go by default against it and successfully resisted its enforcement. However, it did not desire to take such course, but pursued the more prudent one of appearing in the state court for the sole purpose of removing the controversy to this court, which it might lawfully do; and, when the controversy was so removed, the question of jurisdiction over the person of the defendant is one for the consideration of this court under the general provisions of the law, and not for the state court under special provisions. *Louden Machinery Co. v. American Malleable Iron Co.* (C. C.) 127 Fed. 1008, and cases therein cited.

It follows, the motion to quash and set aside the service in this case must be, and is, sustained. Such order will be entered by the clerk.

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In re APREA.

(Circuit Court, S. D. New York. February 26, 1908.)

ALIENS—NATURALIZATION—PETITION—VERIFICATION.

Naturalization Act June 29, 1906, § 4, par. 2, 34 Stat. 596, c. 3592 [U. S. Comp. St. Supp. 1907, p. 421], provides that a naturalization petition shall be verified by at least two credible witnesses or citizens of the United States, who shall state that they have personally known the applicant to be a resident of the United States for five years continuously, and of the state for at least one year, immediately preceding the date of the filing of his petition, and that they each have personal knowledge that petitioner is a person of good moral character, etc. *Held*, that where one of petitioner's witnesses at the hearing admitted that he had not known petitioner for five years antedating the filing of petition, as stated in the witness' affidavit, and the other witness, who was a naturalized alien, admitted that he had surrendered his own certificate of citizenship for cancellation because procured in violation of law, the petition was not verified as required by law, and therefore not sustainable.

## Petition for Naturalization.

This petition was filed in this court on the 20th day of November, 1907, and was apparently verified by Giuseppe Silvestri and Alberto Ventri, who made affidavit that they were citizens of the United States and that they had personally known the petitioner to be a resident of the United States for a period of at least five years continuously immediately preceding the date of filing his petition, and of the state of New York for a period of seven years immediately preceding the date of filing said petition, and that to their personal knowledge the petitioner was a person of good moral character, attached to the principles of the Constitution of the United States, and that he was in every way qualified, in their opinion, to be admitted a citizen of the United States. When the cause came on to be finally heard in open court at the expiration of the 90 days prescribed by the statute, the witness Giuseppe Silvestri admitted that he had not known the petitioner for five years antedating the filing of his petition, and could not, therefore, testify to his having resided in the United States during that period of time, or that he was attached to the principles of the Constitution of the United States and otherwise eligible to citizenship as the law requires. The other witness, Alberto Ventri, admitted that he had surrendered his own certificate of citizenship for cancellation, having concluded that it had been procured in violation of law.

Henry L. Stimson, U. S. Atty. (Hugh Govern, Jr., of counsel), for objector.

LACOMBE, Circuit Judge (after stating the facts as above). Subdivision 2 of paragraph 2 of section 4 of the naturalization act of June 29, 1906 (34 Stat. 596, c. 3592 [U. S. Comp. St. Supp. 1907, p. 421]), provides as follows:

"The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the state, territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States."

The petition in this case has not been verified in the manner prescribed by the statute, since the witness Ventri is not a citizen of the United States. It complies with the letter of the statute, so far as the witness Silvestri is concerned, since he did "state in [his] affidavit" that he had known the petitioner the requisite time. By admitting, however, that this statement was inaccurate, the witness has deprived his statement of any probative force, and it would not be a fair compliance with the spirit of the statute to accept a petition thus verified as sufficient.

The petition may be denied, without prejudice to a renewal on proper papers.

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In re O'DEA.

(Circuit Court, S. D. New York. February 25, 1908.)

## ALIENS—NATURALIZATION—WITNESSES—POSTING—STATUTES.

Naturalization Act June 29, 1906, c. 3592, § 5, 34 Stat. 598 [U. S. Comp. St. Supp. 1907, p. 423], provides that the clerk, immediately after filing a petition for naturalization, shall give notice thereof by posting, stating the name, nativity, and residence of the alien, the date and place of his arrival

in the United States and of the final hearing of his petition, together with the names of the witnesses whom the applicant expects to summon in his behalf; but, in case such witnesses cannot be produced on the final hearing, other witnesses may be summoned. *Held*, that other witnesses than those verifying the petition may not be examined at the hearing, where their names have not been posted for 90 days prior thereto.

#### Petition for Naturalization.

The petition came on for final hearing in open court at the expiration of the 90 days prescribed by the statute, when the petitioner represented to the court that he was unable to produce one of the original verifying witnesses, Michael O'Dea, and asked permission to substitute a new witness, named Frank Curran, who was believed to have the requisite qualifications. The representative of the government objected, on the ground that the name of the proposed new witness had not been duly posted.

Henry L. Stimson, U. S. Atty. (Hugh Govern, Jr., of counsel), for objector.

LACOMBE, Circuit Judge. The point is well taken. The naturalization act of June 29, 1906, provides in its fifth section as follows:

"That the clerk of the court shall immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpoena for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses cannot be produced upon the final hearing other witnesses may be summoned." Act June 29, 1906, c. 3592, 34 Stat. 598 [U. S. Comp. St. Supp. 1907, p. 423].

The concluding clause of this section, which authorizes the summoning of other witnesses than those who originally verified the petition, must be read in connection with the whole section, and as requiring that the new witness shall have the same qualifications as those described in the first part of the section, including his having stood the test of having his name publicly posted for 90 days. Otherwise one of the safeguards which Congress provided against the naturalization of improper persons would be cast aside. The very object of posting the names of the witnesses is to give the government opportunity for a full investigation conducted by its own officers, without having to depend solely on the cross-examination of persons of whom it never heard until the cause comes up for final disposition. It is unfortunate that the petitioner has been unable to procure the attendance of his original witness; but it is no great hardship for him to wait until the name of the new witness shall have been posted the requisite length of time. It would seem that persons seeking to be naturalized might avoid such delay by filing with their petitions the names and addresses of alias witnesses whom they propose to call in the event of original witness failing to attend.

The proceeding is adjourned accordingly.

## STATE OF TEXAS et al. v. PALMER et al.

(Circuit Court of Appeals, Fifth Circuit. December 3, 1907.)

No. 1,721.

## 1. COURTS—PRIORITY OF JURISDICTION—APPOINTMENT OF RECEIVER.

Where the relief in aid of which the appointment of a receiver is sought is such as cannot be obtained except by an actual seizure of the property, as the enforcement of a lien thereon, the actual seizure is not necessary to give the court jurisdiction over the property to the exclusion of all other courts, but an order appointing the receiver is an assumption of possession by the court equivalent to an actual seizure.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 1345–1347.]

## 2. SAME—FEDERAL AND STATE COURTS.

In cases where a state court and a United States court may each take jurisdiction of property, the one which first gets jurisdiction holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 1345–1355.]

Conflict of jurisdiction with state courts, see note to Louisville Trust Co. v. City of Cincinnati, 22 C. C. A. 356.]

## 3. SAME—EFFECT OF SUPERSEDEAS.

A district court of Texas appointed a receiver for all the property within the state owned by a foreign corporation, on application of the state, which had recovered judgment against the corporation for penalties for violation of a statute, and also enjoined the defendant from removing any of its property from the state. The receiver qualified and gave bond, but did not take actual possession of the property; the defendant appealing at once from the order, as permitted by Rev. St. Tex. 1895, art. 1383, and giving a supersedeas bond as provided for by article 1404. *Held* that, under such statute as construed by the highest courts of the state, the supersedeas did not operate to vacate the appointment of the receiver, but merely to suspend his functions, nor to deprive the state courts of their exclusive jurisdiction over the property of the corporation, which was only transferred from the district court to the appellate court pending the appeal, and that a federal court was without jurisdiction to appoint a receiver for the same property at suit of a stockholder pending such appeal.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

R. V. Davidson, D. W. Doom, T. W. Gregory, and G. W. Allen (Jewel P. Lightfoot, Jno. W. Brady, Gregory, Gregory & Batts, Allen & Hart, and D. H. Doom, on the brief), for appellants.

S. B. Cantey, E. B. Perkins, H. O. Head, and John D. Johnson, for appellees.

Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

SHELBY, Circuit Judge. This is a suit in equity brought by Bradley W. Palmer, a citizen of Massachusetts, against the Waters-Pierce Oil Company, a corporation organized under the laws of Missouri. The appeal to this court is from two decrees of the Circuit Court—one an interlocutory decree appointing a receiver, and the other a decree refusing to vacate the order appointing the receiver. The case involves questions relating to the jurisdiction of the courts of the state

of Texas and to the custody and control of the property of the Waters-Pierce Oil Company, which can be best stated after briefly showing the proceedings in the state courts and in the Circuit Court.

On September 26, 1906, the state of Texas brought suit in the district court of Travis county, Tex., to forfeit the permit of the Waters-Pierce Oil Company to do business in that state, and to recover of it penalties for violations of the Texas anti-trust statutes. On June 1, 1907, judgment was rendered for the state, canceling the company's permit. Verdict and judgment were also rendered in favor of the state and against the company for \$1,623,900. On the same day, after the rendition of the judgment, the state presented to the district court an application for the appointment of a receiver of all the property of the company situated in Texas, and for an injunction to prevent the company's removing its property from the state. To show the need of a receiver and an injunction, it was alleged that the charter of the company had been forfeited by legal proceedings in Missouri; that the judgment in favor of the state of Texas cannot be collected outside of the state, and that the property of the company in the state is not sufficient to pay the judgment; that the property is in part movable property, and, if carried out of the state, could not be secured to satisfy its judgment; that the state has a lien on the company's property to secure the judgment by virtue of the act of the Legislature of Texas approved April 11, 1907; that the judgment of forfeiture prevented the company from doing business in the state; and that it was necessary, to protect the rights of the state, that the business of the defendant should continue, at least temporarily. This application for a receiver and an injunction being presented to the judge of the district court, he ordered, on June 1, 1907, that notice be given the company, and that it be set down for hearing June 8, 1907. On June 10th, the hearing having been passed to that day, the court granted the application for an injunction and for the appointment of a receiver, but did not name a receiver. On June 13th, Robert J. Eckhardt was named as the receiver, and his bond fixed at \$250,000. The company gave notice that it would appeal, and, on June 15th, the district court fixed \$100,000 as the amount of the bond which the company was required to give to supersede the order appointing the receiver. The company was in court contesting these orders. On June 19th, Eckhardt gave bond, which was approved, and he qualified as receiver. He did not take actual possession of the company's property. On the day last named, June 19, 1907, the company appealed to the Court of Civil Appeals from the order of the district court appointing the receiver, giving the required supersedeas bond. The Court of Civil Appeals, on October 23, 1907, handed down an opinion and entered judgment affirming the decree of the district court appointing Eckhardt receiver. *Waters-Pierce Oil Company v. State of Texas* (Tex. Civ. App.) 105 S. W. 851. The judgment of forfeiture of the company's permit was rendered, as we have said, and the judgment for \$1,623,900 entered on June 1, 1907; and on June 15th, the company appealed from that judgment, giving a supersedeas and appeal bond, approved on that day, for \$3,275,000. On this appeal we are not advised that there has been any decision. On June 19, 1907, Bradley W. Palmer filed the original

bill in this case in the Circuit Court of the United States for the Eastern District of Texas against the Waters-Pierce Oil Company. For the purposes of this decision, it is only necessary to show some of the leading features of the bill and the object of the suit. The complainant sues as a stockholder of the company, owning 100 shares, and avers that the corporation owns both real and personal property situated in Texas which exceeds \$1,000,000 in value. The bill recites elaborately and in detail the proceedings in the District Court of Travis county, Tex., which we have briefly stated. It copies, in part, the anti-trust laws of the state of Texas, averring that they are, in certain respects, in conflict with the Constitution of the United States. It is alleged that the laws of Texas did not authorize the judgment for the amount of penalties as entered in the state court, nor authorize the appointment of a receiver of the property of the oil company by the state court. It is further alleged that an appeal was taken by the company from the order appointing a receiver to the Court of Civil Appeals, the company giving a supersedeas bond, and that the judgment was superseded, and that the judgment and all things incident thereto were removed to the Court of Civil Appeals. The appeal from the penalty judgment to the Court of Civil Appeals is also described. These appeals, it is alleged, superseded the appointment of the receiver. The business and property of the company is described, and facts are alleged tending to show why the United States court should appoint a receiver. The prayer is for the appointment of a receiver to take possession of all the company's property in Texas; that the business of the company may be wound up and its property sold; that the receiver be authorized to manage and operate the property, etc. The Waters-Pierce Oil Company waived service of subpoena on June 19, 1907, and admitted the averments of the bill, and on the same day the Circuit Court appointed Chester B. Dorchester receiver, with the usual powers and authority of receivers in such cases. The decree provides that other parties interested may intervene, and, on June 19th, H. C. Pierce intervened, alleging he was a stockholder, and repeating, in substance, the averments of the original bill, and asking for the same relief. On the next day Dorchester qualified and gave bond as receiver. On June 21, 1907, the state of Texas and Robert J. Eckhardt, the receiver appointed by the district court of Travis county, applied to the Court of Civil Appeals, reciting the action of the several courts herein, and asked that court for relief against the receiver appointed by the United States court, and that the state court would make such orders as would protect and preserve its jurisdiction. The Court of Civil Appeals considered the application and handed down an opinion June 28, 1907 (*Waters-Pierce Oil Company v. State of Texas* [Tex. Civ. App.] 103 S. W. 836), and pursuant to its opinion, the court made an order directing Eckhardt, as receiver, in conjunction with the state of Texas, to appear before the Circuit Court of the United States for the Eastern District of Texas, "and there, by suits, pleas, and applications, urge and insist upon the rights of the state and the jurisdiction of this court in and to and over the property in controversy, and to ask for such orders, decrees, and judgments as they may deem necessary and proper, and to appeal and perfect such appeals

and writs of error as they may deem proper and necessary." On July 1, 1907, the state of Texas and Robert J. Eckhardt, as receiver, applied to the United States Circuit Court, stating the foregoing facts, and moved the court to set aside and annul its orders in reference to the receivership, and that Chester B. Dorchester be discharged as receiver and instructed to return the property of the company to the custody and control of the state courts, and that the jurisdiction of the state courts be recognized. On July 15th, the Circuit Court refused to grant the prayer of the state of Texas and Eckhardt. The order recites as a fact that Robert J. Eckhardt has never taken nor had actual possession of any of the property of the Waters-Pierce Oil Company under the order appointing him receiver, and that Chester B. Dorchester has actual possession under the order appointing him receiver, and the application is overruled without prejudice to any further application that may be made. The appeal to this court by the state of Texas and Eckhardt, as receiver, is taken from the order of June 19, 1907, appointing Chester B. Dorchester receiver, and from the order of July 15, 1907, refusing to vacate the order appointing Dorchester receiver. The making of each order is assigned as error.

The first question presented by the record is whether or not the proceedings in the district court of Travis county, Tex., were such as to confer on it exclusive jurisdiction of the property involved. And, if that question is answered in the affirmative, the second question is whether or not such exclusive jurisdiction was lost by the superseding of the order of the state court appointing a receiver.

The district court of Travis county is a court of general jurisdiction of both law and equity cases. The suit brought by the state of Texas in that court against the Waters-Pierce Oil Company was for the double purpose of forfeiting the permit of the company to do business in Texas, and to obtain a judgment for penalties against the company on account of violations of the Texas anti-trust laws. The proceedings resulted in a judgment for the state of Texas, forfeiting the permit to do business and for penalties to the amount of \$1,623,900. In Texas there are no separate state courts of equity, and there is no practice in the state courts requiring equitable remedies to be administered on bills in equity as in the federal courts. The practice is to administer both legal and equitable remedies on petition, stating the facts and asking for relief. Having obtained this judgment, the state of Texas filed in the court its petition seeking the equitable relief of enforcing an alleged lien upon the property of the company, the appointment of a receiver to take possession of the property, and an injunction to prevent the removal of the property from the state. The petition contained a statement of facts, which, if true, would authorize the court to grant the relief prayed for. Its averments are similar to those of bills in equity in aid of suits at law praying for the appointment of a receiver and the granting of an injunction, but in form the petition conforms to the practice prevailing in Texas. Notice of the petition was given the Waters-Pierce Oil Company, and it appeared. The petition was set down for hearing. After a brief postponement, a hearing was had; both parties to the proceeding being in court. The district court made and entered a formal order or decree appointing

a receiver and fixing his bond. The receiver appeared in the district court, qualified, and gave the bond required by the order, and the bond was approved by the court. All these things occurred before any application was made to the United States court. Everything had been done that could be done to perfect the jurisdiction of the district court and to establish its custody and control of the property of the Waters-Pierce Oil Company, except that the receiver had not obtained the actual possession of the company's property. There has been a contrariety of opinion as to when, in a case like this, the jurisdiction which secures priority attaches. Cases may be found holding that it attaches when invoked by the filing of the bill; others, that it is determined by the priority of the service (*Gluck & Becker on Receivers of Corporations* [2d Ed.] 99); and others, by the priority of the order appointing a receiver, which, Mr. Thompson says, is "tantamount to an actual judicial seizure of the property" (5 *Thompson on Corporations*, § 6855). Here we are not disturbed by these nice distinctions, for the jurisdiction was invoked by the filing of the petition, the issuance of notice, its service, and the formal order appointing the receiver and granting the injunction. Nothing was lacking to complete the actual custody of the property except the manual seizure of it by the receiver of the state court. The relief sought by the petition for a receiver in this case is clearly such as cannot be obtained except by an actual seizure of the property, because one of the purposes is to enforce an alleged lien on the property. In such cases the actual seizure of the property is not necessary to give the court jurisdiction to the exclusion of all other courts. *Farmers' L. & T. Co. v. Lake St. E. R. Co.*, 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; *Adams v. Mercantile Trust Company*, 66 Fed. 617, 621, 15 C. C. A. 1.

In cases where a state court and a United States court may each take jurisdiction, the one which first gets jurisdiction holds it to the exclusion of the other until its duty is fully performed and the jurisdiction invoked is exhausted. If jurisdiction as to the property attaches, it is exclusive till it has wrought its function. No other court of concurrent jurisdiction has the right to interfere with the property within the custody and control of the court first obtaining jurisdiction. *Taylor v. Taintor*, 16 Wall. 366, 370, 21 L. Ed. 287; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, 28 L. Ed. 390. This principle is recognized in authorities too numerous for citation as one which is essential to the dignity and authority of every court, and essential also to the comity which should control the relations between courts of concurrent jurisdiction. A federal court, in a case where the possession of the thing in suit is necessary to the granting of the relief sought, after it has assumed jurisdiction, issued a subpoena in equity, caused it to be served, set the cause down for hearing, and made an order appointing a receiver, would not permit a state court to interfere with its jurisdiction over the property embraced by the order. The whole power of the federal government, if necessary, would sustain the court in maintaining its exclusive jurisdiction. The United States courts should willingly give the same exclusive effect to proceedings in a state court of concurrent jurisdiction that they claim for such proceedings in federal courts. The rules on the subject must be reciprocal oth-



erwise they will not produce that concord and harmony that is so essential to the effective and satisfactory enforcement of the law.

We now come to the consideration of the second question, relating to the effect of the supersedeas. The following is the Texas statute authorizing the giving of supersedeas bonds:

"Should the appellant or plaintiff in error, as the case may be, desire to suspend the execution of the judgment, he may do so by giving, instead of the bond or affidavit in lieu thereof, mentioned in the four preceding articles, or in addition to such bond, a bond with two or more good and sufficient sureties, to be approved by the clerk, payable to appellee or defendant in error, in a sum at least double the amount of the judgment, interest and costs, conditioned that such appellant or plaintiff in error shall prosecute his appeal or writ of error with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against him, he shall perform its judgment, sentence or decree, and pay all such damages as said court may award against him." Rev. St. Tex. (1895) art. 1404.

Article 1383 of the Revised Statutes of Texas of 1895 allows an appeal from an interlocutory order of the district court appointing a receiver, "but the proceedings in other respects in the court below shall not be stayed during the pendency of the appeal, unless otherwise ordered by the appellate court." Before the action of the Circuit Court in appointing a receiver, the Waters-Pierce Oil Company appealed from the judgment for penalties, giving a supersedeas bond for double the amount of the judgment, which was approved. The condition of the bond is that "the Waters-Pierce Oil Company shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, it shall perform its judgment, sentence or decree, and pay all such damages as said court may award against it." The Waters-Pierce Oil Company also appealed to the Court of Civil Appeals from the order appointing a receiver, and gave bond for \$100,000, the amount fixed by the court, "conditioned that the said Waters-Pierce Oil Company, appellant, shall prosecute its appeal with effect, and in case the judgment of the Supreme Court or the Court of Civil Appeals shall be against it, it shall perform its judgment, sentence or decree, and pay all such damages as said court may award against it, and further conditioned that the said Waters-Pierce Oil Company, appellant, shall, in case the judgment is affirmed, pay to the state of Texas, appellee, the value of the rent or hire of all such property embraced in the orders and judgments aforesaid in any suit which may be brought therefor." After fixing the supersedeas bond relating to the order the district court added:

"It is further ordered that, upon the approval by the court and the filing with the clerk by defendant of a good and sufficient bond, conditioned as required by law, for said amount, further proceedings herein be suspended pending appeal; but this order and such appeal shall not affect or rescind the order heretofore entered, prohibiting and enjoining the defendant, its servants, officers, agents and attorneys from removing any of its property or assets beyond the limits of the state of Texas, but said injunction shall remain in full force and effect, pending the appeal from the order appointing a receiver herein."

It was held by the Texas Court of Civil Appeals in *Carter v. Carter*, 40 S. W. 1030, that the appeal and the supersedeas bond had the

effect of suspending the order appointing a receiver. This view was reaffirmed by the same court in *Hill v. Halliburton*, 32 Tex. Civ. App. 21, 73 S. W. 21, the court also holding that, after the supersedeas bond is approved, the jurisdiction of the case belongs to the Appellate Court. And in *People's Cem. Ass'n v. Oakland Cem. Co.*, 24 Tex. Civ. App. 668, 60 S. W. 679, it was held, if, after the appeal and supersedeas, the property has been surrendered to the receiver, the defendant superseding the order is entitled to be placed in possession of it. These cases merely show that, pending the appeal, action under the order appointing the receiver is not permitted. They do not show that the receiver is discharged by the appeal. The jurisdiction of the case passes by the appeal to the appellate court, and the receiver remains in office, but with his right to act suspended. As was said by the Texas court in *San Antonio St. Ry. Co. v. State*, 38 S. W. 54, at page 59:

"The appeal from the trial court removed the cause from that court, and placed it, with the parties, as well as the subject-matter of the litigation, wholly within the jurisdiction of this tribunal; but the judgment of the district court is not affected by the appeal further than that the proceedings to enforce it are stayed, a supersedeas bond having been filed."

The decisions of the Supreme Court of Texas fully sustain this view. The jurisdiction of the state courts is not lost or abandoned by appeal and supersedeas. In such case, the jurisdiction and authority over person and property passes to the appellate court, and an injunction granted by the district court becomes the injunction, in effect, of the appellate court, and that court has ample power to enforce and protect its jurisdiction, and to prevent, on proper application to it, the waste or destruction of property within its custody and jurisdiction. *Churchill v. Martin*, 65 Tex. 367; *Wells v. Littlefield*, 62 Tex. 28; *G., C. & S. F. Ry. v. F. W. & N. O. Ry.*, 68 Tex. 98, 2 S. W. 199, 3 S. W. 564. See, also, *Waters-Pierce Oil Company v. State of Texas* (July 28, 1907; Tex. Civ. App.) 103 S. W. 836. It seems to us clear that no jurisdiction acquired by the state courts was abandoned or lost by the appeal. It is a mistake to assume that the supersedeas proceedings discharged the receiver. His activities are suspended, but he is not discharged. The order appointing him is not vacated, for, on affirmance of the order, he does not have to be reappointed. He has been, pending the appeal, and he remains, a qualified and bonded officer of the state court. The suspension of the order by the appeal and supersedeas permits the defendant to resume or continue in the possession of the property covered by the order, but his possession is subject to the orders and jurisdiction of the state court. One of the conditions of the bond given is that the principal obligor shall perform the "judgment, sentence or decree" of the appellate court. There is nothing in the statute nor in the Texas cases construing it to indicate that the supersedeas bond is a substitute for the property embraced in the order appointing the receiver. This is true, also, as to the supersedeas bond given in the main case to supersede the judgment for the penalties. The condition of that bond shows that it is not a substitute for the property impounded, nor is it security for the penalties sought to be collected.

There is another feature of this case that makes clearer our conclusion that the property remains within the jurisdiction and control of the state court. In this case, at the time the receiver was appointed, an injunction was issued enjoining the Waters-Pierce Oil Company, its servants and agents, from removing any of its property or assets beyond the limits of the state of Texas. This injunction remains in force by the terms of the supersedeas order.

The case of *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660, cited by the learned counsel for the appellee, is not, in our opinion, applicable to the facts of the case at bar. A court of concurrent jurisdiction was allowed to intervene and take possession of property by its receiver in that case, because the first court taking possession of it by its receiver "accepted a bond in lieu of the property and discharged the receiver. \* \* \*." In the case at bar, no bond has been accepted in lieu of the property, nor has the receiver been discharged. The case here is, in principle, more like *Hagan v. Lucas*, 10 Pet. (U. S.) 400, 9 L. Ed. 470, where the claimant gave bond and received possession of the property; but the bond not being accepted in lieu of the property, the court held that the claimant's "custody is substituted for the custody of the sheriff," and that the property was not withdrawn from the custody of the law.

The act of June 6, 1900 (31 Stat. 660, 1 U. S. Comp. St. 1901, p. 550), allowing appeals from interlocutory orders by federal courts appointing receivers, contains the proviso:

"That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal."

It will be observed that the language is in substance the same as that used in reference to a stay of proceedings by the Texas statute (Rev. St. Tex. 1895, art. 1383), which allows appeals from an order appointing a receiver. Where a United States Circuit Court has taken jurisdiction and appointed a receiver of the property of a corporation, and an appeal has been taken and a stay of proceedings allowed, would it recognize the right of a state court of concurrent jurisdiction to intervene and take charge of the property at the suit of a stockholder of the corporation? Unless that would be permitted, the federal courts should not so interfere with the Texas state courts under the same circumstances.

The interlocutory order appointing a receiver is reversed and vacated, and the case remanded for further proceedings not inconsistent with the opinion of this court, and with instructions to discharge Chester B. Dorchester as receiver, and to tax all the costs of the receivership against Bradley W. Palmer, the complainant.

NOTE.—The following is the opinion of Bryant, District Judge, in the Circuit Court, in equity:

BRYANT, District Judge. The state of Texas sued the Waters-Pierce Oil Company in the district court of Travis county, in which suit is sought to recover penalties prescribed by the statute for violation of the anti-trust law, and to revoke the permit of said company to do business in Texas.

June 1, 1907, a verdict was rendered in said cause in favor of the state of Texas, for the sum of \$1,623,900, and canceling the permit of the company to do business in the state. June 1, 1907, the Attorney General filed an application in the district court of Travis county, praying that a receiver be appointed to take charge of all the property of the Waters-Pierce Oil Company situated in Texas and such as might come into said state. June 13, 1907, said district court appointed Robert J. Eckhardt receiver, and said Eckhardt qualified in accordance with the laws of Texas. The defendant filed a motion for a new trial, which motion was overruled. Thereupon it gave notice of appeal, and filed a supersedeas bond in accordance with the Texas statute, which bond was duly approved by the clerk of the district court of Travis county. June 15, 1907, the district court of Travis county fixed the sum of \$100,000 as the amount of the bond which the defendant was required to give in order to perfect its appeal from the order appointing the receiver and supersede said order. In due time the defendant gave such bond, which was approved by the clerk of the district court of Travis county, and thereupon the court entered an order that proceedings in the receivership matter should be stayed pending the appeal, but stipulated and provided that the giving of such bond and the approval of the same should in no manner affect or revoke the injunction theretofore granted, prohibiting the defendant, its officers, agents, and employés, from removing beyond the limits of the state of Texas any of the property of said company, but that said injunction should remain in full force and effect, notwithstanding an appeal had been taken and supersedeas bond given. June 19, 1907, Bradley W. Palmer, a stockholder of the Waters-Pierce Oil Company, filed his bill in equity in this court, setting up the proceedings above detailed: that the case was pending on appeal; that both the judgment appointing a receiver and the judgment for penalties in favor of the state had been superseded and rendered inoperative by reason of the supersedeas bond mentioned; that if the judgment was affirmed the company would be compelled to pay the amount of the judgment, and alleged the fact to be that the Thirtieth Legislature of Texas has passed an act by which it was made a felony for any person to work for a trust or any company which had been adjudged to be a trust, which law would be effective July 12, 1907, and that in consequence thereof it would be impossible for the Waters-Pierce Oil Company to transact its business, and that its physical property, amounting to \$1,000,000, situated in the state of Texas, would be practically destroyed, and that its trade-marks and business rights which had been built up, if properly preserved, were worth the sum of at least \$1,000,000 more, which would be practically, if not totally, destroyed in value, if the business had to be closed and the property could not be used and cared for. By reason of these matters he applied to the court for an order appointing a receiver to take charge of the property of the Waters-Pierce Oil Company, and preserve it for the benefit of the state of Texas, in the event said judgment should be affirmed, and to save such remnant as might be left of the property for the benefit of the stockholders. The defendant, Waters-Pierce Oil Company, appeared by answer and admitted the truth of the allegations set up in the bill, and joined in the application for the appointment of a receiver. After full agreement and close examination of the authorities relating to the questions involved, this court appointed C. B. Dorchester receiver to take charge of all the property of the Waters-Pierce Oil Company in Texas, with the usual powers of a receiver to manage and control the property, sell oils, and do all things necessary to keep it a going concern. Thereafter the Attorney General filed an application before the Court of Civil Appeals for the Third Supreme Judicial District of Texas, praying that court to appoint a receiver to take charge of the property, that Dorchester be restrained from acting, and for general relief. That application was heard, and the opinion of Chief Justice Fisher thereon was as follows:

"Order made Friday, June 28, 1907. Waters-Pierce Oil Company v. State of Texas. No. 4179. Opinion of Chief Justice Fisher, 105 S. W. 851.

"In this case came on to be heard the application of the state of Texas and Robert J. Eckhardt, receiver, in the matters and things therein presented, which, after hearing, was duly considered by the court, and conclusion reached that the relief in part prayed for, to the following extent, be granted, which is embraced in the following order: It is ordered that the receiver, Robert

J. Eckhardt, and the state of Texas, through its attorneys, be requested and directed to appear before the Honorable Circuit Court of the United States for the Eastern District of Texas, and there, by suits, pleas and applications, urge and insist upon the rights of the state, and the jurisdiction of this court, in and to and over the property in controversy, and to ask for such orders, decrees and judgments as they may deem necessary and proper, and to appeal and perfect such appeals and writs of error as they may deem proper and necessary. The other matters of relief prayed for and in the amended application thereto, which is set out in the opinion of the court, are hereby continued for consideration and determination to the next term of this court."

Thereafter the state of Texas filed in this court an application to vacate the order appointing C. B. Dorchester receiver, and to refer the controversy to the decision of the state courts. The motion of the state sets forth in detail all the proceedings above mentioned, and we have deemed necessary to give only such statement as will make intelligent to the reader the questions presented.

The prayer of the motion is as follows:

"Wherefore, the state of Texas and the said Robert J. Eckhardt, receiver of the Waters-Pierce Oil Company, respectfully move the court to set aside and annul all of its orders and decrees entered in this cause appointing a receiver, or in any manner relating thereto; that the said receiver, C. B. Dorchester, who was appointed receiver herein, be discharged finally as such receiver; that the said Dorchester be instructed and directed to return the property and assets of the state court, and the jurisdiction of the latter court recognized."

The hearing of this motion was begun on July 9th, and full argument was made by counsel representing all interests as they appear. The contention of the state of Texas is that the United States court was without jurisdiction or power to appoint a receiver, because, they contend, the Waters-Pierce Oil Company was in the custody of the state court, and no other court had power to interfere with it in any manner whatever. This contention was based upon the proposition that the property was in custodia legis, and, as it was a suit to forfeit the permit to do business in Texas, to that extent, at least, it was a proceeding in rem. It will thus be seen that the principal question for decision is: "Did the district court of Travis county, by reason of the acts done, have the exclusive jurisdiction, upon the grounds stated, of the property of the Waters-Pierce Oil Company, and was this court without jurisdiction to appoint a receiver?"

The right to appeal and give a supersedeas bond is fixed by article 1383 of the Revised Statutes of Texas of 1895, as follows:

"An appeal or writ of error may be taken to the Courts of Civil Appeals from every final judgment of the district court in civil cases, and from every final judgment in the county court in civil cases, of which the county court has original jurisdiction, and from every final judgment of the county court in civil cases, of which the court has appellate jurisdiction, where the judgment or amount in controversy exceeds one hundred dollars, exclusive of interests and costs, of the district court appointing a receiver or trustee in any cause, provided said appeal be taken within twenty days from the entry of said order; and appeals in such cases shall take precedence in the appellate court, but the proceedings in other respects in the court below shall not be stayed during the pendency of the appeal, unless otherwise ordered by the appellate court." Acts 1892, p. 42, c. 17.

This is the article of the Texas statute under which the supersedeas bond was given and appeal taken from the order appointing the receiver. This statute has received judicial construction by the courts of this state upon three different occasions. The first time the court was called upon to construe it was in the case of *Carter v. Carter* (Tex. Civ. App.) 40 S. W. 1030. That was a suit for divorce filed in Dallas county, and also for a partition of the community property. The case having been continued for the term, upon the application of the plaintiff, the court appointed a receiver to take charge of the community property, fixed his bond at \$1,000, and directed him, upon qualifying as receiver, to take possession of the property. The defendant excepted to the action of the court in appointing such receiver, gave notice of appeal to the appellate court of that division, and promptly perfected his appeal by filing his supersedeas bond in the sum fixed by the order of the court. The receiver

duly qualified, executed the bond required, and was proceeding to execute his trust in conformity with the order of his appointment, when an application was made by appellant for an order from the appellate court restraining the receiver from interfering with the property pending the appeal from the order appointing him such receiver. The court in passing upon the statute said: "The question presented is: Does the appeal under the supersedeas bond in the sum fixed by order of the court suspend the order appointing the receiver pending the appeal?" and after discussing the statute, and the manner of its wording, comes to the conclusion that the order was suspended by the appeal, and that the restraining order prayed for should issue. In that case, instead of the receiver being allowed to take possession of the property, he was restrained from taking possession of it. The statute came again before the Court of Civil Appeals at Dallas for construction in the case of *People's Cemetery Ass'n et al. v. Oakland Cemetery Company et al.*, 24 Tex. Civ. App. 668, 60 S. W. 679. In that case a receiver was appointed by the district court of Dallas county by an interlocutory order, and on the same day of his appointment the receiver qualified and demanded of the association that it turn over to him the property designated in the order, which demand was promptly complied with. January 7, 1901, the association gave due notice and proper notice of appeal to the Court of Civil Appeals from the order appointing the receiver, and on the same day perfected its appeal by filing in the court below a supersedeas bond in amount fixed by the court, which bond was duly approved. Thereupon the association demanded of the receiver the property that had been turned over to him, which demand was refused, whereupon the appellant filed a motion in the appellate court asking that the receiver be required to restore its property. In this case it was contended that the appeal did not vacate, but only suspended, the receivership, and that the receiver should be permitted to hold the property coming to his hands until the appeal was determined. The court held that the effect of the appeal was to supersede the order of appointment and everything done thereunder, and that appellant was entitled to demand the status quo as it existed at the time the order was made. The court say: "To hold otherwise would give validity and effect to the order appealed from, and destroy the right given to the defendant by the statute to supersede such order. It is settled in *Carter v. Carter*, supra, that the receiver cannot act pending the appeal. Generally, the property involved is of such a nature that it cannot be passively held without injury or loss. So, if we concede the proposition that a receiver who has gotten possession of the property before the appeal is perfected may hold it in spite of the appeal, we would have the anomaly presented of requiring him to hold property which ought to be actively managed or operated, and refusing him permission to so manage or operate it. Beach, Rev. pp. 127-129." Among other things, the court used this language: "The right to the possession of its property being secured to it by the giving of the supersedeas bond, it is immaterial whether such possession would be beneficial. The right is a legal one, and must be recognized and enforced."

This statute came before the Court of Civil Appeals at Galveston for construction in the case of *Hill et al. v. Halliburton et al.*, 32 Tex. Civ. App. 21, 73 S. W. 21. This was a case pending in the district court at Beaumont, and was an application for the appointment of a receiver concerning waste oil on "Spindle Top," and, after hearing, the judge appointed a receiver, who qualified by giving bond, etc. Thereupon the receiver demanded of the defendant the possession of the property, which demand was complied with and the property delivered over to him. The district court fixed the supersedeas bond at the sum of \$100,000, and the defendant tendered a bond to the district clerk in accordance with the order of the court fixing the amount of the bond, which bond was duly approved by the clerk. The court gave notice, and fixed a day for the parties to appear before him, stating that the object was to erase the approval of the clerk from the bond, and that he had directed that the bond be approved only by the court, and that the receiver should have five days time in which to accurately measure and ascertain the amount of oil that the defendants had on hand, and which the receiver was to receive under his order. These matters did not appear in the order of the court prior to the time the bond was approved, but did appear in the subsequent order, and the court

stated that the declaration had been made orally from the bench at the time of the appointment of the receiver. The defendants applied to the Court of Civil Appeals at Galveston, the case being returnable there, for a writ of injunction against the district judge to prevent his erasing the approval of the clerk to the bond, and also praying for the restoration of the property to their possession. These were the vital points raised in the case. The appellate court held that the clerk had the right to approve the bond, and not the judge. They used this language: "It was not within the power of the judge to suspend the appeal by an order directing the bond to be presented to him for approval, or that it should be held up until the receiver could make an inventory of the property, for, when the steps to perfect the appeal were complied with, the jurisdiction of the district court ceased, and that of this court attached, and, when the order was made, it was the right of the defendants to perfect the appeal at once."

The above are the only decisions of the Texas courts of which I am aware construing that section of the statute, and the right under it to give a supersedeas bond. These authorities hold the law to be that, when a receiver is appointed by the district court, and the party excepts and appeals from such order, and gives a bond in the sum fixed by the order of the court, which bond is approved by the clerk, the functions and control of the receiver cease pending the appeal, and that the defendant is entitled to the possession of his property, whether it has been taken by the receiver or not, and that it is not a matter of grace, but of legal right.

It will thus be seen by the authorities cited that, without dissent or conflict in any way whatever, the courts of Texas, passing upon this question, have decided the first contention of the state against it. These authorities lay down the rule to be that the possession of the property is not in the court or under its control, but is in the defendant as fully as if the receiver had never been appointed. The receiver was appointed by the state court upon the application of the state, based upon the ground that the state had recovered a judgment; that the property of the defendant in the state was inadequate to pay the judgment, and therefore a receiver was necessary to seize and hold the property in order to protect the state in the collection of its judgment. While the case was in this condition, the defendant appeared and tendered a bond in accordance with the statute of the state of Texas in double the amount of the principal, interest, and costs of the state's claim, and, instead of having imperfect security, the state was given perfect security for the collection of its judgment, and in the manner provided by law. In addition to this, the Waters-Pierce Oil Company gave a bond in the sum of \$100,000, being the amount fixed by the court, in order to suspend the powers of the receiver to act pending the appeal. Both these bonds were passed upon by the clerk of the district court of Travis county, who, under the law, is the only one who has the right to determine whether or not the security offered is good. He decided the security was good, and therefore approved the bonds, and, when the bonds were thus approved, the necessity for the appointment of the receiver ceased. The authorities all hold that his powers to act do cease, whether the court has ordered it or not; and, in addition thereto, the district court that created the receiver entered the decisions of this state, and, under the act of the court appointing the receiver, it is established that the custody of the property was in the Waters-Pierce Oil Company, and that the receiver appointed by the state court could not act.

The only remaining contention of the state that need be considered is that, because it was a suit to forfeit the permit of the Waters-Pierce Company to do business in Texas, it was therefore a proceeding in rem. It does not seem to me that it can be seriously contended that the institution of a suit under the Texas statute to forfeit the charter of a corporation conflicts with the power of a federal court to take charge of its property and operate it during the pendency of a suit in the state court, notwithstanding the statute under which the forfeiture suit is instituted provides for the enforcement of the judgment, when rendered, through the instrumentality of a receiver. That there is no such conflict in such case is well settled by Texas decisions. *City Water Co. v. State*, 88 Tex. 600, 32 S. W. 1033; *Water Co. v. City of Palestine*, 91 Tex. 540, 44 S. W. 814, 40 L. R. A. 203. These two cases were suits upon the part of the

state to forfeit the charters of the respective water companies. The properties of the water companies were in the hands of receivers appointed by federal courts, and when the question reached the Supreme Court for decision they held that the suits to forfeit the charters could proceed in the state courts, and at the same time the property could be administered by the federal courts through a receiver, and that it did not involve a conflict of jurisdictions. I can see no difference between a suit to forfeit a permit to do business and a suit to forfeit a charter which secures a right to do business, and therefore it seems to me that the contention of the state in this case is conclusively settled by the decisions of the state courts, and adverse to the contention of the state made in this motion. It also seems to be well settled that the fact that state statutes provide for winding up the affairs of a dissolved corporation through the instrumentality of a receiver to be appointed by the court decreeing the dissolution does not exclude other courts of concurrent jurisdiction. *Mercantile Trust Co. v. M., K. & T. Ry. Co.* (C. C.) 48 Fed. 355.

In the argument on the motion to vacate the receivership I have been told that it is my duty to follow the construction of state statutes placed upon them by state courts of last resort. I recognize this rule fully, and, in acting in this case, I acted in reference to the state of adjudication on this question as it then existed. The courts of last resort in this state had established the rules that any defendant for whose property a receiver had been appointed had the right to appeal from such order, to give the security fixed by the court, and, when he had done so, his property should be returned to him absolutely, and the order appointing the receiver was, at least, inoperative. It appears to me that they announce the doctrine that the powers of the receiver cease, and that the adverse party takes the security which the law furnishes, and the defendant takes his property with the right to use, control, and dispose of the same.

In this case it is claimed that, by the act of the Thirtieth Legislature, effective April 11, 1907 (Laws 1907, p. 175, c. 87), the state has a lien upon the property. In order to understand the state's case, it must be borne in mind that the original suit filed did not assert a lien, and when it was instituted no such lien existed, but, pending the litigation, the act of the Thirtieth Legislature was passed, which provides that the state shall have a lien upon the property of trusts, etc. The suit upon the part of the state was not one having for its object the sequestration of the property of the defendant, or affecting the title to the same. It was to recover a money judgment fixed by the statute for violation of the anti-trust law of the state, and also the cancellation of the permit of the Waters-Pierce Oil Company to do business in Texas. It proceeded on that theory to final judgment. After the verdict had been rendered, the Attorney General filed in court an application for the appointment of a receiver, and in that application, for the first time, asserted a lien and recited the fact of the judgment and its amount, and that there was a suit pending in the state of Missouri for the forfeiture of the charter of the Waters-Pierce Oil Company, and that it had been recommended by the Supreme Court of Missouri, under their practice, that the charter of the Waters-Pierce Oil Company should be canceled; and then sets forth that the penalties recovered in this case by the state of Texas could not be collected outside of the state of Texas, and that the property of the defendant situated in the state of Texas, as plaintiff is informed and believes, is totally inadequate to pay the judgment, and that the great bulk of the property in Texas, belonging to the defendant, subject to the payment of said judgment, consists of current accounts with merchants and dealers in the state of Texas, of tank cars, of money on hand, of oil that is easily removed, practically the whole of it being personal, movable property, and, if carried beyond the limits of the state of Texas, cannot be pursued by the state, and the state would have no way of collecting its judgment; that under and by virtue of an act of the Legislature of the state of Texas, approved April 11, 1907, the state has a lien upon all of said property to secure the payment of the above-mentioned judgment. It also prayed that the receiver be allowed to take the business and keep it a going concern. I mention these matters to show that the suit of the state of Texas was strictly a personal action, and was not a proceeding in rem in any respect whatever. If there was any res involved in it, or that could be claimed to be involved in it,



it was only the right or permit to do business in the state. It is a principle of law generally, if not universally, recognized that, when a court of equity has before it a proceeding for the purpose of appointing a receiver to take charge of the property of a defendant for the benefit of all parties at interest, and has taken into its actual possession the property for that purpose, no other court will interfere with the jurisdiction so acquired. I have universally recognized this rule, and observed it perhaps with a greater degree of strictness than the law requires, because I have invariably refused to entertain any application for the appointment of a receiver where I was advised that the application had been first filed in some other court of competent jurisdiction having that object in view. How does that principle apply in this case? If no appeal has been taken from the order appointing the receiver in the state court, it could and would have reduced the property to its possession, and no other court could have had the right to interfere with its administration of the property of the defendant. But the statute under and by virtue of which the appointment was made has been construed as above stated, and the question has been determined that the trial court, after a supersedeas bond has been given and approved, is not in custody of the property, and the defendant is entitled to its possession and use, not as a matter of grace, but as a matter of legal right. Consequently, I am at a loss to understand how it can be successfully or seriously contended that in this case, where a receiver had been appointed who had never taken possession of the property, which is admitted, was never in possession of it actually or constructively, and it being admitted that a supersedeas bond had been given and approved, and the district court of Travis county can no longer act in that case for the benefit of the plaintiff or any other person, the state court has the custody of the property of the Waters-Pierce Oil Company, and no other court can afford relief to any other person entitled to it. The contention of the state is that the property is in custodia legis, and for that reason only this court was without jurisdiction and power to appoint the receiver. Let us analyze this proposition, because if it is to be established as the law in this state, and is the law in this state, the effects of it are so far-reaching and disastrous to the business interests of this country that it will be well for every business man in Texas to understand its meaning. Say a bank in this county held a note upon a citizen of Cooke county for \$600, secured by a first mortgage lien upon a thousand head of steers, and the note being payable in this county, and for that reason the venue of this court could be invoked, and suit was brought upon it for judgment and foreclosure of the mortgage lien, and for the sale of the cattle; and after judgment had been rendered, the showing was made to the district judge that the defendant was wholly insolvent; that the cattle were within a mile of the Indian Territory line, and the defendant was about to remove them beyond the jurisdiction of the state of Texas, and that it would inflict a great loss upon the judgment creditor, and, upon such representation, the district judge should appoint a receiver to take actual possession of the property. The defendant excepts to this order and appeals from it, and gives to the plaintiff security in double the amount of the principal, interest, and costs, and also executes a supersedeas bond and appeals from the order appointing the receiver. Thereupon the cattle are delivered back to the possession of the defendant in the judgment. The case then goes to the Court of Civil Appeals for revision. In that attitude, say a citizen of Cooke county, where the defendant resides, holds a second-mortgage lien upon the cattle for \$5,000, and, the defendant being insolvent, is about to remove the cattle from the state of Texas. The holder of this note brings his suit in the district court of Cooke county, sets up all the facts, recites the first suit and judgment and supersedeas bond, and that said suit is pending on appeal in the Court of Civil Appeals, and that the court in Grayson county is without jurisdiction to afford him any relief because his obligation is payable in Cooke county, and the defendant lives in Cooke county, and, therefore, the litigation in the first suit having been closed, the court in which the receiver was appointed is without jurisdiction to aid him, and, upon proper presentation of the facts, the court in Cooke county appoints a second receiver to take possession of the cattle and hold them subject to the orders and disposition of the court, both of these actions being in state courts. I ask the question: Is there a lawyer in Texas who would for a moment have held that, by reason of the first suit in Grayson

county, and the appointment of a receiver, that court had acquired the actual custody of the defendant's property, and that no other court could, under the state of facts, furnish any relief to the junior lien holder or an unsecured creditor? Would any one have held that the court in Cooke county was trespassing upon the jurisdiction or rights of the court in Grayson county? Most certainly not. What would the court in Cooke county in that state of case do, there being alleged in the bill for the appointment of the receiver the fact of the first lienholder's suit and his priority and superior rights to be first paid? It would do what any court of equity would be bound to do. It would entertain the suit; it would sell the property subject to the first-mortgage lien; or, if it deemed it best, it would sell it clear of liens, and would direct that the first lienholder, whenever his claim was reduced to final judgment, be paid in full; that the second lienholder be paid his debt, if the property was sufficient to pay it, and that any other creditor having an unsecured claim, who might intervene in the case, would be paid as far as the proceeds would go, or, if paid in full, the remainder would be returned to defendant. This is the plain, equitable business rule that governs in this country where there are liens or not liens. A statutory lien has no greater force than a contract lien. One is at least as sacred as the other, and therefore, when the state has a suit asserting a lien, it rests upon the same principles as any other lien, no greater and no less. Some people seem to think that because the state is a litigant it has greater rights than an individual; but such is not the case.

In the case of *Fristoe v. Leon & H. Blum*, 92 Tex. 80, 45 S. W. 999, the Supreme Court of Texas, through Justice Brown, uses this language: "It is well settled that so long as the state is engaged in making and enforcing laws, or in the discharge of any other governmental function, it is to be regarded as a sovereign, and has prerogatives which do not appertain to the individual citizen, but when it becomes a suitor in its own courts or a party to a contract with a citizen, the same law applies to it as under like conditions governs the contracts of an individual." (Citing many authorities, state and federal.)

Let us present another illustration along the same line as that above. Instead of the second lienholder being a citizen of Cooke county, he is a citizen of the state of Missouri, and exercising his right to sue in either the federal or state court, he institutes his suit in this court, setting up the fact of the first suitor's superior lien and his secondary equities by reason of his second-mortgage lien, and for good and sufficient reasons shows to this court that a receiver should be appointed to preserve his rights, and the court entertains his suit and appoints a receiver. Would any one have held that this court was invading the jurisdiction of the state court? It would not have been presumed any more in that case than it [if] the suit had been instituted in the district court of Cooke county, unless such presumption arose from a feeling of antipathy towards federal courts exercising authority. That could be the only reason, and is not a valid one. Therefore the situation in this case is that the state has a personal judgment. It claims a lien, and the judgment for the money recovery has been suspended in conformity with Texas laws. The order appointing the receiver has been suspended in the manner provided by our statutes, and hence the district court of Travis county is powerless to do anything further in that case because it has been closed. The logic of the state's contention is that, while this is true, yet it has the legal custody of the property, and therefore all other courts are powerless to grant relief. This is an analysis of the state's contention. This cannot be the law in this state, and has never been so held to be by any decision of which I am aware.

It would be ruinous to the business of the state of Texas for such doctrine to be established. If a man were so unfortunate as to be sued, and a judgment obtained against him, and if for any reason a receiver were appointed to take charge of his property, he would be placed in this position: If he did not appeal from the order appointing the receiver, the receiver would take charge of his property, and either conduct the business or sell out his estate, and await an undetermined suit that was pending. If that were done, the merchant's trade and business would be destroyed. If he appealed from the order appointing the receiver, and gave the security that the law requires, and yet it was insisted that his property was in custodia legis, and that no other creditor could secure relief in any court, it would destroy his credit and accomplish his

destruction in advance of a final determination of whether or not he should pay the judgment that had been rendered. This contention is of such far-reaching effect, and so ruinous in its consequences, if adopted as a principle of law, it arises far above the case we have for consideration, and should be discussed with that seriousness and earnestness its dangerous nature demands. It is a new doctrine—one that has never been suggested before in this state as far as I know—and I cannot believe that the courts, no matter what the cause may be, will adopt any such contention. It is not denied that the Waters-Pierce Oil Company, although entitled to the use and possession of its property pending the suit which it is resisting, cannot be operated under existing conditions in this state. The anti-trust law does not make the question depend upon a final adjudication—which the courts would most likely hold to be its meaning—yet what employé is going to risk his liberty upon the possible construction that may be made by the courts upon this statute? It would result in the absolute stoppage of the business of this state, and the Waters-Pierce Oil Company could not secure a person to board a team of mules that belong to it, so complete would be the destruction, for the reason that the same Legislature passed an act by which it was made the duty of every county attorney in Texas to prosecute violators of the law, and provided for a fee of \$250 to be divided between the county attorney and district attorney, where both exist in the county, in certain proportions. It is idle to say that the law gives the Waters-Pierce Oil Company the right of possession of its property and its use, and these laws when put into force could absolutely destroy the value of the property, and especially all of it which might be of a perishable nature, and that in advance of a final judgment. If this is the true construction, then you give the defendant against whom a judgment is rendered the shadow of a right, but not its substance. You take this property and destroy it by indirection as effectually as if it had been taken and sold and the title passed from him without legal right. It may be that some people honest in intention think that, because of the Waters-Pierce Oil Company being a trust, it would be proper and legitimate for these results to follow. The Legislature of Texas, the sole source of power, has fixed what the punishment shall be. They have fixed it at a fine of so much per day, and the revocation of its permit to do business in the state. If the judgment rendered in the district court of Travis county is made final, that is the punishment of the Waters-Pierce Oil Company. It will be that it pay the fine and all costs, and its right to do business in the state revoked, and the court of Travis county will have the power to see that the decree is made effectual. That would be the extent of the matter, and as far as the penalty could extend or could be lawfully made to extend, and that after final judgment. But, if the opposite construction is to be the law, its property is destroyed in advance of final judgment, and a penalty has been visited upon the defendant not provided by law, and one which the courts could not visit after final judgment. Can this be the law in a civilized country? The violator of the law should be held to the strictest responsibility, and made to pay the penalties prescribed by the statute. But, no matter how great the feeling may be or the desire may be that other punishment should be inflicted, the law does not prescribe it, and no court will inflict it. Bearing upon the question of whether or not, where a receiver has once been appointed, all other courts are without authority to act, I deem the case of *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660, to be in principle an authority in this case. That was a case arising in the state of Tennessee. June 6, 1892, John Coleman filed suit in the United States Circuit Court for the Eastern District of Tennessee against the Morristown & Cumberland Gap Railway Company and Allison Shaffer & Co., and an order was entered appointing a receiver of the property of the railroad company. The receiver took possession of the property. June 8, 1892, the railroad company appeared and filed a petition for leave to execute a bond for whatever sum might be decreed in favor of complainant, and that the order appointing the receiver be vacated. This petition was sustained, the bond given and approved, and an order entered discharging the receiver. Thereupon the receiver turned the property over to the railroad company, receiving the receipt of its general manager therefor. June 20, 1892, another party filed his petition in the same cause setting up his claim against

the railroad for service rendered as an employé and vice president of the railroad, and for expenses incurred in its behalf. July 4 and 7, 1892, other petitions were filed setting up other claims against the railroad company. July 27, 1892, each of the defendants filed a separate answer to the complainant's bill. No further order was made by the Circuit Court until November 12, 1892, when, as the record shows, the demurrer of the railroad company to the petitions filed July 4 and July 7, 1892, was argued and overruled, and leave given to answer on or before December rules. The record of the proceedings on that day contains this further recital: "On motion of complainant, and it appearing that this cause is properly filed as a general creditors' bill to wind up the affairs of an insolvent corporation, it is ordered by the court that the bill be sustained as such, and that all creditors of said Morristown & Cumberland Gap Railroad Company, and all other persons interested therein, come forward and exhibit their demands, and have themselves made parties to this bill, on or before the 2d Monday of January next, and show in their petitions the nature and extent of their claims, and whether they have security or lien therefor; and, if so, the nature thereof, and the property upon which their liens rest. But parties having suits now pending in other courts against said Morristown & Cumberland Gap Railroad Company for rights of way or other claims or demands may prosecute the same to judgment, and file their judgments in this court as evidence of the amount and character of their demands." There were other recitals not necessary to mention, except that the court was moved for a restoration of the receivership and the appointment of a receiver to take possession and custody of all of the property of the defendant, and a temporary receiver for that purpose was so appointed. November 29, 1892, an amended and supplemental bill was filed, naming as complainants John Coleman, and also the various subsequent intervening petitioners. October 28, 1892, a bill was prepared, addressed to the Hon. John D. Smith, Chancellor, presiding in the chancery court of Morristown, Tenn., setting forth certain judgments in favor of the complainants against the railroad company, its insolvency, as well as that of the firm of Allison Shaffer & Co., the existence of a multitude of unpaid claims, and prayed the appointment of a receiver. Without going through all the details, the state court in October appointed a receiver to take charge of the property of the railroad company. This was done, and the receiver appointed by the state court remained in possession of the property until November 14, 1892, when the receiver appointed by the United States court took actual possession of the property. Thereupon the receiver of the state court applied to the Circuit Court of the United States for possession, and in deciding that question and commenting upon its various phases, Judge Brewer rendering the opinion, the Supreme Court used this language: "While the validity of the appointment made by the Circuit Court on June 6, 1892, cannot be doubted, yet, when that court thereafter accepted a bond in lieu of the property, discharged the receiver and ordered him to turn over the property to the railroad, and such surrender was made in obedience to this order, the property then became free for the action of any other court of competent jurisdiction. It will never do to hold that after a court, accepting surety in lieu of the property, has vacated the order which it has once made appointing a receiver, and turned the property back to the original owner, the mere continuance of the suit operates to prevent any other court from touching that property." The only difference in principle in the case at bar and the one from which I have just quoted is that in the Tennessee case the court entered an actual order of discharge. The case was still pending for the appointment of a receiver, and was so pending when the suit was instituted in the state court and the receiver appointed. In the case at bar there has been no order of the district court of Travis county discharging the receiver, but the statute of this state, and the decisions of this state construing it, deprived him of all power to act pending the appeal, and the court that did appoint him directed him not to take possession of the property, and therefore, whether discharged or not, he could not act, and hence the property was released to the defendant, Waters-Pierce Oil Company, and was the subject of litigation in other courts, if occasion should arise necessitating the same.

Having no desire to trench upon the authority of any state court, I admit,

for the purpose of this case, that the Waters-Pierce Oil Company is a trust; that it has violated the laws of the state, and is subject to the payment of the judgment of the district court of Travis county. I concede to every court in this state the same correctness of intention that I claim for myself, and in no instance have I knowingly trespassed upon their authority, nor would I knowingly do so. I had no thought of so doing in this case, and, notwithstanding all that has been said, I have not yet been able to perceive in what particular I have in any wise interfered with the jurisdiction of the appellate court to hear and determine the questions involved in that suit. Admittedly the property of the Waters-Pierce Oil Company was never in the possession of the state court, was never in its custody, and that its custody was not a question for consideration in determining whether or not the defendant was a trust and was subject to the payment of the penalties prescribed by law, and the revocation of its permit to do business in Texas. I have neither the desire nor the power to interfere with that question. Those are questions for the appellate court to determine, and, if the judgment is affirmed, it should be paid. The rights of the state are correctly set forth in the bill of complaint in this case, and this court is thereby advised of the fact of the judgment; the assertion of a lien; that an injunction exists that the property shall not be moved out of the state of Texas—all of which this court would carefully observe, and in no wise have I interfered with the jurisdiction of the court or any of its orders. Under the opinion and decision of the Court of Civil Appeals at Austin, the state receiver and the Attorney Generals were permitted to apply to this court for all orders that might be deemed proper for the protection of the state court and its jurisdiction. They have demanded at my hands the return of the property to the possession of the Waters-Pierce Oil Company, and that is the only thing demanded. I do not see how that would be complying with any direction of the appellate court, because, if the property is to be returned to the Waters-Pierce Oil Company, it cannot be returned to the custody of the state court, for such custody never existed. As I understand the facts and law of this case, I can only comply with such request. In conclusion, I will state that I acted upon the faith of the Texas laws as construed in the above decisions, and had the legal right, as I thought, to act as I did. What were the motives which impelled this court to appoint a receiver in this case? In brief, they were these: The state had sought to sequester the property of the defendant for the better protection of its judgment. The order of the state court appointing a receiver had been appealed from. The state court could no longer pursue that remedy pending the appeal. I was aware of the fact that almost 85 per cent. of the oil consumed in Texas by railroads, gins, mills, and the people of Texas for the purpose of lighting their homes was supplied by the Waters-Pierce Oil Company, and if its equipments, covering some 216 counties in Texas, were to be stopped and paralyzed, and could not be used for the purpose of distributing oil to the people and industries of Texas that needed it, a great hardship would be visited upon all who used it for illuminating and lubricating purposes. I was also made aware of the fact that many contracts had been made for supplying oil, which could not be complied with under existing conditions, and that the company, although perfectly solvent and doing business in other states, could not perform such contracts in this state, and that it would be subjected to many suits for broken contracts to which there could be no answer, and, in addition thereto, its physical property in Texas would be practically destroyed. Being impelled by these considerations and these only, which, in my judgment, appeal strongly to the sense and conscience of the chancellor, I thought it best, pending the appeal, the state court appointing the receiver being powerless to act, and in keeping with my duty, and to the end that this property should not be destroyed in violation of the Constitution and laws of the United States, and in violation of every principle of common right, that a court of equity should take and preserve it for the benefit of the state of Texas, because it has the superior claim, and to see that the people of Texas should not be subjected to the inconvenience and hardship that would necessarily follow for several months; and that the stockholders' interests should not be destroyed by the destruction of the property and business in Texas, and the suits that could be legally brought against the company for violated contracts. These were the

considerations that moved me to action, and not a desire for jurisdiction nor thought of interfering with the rights of the state courts to hear, determine, and execute their own judgments. It never occurred to me that such results could follow, nor have I yet been able to understand how they could.

In order that there may be no misunderstanding, I now state that, if the assets of this company are administered by this court, the property or its proceeds will be held for the benefit of the state of Texas, in case the security it has should from any cause fail, and said judgment should be affirmed, and the state can secure the benefit of this property to pay its claim in any lawful and proper manner it may elect to employ. The receivership was only intended to meet the conditions that existed pending the appeal, and, if the judgment is affirmed, the proceeds of the property will be available for the use of the state of Texas, if it needs them.

The only question that has disturbed me in the least is this: The state has a lien fixed by statute. I must assume that lien to be valid and enforceable. The suit was first instituted in Travis county, and, if the case is reversed, it will proceed again in Travis county, and the receiver's powers may be held by that court to revive, or an additional order may be put in force. In that event, an apparent conflict would arise between the state and federal courts. This question has not been discussed nor presented to me in argument, and therefore I have no fixed opinion upon the matter. My inclination at this time, in that state of case, would be to surrender the jurisdiction of this property and its control to the state court, as I freely admit it is as competent to handle and preserve the property as this or any other court, and this court only acted because of the inability of that court at that time to act. While, as stated above, this is my present view of the question, yet I do not wish to be understood as so holding at this time, because the question has not yet been discussed, and I would not wish to place myself in the position of making a promise which, upon full argument and understanding of the matter, I could not comply with. I can only repeat what I have heretofore said. If the judgment is affirmed, the proceeds of this property, or the property itself, will be available for the use of the state, if it needs or desires it in the protection and collection of its judgment. If the case is reversed, and the power of the state receiver is revived, an application upon his part to this court for the surrender of the property to his custody will be given due consideration, and, if it can be legally surrendered by this court to the state receiver, it will be most cheerfully done.

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PLATT v. LECOCQ et al.

(Circuit Court of Appeals, Eighth Circuit. December 9, 1907.)

No. 2,588.

1. COURTS—FEDERAL COURT—JURISDICTION—SOUTH DAKOTA STATUTE TO REGULATE COMMERCE—FEDERAL COURTS SAME POWER AS STATE COURT UNDER.

Where, in a suit in equity in the United States Circuit Court to prevent the enforcement of an order of the Railroad Commissioners of South Dakota, in which there was diversity of citizenship, the defendants answered and filed a cross-bill to enforce the order, the United States Circuit Court, on the hearing, and this court, on the appeal, has the same power to hear and determine the original question and "to do justice in the premises" conferred upon the circuit court of the state by the act to regulate commerce. Section 449 of the Revised Political Code of South Dakota.

2. SAME—COURTS—JURISDICTION—STATE LEGISLATION MAY ENLARGE.

Rights created and remedies provided by the statutes of a state to be pursued in the state courts may be enforced and administered in the national courts either at law or in equity or in admiralty, as the nature of the rights and remedies may require.

"A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality." *Davis v. Gray*, 16 Wall. (U. S.) 203, 223, 21 L. Ed. 447.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

3. CARRIERS—REGULATION OF COMMERCE—THE GENERAL RULE OF AN EXPRESS COMPANY TO REFUSE TO RECEIVE MONEYS TO KEEP OVERNIGHT NOT VIOLATIVE OF SECTION 437, REVISED POLITICAL CODE OF SOUTH DAKOTA.

Section 437 of the Revised Political Code of South Dakota is an anti-discrimination statute. Its legal effect is to prohibit any common carrier from giving any unreasonable preference or advantage to, and from imposing, any unreasonable prejudice or disadvantage upon, any particular person, company, firm, corporation, locality, or any particular description of traffic over any person, company, firm, corporation, locality, or any particular description of traffic similarly situated.

Rules and the practice thereunder by an express company to refuse to receive packages of specie and currency on the day preceding that upon which the only trains carrying express matter start from the places of tender for the destinations of the packages between 6:29 and 8:00 a. m. do not violate this section, where the rules and practice are universal, apply to all cities and towns except such large cities as New York, Philadelphia, and Chicago, and apply to 40 cities and towns in South Dakota.

4. SAME—COMMON CARRIER HAS RIGHT TO CONDUCT ITS BUSINESS—ITS RULES AND PRACTICE PRESUMED TO BE REASONABLE.

A common carrier has the right to conduct its own business according to law free from the interference of strangers.

It may make rules for its conduct which fix the times, the places, the methods, and the forms in which it will receive the commodities it offers to transport, and these rules are presumptively reasonable and just. They may not be lawfully annulled or modified by commissions or courts unless they are clearly shown to be unlawful or unreasonable.

5. SAME—REASONABLENESS OF TIME OF RECEIPT OF GOODS MEASURED PRIMARILY BY ITS RELATION TO THE BUSINESS OF THE COMMON CARRIER RATHER THAN TO OTHER BUSINESS.

A common carrier must receive at reasonable times goods of the kinds it undertakes to transport.

But the law imposes no duty upon it to receive money or goods, and thereby to assume liability for their safe-keeping and insurance an unreasonable length of time before the transportation can begin.

The reasonableness of the time within which it must receive them is to be measured primarily by its relation to the transportation of the property, to the business of the carrier, with secondary and proper consideration of the business of its customers.

6. SAME—EXPRESS COMPANY—REASONABLENESS OF REFUSAL TO RECEIVE MONEY ON DAY PRECEDING TRANSPORTATION.

The rules and practice of an express company to refuse to receive packages of specie and currency for transportation from a bank which had a burglar proof vault and adequate facilities in the city where the packages were tendered to keep them safely overnight on the day preceding the departure of the only trains which carried express matter to the destinations of the packages, and which left at various times between 6:29 and 8:00 in the morning, are not unreasonable, unlawful, or unjust.

7. SAME—ESTABLISHED RULES AND PRACTICE—COURTS SHOULD NOT INTERFERE WITH IN ABSENCE OF INJUSTICE OR SUBSTANTIAL INJURY OR THE THREAT OF IT.

Courts and commissions should not interfere to annul or modify the established rules and practice of transportation companies on account of trivial troubles and incidental inconveniences, nor unless clear injustice or substantial injury or the imminent threat of it has resulted from them.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of South Dakota.

For opinion below, see 150 Fed. 391.

This is an appeal from a decree of the court below that an order of the Board of Railroad Commissioners of South Dakota, that the United States Express Company, an association of New York, receive at its offices in Aberdeen, S. D., from the Aberdeen National Bank, all moneys, specie, and currency tendered to it by that bank for carriage on certain trains which leave Aberdeen at 6:30, 7:00, and 7:45 a. m., during all reasonable business hours of the day preceding the departure of these trains, be enforced. The United States Express Company conducted all the express business upon these trains which were upon the lines of the Chicago, Milwaukee & St. Paul Railway, and it maintained offices at Aberdeen and at other stations on the line of this railroad to which no trains carrying express matter ran out of Aberdeen except those which started between 6:29 and 8:46 in the morning. The bank had correspondents in these towns to which it sent specie and currency on their orders in the regular course of its banking business. The business of the express company was extensive, indeed national in its character, and it was, and for many years had been, conducted in obedience to these general rules:

"Office Safes.

"(A) Two classes of safes are provided by the company, burglar proof safes for large and important offices and fireproof safes for smaller offices.

"(B) At offices where burglar proof safes are provided, it is required that an employé shall remain in the office at night in charge of the safe.

"Care of Money.

"(B) Money or valuables must not be accepted for shipment after trains are gone, necessitating keeping them in the office overnight. If circumstances seem to require its receipt, authority must be obtained from the general superintendent.

"Restrictions on Receipt.

"(B) Money and valuables must not be left overnight in burglar proof safes, unless in charge of an employé on guard during the night."

These rules were universal in their application, and were enforced throughout the country, but prior to September, 1903, the agent of the company at Aberdeen, without the knowledge of the general superintendent, had broken them by receiving money the day before it could be sent to its destination and storing it overnight. Ever after September, 1903, these rules have been strictly enforced at Aberdeen, as elsewhere. The express company had no burglar proof safes or suitable safeguards for storing or keeping specie or currency at Aberdeen, which is a town of about 6,000 inhabitants, or at any of its offices, except in half a dozen large cities such as New York, Philadelphia, and Chicago. But it maintained in the cars in which it kept money in transit specially constructed stationary car safes to secure it from burglars, fire and loss. The bank, on the other hand, was in the general banking business, and as a necessary part of this business was engaged in storing and safely keeping large quantities of specie and currency at Aberdeen for itself and for its depositors, and it had a burglar proof vault with a time lock for the purpose of safely keeping this money. In the opinion of the officers of the express company the storing overnight of the packages of specie and currency, which the bank desired to send out to the towns reached by these morning trains, would necessarily entail upon it the additional expense of purchasing a burglar proof safe which would cost from \$800 to \$1,250, and the maintenance of a night watchman. In the opinion of the officers of the banks at Aberdeen the express company would not be required to maintain a watchman, but a burglar proof safe would be a reasonable and necessary provision for the protection of this money. The bank could store and keep the specie and currency overnight and deliver it to the express company in the morning before the trains left, without any additional expense. The disadvantages such a course would entail upon the bank were that it would be compelled to set its



time lock to open the vault at 6 in the morning, and send two of its messengers to take the money from the vault to the office of the express company in the morning before the trains left, and to take the risk of this course of proceeding, or of keeping the packages outside its vault during the night. The officers of the bank testified, however, that the police protection at Aberdeen was so complete that they did not need or use night watchmen.

The charge of the express company for the transportation of money was 40 cents for each \$1,000. If it should receive and carry all the money sent out of Aberdeen to the towns under consideration, its total revenue from this transportation for one year would not exceed \$600, and if the expense of this carriage did not exceed the average cost of transporting express matter, and the evidence is that it would exceed that average, its total net profit from that business would not exceed \$40. If it is required to receive specie and currency tendered for transportation to these towns on the day before the trains which carry it start, the necessary expense of receiving and storing this money will exceed the profit from this business, and cause it to entail a loss upon the express company. It may not raise its rate and thus protect itself against this loss, for it would get none of this business at a higher rate because currency may be, and is, sent by mail insured for from 20 per cent. to 25 per cent. less than the express company's present rate. The business respecting which this litigation arose is the carriage of outgoing packages of specie and currency from the Aberdeen Bank to its correspondents in the country towns. Those correspondents determine the method by which this money shall be sent to them, and they pay for the carriage. The complaint of the Aberdeen Bank is not that the rules of the express company entail any expense upon it in the matter of this carriage, but that its correspondents threaten to keep larger balances in Minneapolis and smaller balances with it, unless it gets its messengers out in the morning and delivers the specie and currency which they order from it to the express company before the morning trains start, or compels the express company to receive this money on the day before these trains commence their journeys. From 80 per cent. to 85 per cent. of the business of transporting money in the country is conducted by mail. The method by which the carrying of specie and currency into Aberdeen to the bank is conducted is determined and paid for by the bank. The express company has always received all in-shipments of specie and currency coming to Aberdeen after the close of banking hours, and has stored them until the business hours of the next day, when it delivered them. Notwithstanding this fact, the bank caused shipments of money into Aberdeen to itself from St. Paul and Minneapolis, which amounted to several hundred thousand dollars, to be made by mail insured, and caused none to be sent to it by the express company during the year preceding the commencement of this suit, and thereby saved itself from 20 per cent. to 25 per cent. of the express company's rate. The expense of sending specie in large quantities by mail is too great on account of the postage, and the express company received and kept overnight specie tendered to it for transportation in amounts not exceeding \$200 to a single destination. There were other express companies which had offices at Aberdeen which received silver and currency the day before the next trains to the destinations of these packages departed, but they operated upon other railroads. The United States Express Company refused, in accordance with its general rules, upon the demand of the bank, to receive and keep overnight specie in large amounts and currency for transportation on the earlier trains specified to the destination of this money in the country towns on the Chicago, Milwaukee & St. Paul Railroad. There were 40 other towns in South Dakota beside Aberdeen in which this express company maintained offices, and in which, if it received all money tendered during business hours for transportation on the trains next departing, it would be compelled to store and keep this money overnight.

Upon the state of facts which has been recited the court below adjudged that the express company should receive on the preceding day, and keep overnight, specie and currency tendered by the bank for transportation to its correspondents upon these morning trains, and this decree is assailed on the ground that the rules and practice of the express company were neither discriminatory nor unreasonable, and that the requirement of the decree is unreasonable, confiscatory, and unconstitutional.

J. W. Boyce (R. H. Warren, Frank H. Platt, and George W. Field, on the brief), for appellant.

P. J. Rogde and A. W. Campbell (E. W. Taylor and S. W. Clark, on the brief), for appellees.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The act to regulate commerce of the state of South Dakota, which is embodied in chapter 7 of its Revised Political Code, provides that the Board of Railroad Commissioners may investigate, and on notice to the carrier may hear and decide, on the complaint of a petitioner, the issue whether or not "anything has been done or omitted to be done in violation of this article, or of any law cognizable by said Commissioners" by such carrier, and that if they find such violation they may notify the carrier to desist therefrom. If the carrier does not comply with this notice or order, any person interested may apply to the proper circuit court of the state, "and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises." Rev. Codes S. D., c. 7, §§ 431, 446, 447, 448, and 449, pp. 78, 83, 84, and 85. The bank and the Board of Commissioners of South Dakota proceeded in accordance with these statutes until the board had investigated and heard the matter here in controversy, upon the petition of the bank, and had made the order that the express company should receive the money and store it overnight for carriage on the morning trains. Thereupon the express company exhibited its bill in the court below to enjoin the board and the bank from enforcing this order, and defendants answered and filed a cross-bill, wherein they prayed the court below to enforce the order of the Commissioners, and it was upon these pleadings, after evidence and a final hearing upon the merits, that the court below entered its decree against the express company.

Rights created and remedies provided by the statutes of a state to be pursued in the state courts may be enforced and administered in the national courts, either at law or in equity, as the nature of the rights and remedies may require. "A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality." *Davis v. Gray*, 16 Wall. 203, 221, 21 L. Ed. 447; *Darragh v. H. Wetter Mfg. Co.*, 23 C. C. A. 609, 617, 78 Fed. 7, 14; *National Surety Co. v. State Bank*, 56 C. C. A. 657, 667, 120 Fed. 593, 603, 61 L. R. A. 394; *Barber Asphalt Co. v. Morris*, 66 C. C. A. 55, 59, 132 Fed. 945, 949, 67 L. R. A. 761. The court below, therefore, in the hearing of this case and this court upon this appeal stand in the place of the circuit court of the state, and have plenary power under the statute of South Dakota to determine the

original question of the reasonableness of the rules and practice of the express company, and "to do justice in the premises." The questions in this court arise on an appeal from a decree in equity where we must consider them *de novo*, invested with all the judicial and discretionary powers, and charged with all the duties of the chancellor in the court below. The questions at issue are, were the rules and practice of the express company in violation of any of the provisions of chapter 7 of the Revised Political Code of South Dakota, or of any law cognizable by the Railroad Commissioners of that state, and if they were, was the order of the Commissioners unauthorized, or in violation of any of the provisions of the Constitution of the United States, or of the state, several of which are invoked by the counsel for the express company?

The only provisions of law that counsel for the bank contend were violated by the express company are section 437, c. 7, of the Revised Political Code, and section 1578 of the Revised Civil Code of South Dakota, which, so far as they are relevant here read in this way:

"Sec. 437. It shall be unlawful for any common carrier subject to the provisions of this article to make or give any preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever." Rev. Codes, p. 80.

"Sec. 1578. A common carrier must, if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry." Rev. Codes, p. 786.

The legal effect of section 437 is to prohibit any common carrier from giving any unreasonable preference or advantage to, and from imposing any unreasonable prejudice or disadvantage upon, any particular person, company, firm, corporation, locality, or any particular description of traffic over any other person, company, firm, corporation, or locality, or any particular description of traffic similarly situated. *Interstate Commerce Commission v. B. & O. Railroad*, 145 U. S. 263, 278, 282-284, 12 Sup. Ct. 844, 36 L. Ed. 699; *Interstate Commerce Commission v. B. & O. Railroad* (C. C.) 43 Fed. 37, 47; *Harp v. Choctaw, O. & G. R. Co.*, 61 C. C. A. 405, 412, 125 Fed. 445, 452; *Oxlade v. Northeastern Ry.*, 15 Common Bench (N. S.) 680; *U. S. v. Delaware, L. & W. R. Co.* (C. C.) 40 Fed. 101, 103; *Harp v. Choctaw, O. & G. R. Co.* (C. C.) 118 Fed. 169, 176. The section is an anti-discrimination statute pure and simple. It is in *pari materia* with the first paragraph of section 3 of the Interstate Commerce Law of February 4, 1887, 24 Stat. 380, c. 104 [U. S. Comp. St. 1901, p. 3155], and must be interpreted in the same way. The burden was, therefore, upon the bank to prove that the rules and practice of the express company wrought a preference or advantage, or a prejudice or disadvantage to some party, locality, or description of traffic over another similarly situated. The record of this case has been searched in vain for any substantial evidence that any person, company, firm, corporation, locality, or description of traffic similarly situated to the bank and

the city of Aberdeen, or to the business of carrying money by express, was given any preference or advantage by these rules and this practice, nor does the record contain any such evidence that either the bank, the city of Aberdeen, or the particular description of traffic here under consideration was subjected by these rules and this practice of the express company to any prejudice or disadvantage over any other party, locality, or description of traffic similarly situated. The bank and the city of Aberdeen were furnished the same opportunities and facilities for shipping their money by express on the morning trains that 41 other places and their inhabitants similarly situated in the state of South Dakota were provided with. The rules and practice of the express company were universal. They governed its business of receiving and carrying money out of 41 other places in South Dakota where there were departing morning trains, and where it will be necessary for the express company to store money overnight if it receives it during the business hours of the day preceding the departure of the trains upon which it must be carried.

On the other hand, there was evidence strongly tending to show that the order of the Commissioners would inevitably subject the transportation of money by express from the bank at Aberdeen to the towns specified in the bill to a disadvantage or prejudice to which the carriage of money by express from other parties and places similarly situated is not subject, and that it will impose upon this form of traffic another disadvantage, in that the express company will be compelled to carry it on at a loss, while the other forms of traffic similarly situated which it conducts may be carried at a profit. Since the rules and practice of the express company wrought no preference, prejudice, or disadvantage to any party or locality, or description of traffic over any party, locality, or description of traffic similarly situated, they did not violate section 437 of the Revised Political Code of South Dakota. *Cincinnati Chamber of Commerce v. B. & O. S. W. R. Co.*, 10 Interst. Com. R. 378, 382, 383.

But the express company was a common carrier, and section 1578 required it to receive these packages of specie and currency at a reasonable time and place. Was it unreasonable for the company to refuse to receive on the day preceding the departure of the morning trains and to store overnight the specie and currency which the bank might tender it for transportation to its correspondents upon these trains? The Board of Railroad Commissioners and the court below have answered this query in the affirmative, and counsel of the bank cite in support of their conclusion section 449 of the Revised Political Code of South Dakota, which declares that in any hearing in the circuit court of the state the report of the Commissioners shall be prima facie evidence of the matter therein; *Alsop v. Southern Express Company*, 104 N. C. 278, 10 S. E. 297, 6 L. R. A. 271, in which the majority of the Supreme Court of North Carolina, Chief Justice Merrimon dissenting, held that an express company which at 2 in the afternoon, after the only daily train to the destination of the package had departed on its regular time at 12:55 in the afternoon, refused to

receive a package of money containing \$70 until the next morning, violated a statute of that state which required it to receive such packages "whenever tendered"; *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 206 U. S. 1, 27 Sup. Ct. 585, 595, 51 L. Ed. 933, wherein the Supreme Court was considering whether or not an order of the defendant in error that the railroad company should operate an extra train so as to make a connection of trains at Selma was repugnant to the due process or equal protection clause of the fourteenth amendment, and that court held that it was not, and that the mere fact that the operation of the extra train would necessarily compel the company to incur a loss upon its operation when it did not appear that this loss would cause its income to be less than its operating expenses, fixed charges, and a reasonable return upon its capital, did not of itself give rise to the conclusion that the order requiring its operation was so unreasonable as to make it violative of the Constitution, but added, "Of course, the fact that the furnishing of a necessary facility ordered may occasion an incidental pecuniary loss is an important criteria to be taken into view in determining the reasonableness of the order, but it is not the only one"; *St. L. & S. F. Ry. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, and *Minneapolis & St. L. R. R. Co. v. Minnesota*, 186 U. S. 257, 267, 22 Sup. Ct. 900, 46 L. Ed. 1151, which are to the same effect—and they argue that because ordinary business hours constitute a reasonable time to conduct ordinary business, because the bank will be subject to the risk of the loss of the money if it stores it overnight, and of danger of loss of more if it opens its vault before the morning trains start, because the other express companies operating on other lines of railroad receive specie and currency at Aberdeen for transportation on the day preceding the departure of the trains which carry it, and because the United States Express Company receives incoming packages of money during the evening and night, and delivers them the next morning, the rules and practice of the express company under consideration were unreasonable, and the order of the Commission and the decree of the court should be affirmed.

But the statutory presumption that the report and the order of the commission were correct is met by a counter presumption of law, of no inconsiderable strength, that the rules and practice of the express company, which are the product of the special knowledge, wisdom, and experience of its officers and agents, who have been trained in this special business, and presumptively know better than others under what regulations it ought to operate, are reasonable and just, both to the express company and to the public. The duty and the interest of the officers and agents of the express company alike incited them to make these rules and this practice fair and just, for if they were unreasonable to the company they necessarily inflicted injury upon it, and if they were unjust to its customers they necessarily drove away the business of the express company, and proved deleterious to its interest.

A common carrier has the right to conduct its business in its own way in accordance with the rules of the common and statutory law. It

is bound to receive and to transport goods of the character which it offers to carry at reasonable times and places, but at no other times or places. It has the right to make and enforce reasonable regulations which may lawfully fix the times, the places, the methods, and the forms in which it will receive the various commodities it undertakes to carry, and the rules which it thus adopts are presumptively right and reasonable. The burden is on him who assails them to prove that they are unfair and unjust, and it is only when it clearly appears by competent evidence that they are unreasonable that commissions or courts may lawfully interfere to annul or to change them. *Harp v. Choctaw, O. & G. R. Co.*, 61 C. C. A. 405, 410, 125 Fed. 445, 450; *Lake Shore & Mich. Southern Ry. Co. v. Smith*, 173 U. S. 684, 691, 19 Sup. Ct. 565, 43 L. Ed. 858; *Harp v. Choctaw, O. & G. Ry. Co. (C. C.)* 118 Fed. 169.

The business of a common carrier is not the storing or the safely keeping or the insuring of the safety of goods or money. Its business is the transportation of them. Nevertheless, it necessarily insures not only their carriage, but their safety from the time of its receipt of them for transportation until it delivers them at their destination. It may not lawfully refuse to receive them for carriage within a reasonable time before the transportation can commence, but, since the keeping and the insurance of the safety of the goods before and after the transportation are but the necessary incidents of the carriage, and do not constitute the chief undertaking or business of the carrier, no duty is imposed upon it to assume them an unreasonable length of time before the carriage can begin. Not only this, but the reasonableness of the time before the transportation within which it is the duty of the carrier to receive money or goods for carriage must be measured primarily by the relation of this time to the business and the liabilities of the carrier, and not by its relation to the various trades and conveniences of its customers, although, of course, not without due consideration of the latter. A carrier does not undertake to operate, nor is he responsible for, the business of its customers, or for the conduct of that business, hence the carrier's business should not be controlled primarily by the managers of the business of its customers. *Lane v. Cotton*, 1 Lord Raymond, 646, 652; 3 Comyns, 100, 105; 2 Parsons on Contracts (9th Ed.) \*175; Story on Bailments (9th Ed.) § 508, p. 484; Hutchinson on Carriers, § 115.

The opinion of the majority of the Supreme Court of North Carolina in *Alsop v. Southern Express Company*, 104 N. C. 278, 10 S. E. 297, 6 L. R. A. 271, is not controlling in this case, and it is authoritative only so far as it is persuasive, and in the light of reason and principle it is not persuasive. When the only train on which an express company can carry a package of money to its destination leaves at 12:55 in the afternoon so that there are at least three business hours of that day before its departure, we are not persuaded that it is the duty of the carrier to receive the money at two in the afternoon of the preceding day and thereby to assume the liability of a warehouseman and an insurance company during the night. Its business is transporting, not storing and insuring, and no duty rests upon it to assume the

responsibilities of the latter occupations farther than it is necessary to do so to conduct its business of transportation in a rational way, and in such a case the reasonable conduct of that business does not seem to us to require an express company to assume these responsibilities before the business hours of the day of the departure of the train. The dissenting opinion of the Chief Justice is more persuasive than the opinion of the majority of the court.

The opinions of the Supreme Court in *Atlantic Coast Line R. Co. v. North Carolina Corporation Commission*, 207 U. S. 1, 27 Sup. Ct. 585, 51 L. Ed. 933, St. L., etc., *R. Co. v. Gill*, 156 U. S. 649, 15 Sup. Ct. 484, 39 L. Ed. 567, and *Minneapolis & St. L. R. R. Co. v. Minnesota*, 186 U. S. 257, 267, 22 Sup. Ct. 900, 46 L. Ed. 1151, do not govern this case, because the Supreme Court was not considering and deciding in those cases, as this court must in the suit at bar, the original question whether or not the rules or practice of the quasi public corporations were reasonable, or what ought to be adjudged to do justice in the matter, but whether or not certain acts of Legislatures and Railroad Commissions were so unjust and confiscatory that they violated the Constitution of the United States. Questions of that nature cannot arise in this case because, as we have seen, this court is vested with plenary power in equity "to do justice in the premises" conferred by the Legislature of South Dakota upon the courts of that state of co-ordinate jurisdiction. The suit in hand is more analogous to *Interstate Commerce Commission v. Delaware, L. & W. R. Co.* (C. C.) 64 Fed. 723. The issue here is the original question of the reasonableness of the rules and practice of the express company, and upon that issue the relative cost of, and the revenue from, handling the packages of money, which the bank seeks to compel the express company to store overnight in accordance with the order of the Commissioners, are competent and important, if not controlling, considerations. *Atlantic Coast Line R. Co. v. North Carolina Corp. Com.*, 207 U. S. 1, 27 Sup. Ct. 595, 51 L. Ed. 933; *Interstate Commerce Commission v. Delaware, L. & W. R. Co.* (C. C.) 64 Fed. 724; *Chicago, St. P., M. & O. Ry. Co. v. Becker* (C. C.) 35 Fed. 883, 886.

It does not follow from the fact that ordinary business hours constitute a reasonable time to conduct ordinary business that such hours are a reasonable time to conduct all business, or that all business hours constitute a reasonable time for an express company to receive all packages of money for transportation. The reasonableness of the time for their receipt is not to be determined by its relation to ordinary business hours alone, but by its relation to the business of the transportation of such packages, by the fact that this business is not and cannot be transacted in ordinary business hours, by the risks and liabilities entailed by receiving and storing such valuable and easily stolen packages, by the relative facilities and safeguards of the carrier and its customers for safely keeping money before the transportation commences, and by all the pertinent facts and circumstances of the case. The reasonableness of the time when an express company ought to receive and deliver packages of money is no criterion for the reasonableness of

the time when a bank ought to conduct its ordinary business of receiving deposits, discounting commercial paper, and loaning money; nor is the reasonableness of banking hours any criterion for the reasonableness of the time of receiving or delivering packages of money and transacting the business of the express company. *Marshall v. American Express Company*, 7 Wis. 1, 73 Am. Dec. 381.

The fact that other express companies operating on other lines of railroad receive money at Aberdeen the day before they send it out is persuasive, but not conclusive, evidence that such a practice is reasonable. But the receipt by the United States Express Company of incoming packages in the evening and in the night, and their delivery in the morning, seems to be a necessity of the business, and is far from conclusive evidence that it would be reasonable to require the company to receive such packages the day before the morning trains depart and to store and insure them through the night.

Upon a review of the entire evidence, the case in hand is this: Other express companies at Aberdeen operating upon other railroads receive and keep overnight packages of specie and currency for transportation on the early morning trains of the following day, and the United States Express Company refuses to do so in accordance with rules of universal application which it has enforced for many years, and which it deems essential to the just and economical conduct of its business. It has the right to make and enforce lawful rules, and to conduct its business according to the common and statutory law without the interference of strangers to it. Its rules are presumptively fair and just, and courts and commissions should not annul or change them unless the fact that they and the practice under them are unreasonable clearly appears. The rates for the transportation of packages of currency insured by mail are from 20 per cent. to 25 per cent. less than the rates for their carriage by the express company. This express company operates between Minneapolis and Aberdeen, and its practice has been to receive and keep incoming packages of money, which arrived in the evening and night, and to deliver them the next day. The bank controlled the method by which the currency it received from Minneapolis should be shipped to it, and it caused none of it to be sent by the express company, but many hundred thousand dollars of it by mail during the year preceding the commencement of this suit. If all the outgoing packages of specie and currency from Aberdeen to the towns specified in the report and order of the Commissioners should be sent by this express company its gross revenue from their carriage would not exceed \$600, and its net income from it would be less than \$40 under its present rules and practice. If it is required to receive moneys tendered for transportation to these towns on the day before the morning trains start it will be obliged to incur such additional expense and risk that this business will entail a net loss, this description of traffic will be preferred, and this bank and the city of Aberdeen will be preferred to other descriptions of traffic, towns, and their inhabitants that are probably similarly situated. The safe-keeping overnight and delivery in the



morning before the trains start of the specie and currency which the bank might desire to ship by this express company upon these morning trains will entail no more expense upon the bank than their delivery the day before, while the receipt of them on the latter day and their storage overnight will cause the express company additional expense, and will make its business of handling this money a losing one. The risk of keeping these packages of money overnight is less to the bank than to the express company, because it has a burglar proof vault, and trusty messengers for the purpose of keeping large amounts of money safely, and protecting them against robbers and fire in the city of Aberdeen, while the express company has no such safeguards and facilities in that city, and, finally, the business of the bank is to receive and keep safely for its depositors in the city of Aberdeen, and to send to them and to others who buy or borrow it, the specie or currency deposited with it, and it has a suitable vault and trusty officers and servants to carry on this business and to protect this money. The business of the express company, on the other hand, is to transport money, to keep it safely, and to insure it against loss during its transportation, and for this purpose it has specially constructed stationary safes in cars and trusty messengers to travel with it, but it is no part of its business to store or to keep valuable packages of specie or currency for any length of time greater than is reasonably necessary to conduct its transportation. The trains under consideration do not leave Aberdeen at very early hours in the morning, and it is neither impossible nor impracticable for the bank to deliver its packages of money to the express company in the morning of the day before the trains start. To require the express company to receive these packages on the preceding day, and to store them and to insure their safe-keeping overnight is to transfer to the express company a part of the risk, responsibility, and business of the bank, a part of the safe-keeping of specie and currency in the city of Aberdeen, a part of its business which it has adequate safeguards to conduct, which it undertakes to carry on, and for which it presumably receives reasonable compensation, while the express company, which has no such facilities, can secure no such compensation, and does not offer or undertake to do any such business. In view of these facts, rules, and considerations, the evidence in this case falls far short of convincing proof that the rules and practice of the express company upon this subject which have been assailed here were unreasonable or unjust. Indeed, in our opinion, it would be far more unreasonable to require the express company to receive these packages of specie and currency for transportation on the morning trains the day before they start, and thereby to compel it to store and insure them overnight, than it would be to refuse so to do, and thus to leave the bank to send them insured by mail at a lower rate, or to deliver them to the express company in the morning before the trains depart.

There is another consideration which leads to the same conclusion. Courts and commissions ought not to interfere with the established rules and practice of transportation companies on ac-

count of incidental inconveniences and trivial troubles to which the conduct of all business is necessarily subject. The business of railroad companies and express companies cannot be conducted for the purpose of carrying on the business of their customers exclusively, nor without some discomforts and inconveniences to all parties engaged in any of these occupations. Unless a clear injustice is perpetrated or a substantial injury is inflicted, or there is an imminent threat of them, the annoyances and inconveniences in the transaction of the business of the transportation companies should be left for correction to the pecuniary interests and business instincts of the respective parties concerned, and their laudable anxiety to secure, retain, and increase their business. No injustice has been perpetrated in this case. No serious damage has been, or is likely to be, inflicted upon the bank by the refusal of the express company to receive money until the morning of the day when the trains depart, in view of the pregnant fact that it has elected to cause its incoming currency to be shipped to it by mail for more than a year, and to the amounts of hundreds of thousands of dollars, when it could have caused it to have been sent by this express company. No other shipper is complaining, and the practice of the express company creates no preference or prejudice to party, locality, or description of traffic, while the practice which the bank seeks to enforce will inevitably compel other parties and other descriptions of traffic to bear a part of the burden of storing and keeping overnight the moneys it seeks to send out. There is no equity in this case of the bank, and it is entitled to no relief.

The decree below must accordingly be reversed, and the case must be remanded to the Circuit Court, with instructions to render a decree that the cross-bill be dismissed upon the merits, and that the bank and the Commissioners be enjoined from enforcing the order of the latter, and it is so ordered.

VAN DEVANTER, Circuit Judge, concurs in the result.

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DAVIS v. CROMPTON et al.

(Circuit Court of Appeals, Third Circuit. December 20, 1907.)

No. 21.

1. BANKRUPTCY—PETITION FOR REVIEW—ISSUES REVIEWABLE.

On a petition to review the judgment of a district court in bankruptcy, the respondent may rely upon any ground disclosed by the record to support the judgment, although upon such ground the decision may have been adverse to him.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. SAME—VALIDITY OF CONDITIONAL SALE CONTRACT—LAW GOVERNING.

The validity of a conditional sale contract by which title was reserved in the seller as against the trustee in bankruptcy of the purchaser depends upon the law of the state in which delivery of possession thereunder was made.

[Ed. Note.—For cases in point, see *Cent. Dig.* vol. 6, *Bankruptcy*, § 275.]

## 3. SAME.

Under the law of Pennsylvania, the title reserved by a seller under a contract of conditional sale until full payment of the purchase money in the absence of actual fraud is valid as against the purchaser and all others except creditors who have acquired a lien by attachment or execution, and in such respect a trustee in bankruptcy of the purchaser succeeds only to his title and rights.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 275.]

## 4. SAME—LEVY BY JUDGMENT CREDITOR—DISCHARGE BY BANKRUPTCY PROCEEDINGS—SUBROGATION OF TRUSTEE.

Under Bankr. Act July 1, 1898, c. 541, § 67f, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3450], providing that all levies or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt, and the property affected shall be deemed wholly discharged and released from such levy or lien "unless the court shall on due notice order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate," where a receiver in bankruptcy obtained a restraining order from the court and took possession of property of the bankrupt from the sheriff who held it under a levy, the lien of such levy was wholly discharged, and the trustee could not thereafter assert rights thereunder as against an adverse claimant of the property.

Petition for Revision of Proceedings of the District Court of the United States for the Eastern District of Pennsylvania, in Bankruptcy.

S. W. Cooper, for petitioner.

Wm. A. Carr, for appellees.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

GRAY, Circuit Judge. This case comes before us upon the petition of the trustee in bankruptcy of the Arkonia Fabric Manufacturing Company, to review, in matter of law, an order of the District Court for the Eastern District of Pennsylvania, sitting in bankruptcy, affirming certain findings of a referee in bankruptcy. The pertinent facts, as disclosed in the said petition, and in the record accompanying it, are as follows:

On September 7, 1906, a petition in involuntary bankruptcy was filed against the Arkonia Fabric Manufacturing Company, and on September 12th following, the petitioner was appointed receiver of the said company. On October 5, 1906, the said company was adjudged a bankrupt in the court below, and on the 3d of November, 1906, the petitioner was duly appointed trustee of the estate of the said bankrupt. Among other property which came into his hands, first as receiver and afterwards as trustee, were 10 looms claimed by the Crompton-Thayer Loom Company, a partnership trading under that name, and the appellee in the case before us. The claimants filed a petition in the court below, setting forth that the said looms belonged to them, and thereafter, under order of the court, upon entering into a bond in the sum of \$4,000, conditioned that they would prosecute their claims before the said District Court, or referee, the said looms were delivered into their possession. The claimants thereupon submitted the question of their title to the said

looms to David W. Amram, Esq., referee in bankruptcy, by petition, and answers were filed by the said trustee. After hearing, the referee decided in favor of the title of the claimants to the said property and against the right of the trustee in bankruptcy to hold the same. The said trustee thereupon filed a petition, asserting that the said order and judgment of the said referee was erroneous, and praying that the issue might be certified to the District Judge for review. The learned District Judge sustained the judgment of the referee in a *per curiam* opinion, in order, as stated by said judge, that the matter might be speedily brought before this court for a determination of the rights of the parties. The case before the referee is stated in the opening paragraph of his opinion, as follows:

"The issues in this proceeding are raised by petition of the Crompton-Thayer Loom Co., claiming title to ten looms used by the bankrupt at its mill in Philadelphia, and answers of trustee denying claimant's title. These looms were found in possession of the bankrupt at the time of bankruptcy and came into the hands of the receiver. The claimant avers that the looms were delivered by it to the bankrupt as a bailment under a contract dated April 9, 1906, which contract is in form a so-called 'installment lease' or 'bailment lease.' The trustee in bankruptcy contends, on the other hand, that the lease of April 9, 1906, does not contain the entire contract between the parties, but that the contract is to be found in a series of letters which passed between the claimant and the bankrupt, beginning January 24, 1906, and that the lease of April 9th was merely executed in accordance with the contract established by this correspondence and for the purpose of carrying out the terms thereof, and that the contract is one of conditional sale and title to the looms is now in the trustee."

After a careful review of the evidence, which he says was "practically entirely documentary, consisting of a file of correspondence and the book entries of the claimant," the referee found that the real character of the contract between the claimants and the bankrupt, was not determined by the existence of the so-called installment or bailment lease, but by the real intent of the parties, as evidenced by the documentary evidence referred to, and that, under the law of Pennsylvania, the contract was one of conditional sale. Nevertheless, the referee was of opinion, and so decided that as the trustee in bankruptcy stood precisely in the shoes of the bankrupt with regard to the title to this property, and as the bankrupt had not complied with the conditions upon which alone the sale was to be complete and the title of the vendor divested, the same remained in the vendor, and was paramount to that of the trustee in bankruptcy, unless the latter complied with the conditions imposed by the contract of sale. It is admitted that, if this transaction were really a bailment by way of lease, the bankrupt, as lessee, at and before the time of the bankruptcy, would have had no title to the goods in question, except its possessory title under the lease; on the other hand, the title of the lessor remained, as it originally was, good against all the world, without exceptions. The claimants, therefore, sought to maintain that the contract with the bankrupt was such a lease. Though the court below decided that the transaction in question was one of conditional sale, it also decided in favor of claimants, that under the circumstances the

title of the vendor was good as against the trustee in bankruptcy. The claimants, therefore, were not in a situation to ask for a review. Counsel for the appellant on this ground objected that the appellees had no right in this court to contest the finding of the court below, that the contract between the parties was not a bailment. We are of opinion, however, that in maintaining the decision of the referee, as affirmed by the District Court, the appellees may rely upon any ground disclosed by the record upon which that decision might be thought to be maintainable, even though it be not the ground upon which that decision was made. We agree, however, with the conclusion, that the transaction in this case was one of conditional sale, and not of bailment. The view we take of the rights of the parties to the issue before us, renders it unnecessary that we should discuss the grounds of our agreement with this conclusion.

That in a sale of personal property there can be a delivery, and yet the vendor retain title until the purchase price be paid, or other condition performed by the vendee, is a generally accepted doctrine in the jurisprudence of this country and of England. In many of our states, it is provided by statute that such sales, though valid between the vendor and vendee, are not so as to creditors, or as to bona fide purchasers for value without notice. In all of them, perhaps, as also in the courts of the United States, are some such limitations imposed upon this doctrine of conditional sales, as are recognized as being substantially within the spirit of the statute of 13th Elizabeth, which was intended "for the avoiding and abolishing of feigned, covinous, and fraudulent feoffments, gifts, grants, alienations, etc., etc., as well of lands and tenements, as of goods and chattels \* \* \* devised and contrived of malice, fraud, covin, collusion, or guile, to the end, purpose, and intent to delay, hinder, or defraud creditors." Indeed, the principle of this statute has been embodied in the law of all the states. As said by the Supreme Court in *Clements v. Moore*, 6 Wall. 312, 18 L. Ed. 786, quoting Lord Mansfield, "the common law, without the statute, would have worked out the same results."

The precise extent to which such a conditional sale as we have in the present case, must be held invalid as to creditors, whether general or subsequent, and as to bona fide purchasers, mortgagees and pledgees, without notice, must depend upon the law of the state in which delivery of possession under the conditional sale has been made. The statute of 13th Elizabeth has been adopted as part of the common law of Pennsylvania, but we must look to the decisions of the courts of that state to ascertain in what sense the words "bargains and conveyances of goods and chattels," "to the end, purpose and intent to delay, hinder or defraud creditors," shall be "utterly void, frustrate and of none effect," are applicable to a conditional sale. Though the language of the courts of Pennsylvania in the earlier decisions, as in *Martin v. Mathiot*, 14 Serg. & R. 214, 16 Am. Dec. 491, may have been strict and unqualified in asserting the doctrine that possession separated from property was a badge of fraud as against creditors generally, it is to be

noted in that case, as in others, that the controversy was between the vendor and the sheriff, who had levied an execution on behalf of a creditor, or between the vendor and creditor himself in such execution, who had obtained a specific lien thereby. As well said by the learned referee:

"Modern business has recognized the necessity of such contracts, and the immense growth of business transactions made under so-called 'bailment leases' or 'installment leases,' testifies to this change of sentiment. In principle, I see no difference in the economic effect of delivery of goods under a 'bailment lease' or under a contract of conditional sale. In the one case, as in the other, property is delivered with the intention of being sold upon the performance of certain conditions. In the contract of bailment, the bailee must pay certain rental, and at the expiration of the rental period, he may, upon complying with certain formalities, become the owner of the property leased. In a contract of conditional sale, precisely the same effect is intended to be produced, except that the conditional vendee does not become the owner of the property until after he has completed the payments of the purchase money. So far as creditors of the appellee or vendee are concerned, the form of the contract makes no difference."

The object of both forms of contract is the same, and the dissociation of ownership from the possession is intended as security to the vendor for the payment of the purchase money, according to the terms of the contract of sale. In case either of a bailment lease or of a conditional sale, the separation of ownership from possession is a dominant incident. The Supreme Court of Pennsylvania, in a late case, *Post v. Berwind White Coal Mining Co.*, 176 Pa. 297, 35 Atl. 111, decided in 1896, cited by the referee, has not condemned such separation of ownership and possession as a badge of fraud, per se, but confines itself to a practical statement of the extent of the right of creditors of the vendee as to such sales. The issue raised on the sheriff's interpleader in this case was referred, in accordance with the act of assembly in that behalf, for decision, to Frank P. Prichard, an eminent member of the Philadelphia Bar. The following excerpt from his opinion, afterwards affirmed by the Supreme Court, clearly states the law of Pennsylvania, as to the question now under consideration:

"The legal title reserved in the vendor, or in the trustee for his benefit, is a perfectly valid title. It is not void, but is good between the parties and as against volunteers. Under the law of Pennsylvania, however, it is invalid as to attaching creditors of the vendee. This right of the attaching creditor is an absolute one, irrespective of any actual fraud or notice. It can be asserted, however, only in case the attaching creditor has acquired a lien upon the property. The outstanding title in the vendor is not a fraud upon the creditor as such. \* \* \* It is not merely the fact that he is a creditor that gives him the right, but the fact that he has a lien acquired while the vendee was in possession as owner. \* \* \* The existence of this lien is essential to enable him to contest the outstanding legal title."

In affirming this opinion, the Supreme Court, by Mitchell, J., used this language:

"The vendor's title is good against all the world, but certain excepted parties, to wit, creditors of the vendee having a lien by levy or attachment on the property, and such lien must be acquired while the property is in the ownership or possession of the debtor."

We take the foregoing to be a correct statement of the extent to which the 13th of Elizabeth is applicable in Pennsylvania to conditional sales, as to which there is no suggestion of actual fraud. In this case, the title to the property in question, though sold and delivered to the bankrupt, was, by the terms of the sale, expressly reserved to the vendor until payment of the purchase money, according to the terms of said contract of sale, had been fully made.

The contention of counsel for appellant is, that the rule in Pennsylvania is an exception to what, he seems to admit, is the rule in most of the states, and that under the statute of 13th Elizabeth, in force in Pennsylvania, any sale of goods delivered to the vendee, in which the vendor retains title, is "fraudulent" as against creditors, in the sense of being affected with actual fraud. This contention cannot be maintained. We have seen in the case just quoted from, that the Supreme Court of the state does not so hold, but distinctly rejects such an interpretation of the statute as would put an honest and valid conditional sale in the category of such cases as *In re Garcewich*, 115 Fed. 87, 53 C. C. A. 510, upon which counsel for petitioner seems to rely. In that case, however, the Circuit Court of Appeals was careful to distinguish the facts upon which its decision rested from such as those in the case at bar. They said:

"We think the court below erred in viewing the case as one in which there had been a valid conditional sale, good as against creditors. If the sale had been of that character, we think the decision would have been correct; but, being a fraudulent one, it was void as to the trustee. Under the present bankrupt act, as under previous bankrupt acts, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt."

In the *Garcewich* Case, therefore, there was a distinct recognition of the right of the conditional vendor as against the trustee in bankruptcy, in cases unaffected by actual fraud. The title of the petitioners, therefore, under the law of Pennsylvania, to the property in question at the time of the adjudication of bankruptcy, was good, not only as between the vendor and vendee, but against all the world, inasmuch as there were no creditors of the vendee who had at that time specific liens, by levy or attachment, on the said property.

It has been often declared by the Supreme Court of the United States, that under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt. It would seem that no other interpretation of section 70 of the act (Act July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), consistent with the rights and vested interests of third parties, could be maintained. The trustee in a certain sense is the bankrupt. The bankrupt's title is his title, whether it be to things in possession or to choses in action. His title cannot rise higher than that of the bankrupt, so as to impinge upon or destroy the interest in or title to property, good as against the bank-

rupt himself. It is true, that, by the language of section 70, the trustee of the estate of the bankrupt is "vested, by operation of law, with the title of the bankrupt, as of the date he was adjudged a bankrupt, \* \* \* to all \* \* \* (5) property which, prior to the filing of the petition, he could, by any means, have transferred, or which might have been levied upon and sold under judicial process against him." But, taking the title of the bankrupt as it existed in him at the time of the adjudication, the trustee takes it subject to the superior title of the vendor. Otherwise, the title of the trustee would be superior to the title held by the bankrupt, and therefore not the title of the bankrupt to the property described in clause 5 of section 70, but one entirely different therefrom. It is this precise title, and no other, which is vested by operation of law in the trustee. These propositions were all distinctly affirmed by the Supreme Court in the recent case of *York Manufacturing Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782. That was a case of conditional sale. The District Court and Circuit Court of Appeals had held that the general creditors were entitled to have the plant of the York Manufacturing Company (the vendor in the conditional sale to the bankrupt), sold for the payment of their claims, because of the failure of that company to file the conditional sale contract, as required by the Ohio statute, and that such failure rendered the contract void as to creditors. The Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court. On appeal from this decree, the Supreme Court reversed the judgment of the Court of Appeals and of the District Court, and decided that "the York Manufacturing Company had the right, as between itself and the trustee in bankruptcy, to take the property under the unfiled contract with the bankrupt, and" that "the adjudication in bankruptcy did not operate as a lien upon this machinery in favor of the trustee as against the York Manufacturing Company."

The statute of Ohio, relating to chattel mortgages, declared a mortgage absolutely void as against creditors of the mortgagor, unless the mortgage, or a true copy thereof, should be deposited forthwith, as directed in the act. The Supreme Court of Ohio held that the mortgage was not void for lack of filing, as between the parties thereto, but that the statute only avoided the instrument as to those creditors who, between the time of the execution of the mortgage and the filing thereof, had taken steps to "fasten upon the property for the payment of their debts." As against such as had in the interim secured liens by attachment, execution, or otherwise, the mortgage would be void. The Ohio statute, requiring the filing of contracts of conditional sales, has a similar provision, making unfiled contracts void as against creditors. As to this statute, the Supreme Court of the United States, in the case just referred to, says:

"We have not been referred to any decision of the Supreme Court of Ohio, as to the meaning of the statute requiring the filing of contracts of conditional sales, but we concur with the Circuit Court of Appeals in this case, that the statute would render the unfiled contract void as to the same class of creditors mentioned in the chattel mortgage statute. Therefore the contract would be void as to creditors who, before its filing, had 'fastened upon the property' by



some specific liens. As to creditors who had no such liens, being general creditors only, the statute does not avoid the sale, which is good between the parties to the contract."

This case, therefore, in its facts, is similar to the one at bar, the Supreme Court of Pennsylvania having held, as we have seen, that in cases of conditional sale, the vendor's title is good against all the world, but certain excepted parties, to wit, creditors of the vendee having a lien by levy or attachment on the property, acquired while the property is in the possession of the debtor.

In the "Cassell" Case, as in the case at bar, it was contended that the "adjudication in bankruptcy was equivalent to a judgment or other specific lien upon the machinery", and the Circuit Court of Appeals held that the seizure by the court of bankruptcy operated as an attachment and an injunction for the benefit of all persons having interest in the bankrupt's estate. As to this, the Supreme Court says:

"We are of opinion that it did not operate as a lien upon the machinery, as against the York Manufacturing Company, the vendor thereof. Under the provisions of the bankrupt act, the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time, the right, as between the bankrupt and the York Manufacturing Company, was in the latter company to take the machinery on account of default in the payment therefor. The trustee under such circumstances stands simply in the shoes of the bankrupt, and as between them he has no greater right than the bankrupt. This is held in *Hewitt v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986. The same view was taken in *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577."

As to the dictum of the Chief Justice in *Mueller v. Nugent*, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405 "that the filing of the petition (in bankruptcy) is a caveat to all the world, and in fact an attachment and injunction", the court says "it was made in regard to the particular facts in that case. The case itself raised questions entirely foreign to the one herein arising, and did not involve any inquiry into the title of a trustee in bankruptcy, as between himself and the bankrupt under such facts as are above stated." We agree, therefore, with the learned referee in the court below, that the case of the *York Manufacturing Company v. Cassell* is of controlling and determinative authority in the present case, and we quote with approval the following from his opinion:

"The rights of the trustee, therefore, are strictly defined by section 70a of the act, and it is now clear from the opinions of the Supreme Court of the United States, first, that the trustee stands precisely in the shoes of the bankrupt with regard to the title to this property, and second, that the bankruptcy proceedings in themselves are not tantamount to an attachment or execution for the benefit of all the creditors, and it therefore follows that the bankruptcy court can do nothing else than determine the status of the trustee with regard to the property by the only test provided by the law, namely, the determination of the status of the bankrupt himself with regard to the said property as of the date of his adjudication."

The counsel for appellee is mistaken in supposing that the decision in the recent case of *Security Warehousing Co. v. Hand et al.*, Trustees of the *Racine Knitting Co.*, Bankrupt (decided in May of this year) 206 U. S. 415, 27 Sup. Ct. 720, 51 L. Ed. 1117, in anywise challenges

the correctness of the views above stated. The facts of that case are entirely different from those of the one at bar. The Racine Knitting Company, the bankrupt at the time of the adjudication, was the owner of the goods in question, but had taken what purported to be receipts for the same from the warehousing company, which receipts were in turn pledged by the knitting company to various banks, as security for loans obtained from them. The warehousing company had no warehouse of its own, but the knitting company made what purported to be a lease to it of certain of its premises, where the goods in question were stored, and from which they were not removed, except as sold by the knitting company, the warehousing company receiving a relatively small commission for the use of its name and the issuance of the receipts. It was evidently, under color of warehouse receipts, a device for raising money. In regard to the transaction, the Supreme Court says:

"There was really no delivery and no change of possession, continuous or otherwise. The alleged change was a mere pretense, a sham."

In another place, the court says:

"The title to this property was in the knitting company. There had been no valid pledge of it. \* \* \* The method taken to store the property was, as found by the district court, a mere device or subterfuge to enable the bankrupt to hypothecate the receipts and thus raise money upon secret liens on property in possession of the pledgor and under its control; and such a scheme, the court said, ought not to receive judicial sanction. Such a scheme, under the facts, and as carried out in this case, and with regard to Wisconsin law, was a fraud in fact."

These excerpts from the opinion of Mr. Justice Peckham, who in this case, as in the Cassell Case, spoke for the Supreme Court, sufficiently point to the difference between the two cases. Nothing in this latter case contradicts what was held in the former. On the contrary, both illustrate and emphasize from different points of view, the position here taken. The distinction between the two cases was between fraud in fact and the mere making of a valid conditional sale. Under the facts of the case just cited, the conclusion arrived at was inevitable: that "there was no valid pledge and no equitable lien in favor of the interveners, which would take precedence of the title of the trustee by virtue of the special provisions of the bankrupt act."

It only remains to consider the remaining contention of the appellant, that he had been subrogated by the court below to the rights of the Chautauqua Worsted Mills, plaintiff in a judgment and execution levied upon the property in question, August 29, 1906. As to this, we cannot do better than to quote again the language of the learned referee:

"Under section 67f of the bankruptcy law it is provided that 'all levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of the petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt.' In this case the Chautauqua Worsted Mills entered judgment and issued execution and levied upon the property on August 29, 1906. The petition in bankruptcy was filed September 7, 1906, whereby the judgment and levy obtained through the legal proceedings in the state court become null and void upon the subsequent adjudication of the bankrupt on

the 5th day of October, 1906. Section 67f further provides that 'the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same and shall pass to the trustee as a part of the estate of the bankrupt.' By the subsequent proceedings in bankruptcy, therefore, the lien of the Chautauqua Worsted Mills was destroyed. The receiver, having obtained a restraining order from the District Court, took possession of the property from the sheriff, and in so taking it took it wholly discharged and released from the lien of the levy. Now, section 67f further provides that such lien shall be deemed wholly discharged and released 'unless the court shall on due notice order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate, and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate aforesaid.' The trustee did not attempt to preserve this lien. It was the receiver who through the restraining order obtained possession of the property discharged of the lien; no proceedings were then taken to preserve the lien, and it was not until April 4, 1907, in the midst of the controversy arising between the conditional vendor (claimant herein) and the trustee, that the trustee filed a petition praying to be subrogated to the rights of the execution creditor, upon which petition an order of subrogation was entered. An examination of the record shows that the execution creditor no longer had any rights at the time the order of subrogation was made, and therefore the trustee took nothing by virtue of the said order."

Concurring, as we do, in these views, it is not necessary to consider whether, if the order of subrogation had been made in time, the bankrupt's estate would be benefited thereby, although a serious question may have been presented in such case; nor are we called upon to say how such a lien, obtained by a single creditor, could be preserved for the benefit of the creditors at large, or at what time or by what proceeding such subrogation can be effected.

We have not thought it necessary to cite the numerous authorities referred to by counsel on both sides and by the referee. They and others, however, have been examined, especially the cases referred to in the Supreme Court of the United States. We think, as we have already said, that the decision of that court in *York Manufacturing Co. v. Cassell*, is controlling in this case, and we therefore agree with the conclusion of the learned referee, that although the title of the bankrupt passed to the trustee in bankruptcy, yet, inasmuch as said title is invalid against the superior title of the conditional vendor, the latter is entitled to retake the property from the trustee in bankruptcy, unless the trustee complies with the terms of sale, and that, as in this case no attempt to comply with the terms of sale was made, the title of the claimant is superior to that of the trustee in bankruptcy.

The order of the court below is therefore affirmed.

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KESSLER et al. v. ARMSTRONG CORK CO.

(Circuit Court of Appeals, Second Circuit. December 4, 1907.)

No. 3.

1. **BILLS AND NOTES—FOREIGN EXCHANGE—WHAT LAW GOVERNS.**

Where drafts were payable at Paris, the law of France determined what constituted payment.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 7, Bills and Notes, §§ 248-254.]

2. SAME—DRAFTS DRAWN IN SETS.

Where two sets of drafts, original and duplicate, were drawn by New York bankers on a bank in Paris, the duplicate to be paid only in case the original was unpaid, the two sets constituted in law but one draft, so that when the holder produced the duplicates duly protested, with notice of demand given, he made out a *prima facie* case, as no duty devolved on him to account for the originals, payment of which was a matter of affirmative defense.

3. JUDGMENT—FOREIGN JUDGMENTS—RES JUDICATA—MERITS.

The original of a set of drafts was indorsed by the payee when it was stolen, and paid under a forged indorsement of the name of the indorsee. The duplicate, having been similarly indorsed by the payee, was received by the indorsee, and, on payment being refused because of the payment of the original, suit was brought against the drawee by the indorsee, in which judgment was rendered against him on the ground that since his name was not on the original he had no standing to criticise the payment thereof, and that the payee was discharged by the law of France where the draft was payable by the payment of the originals, and that the claim was therefore dismissed "entirely," and "as in all respects inadmissible and ill founded." *Held*, that such judgment was not a mere dismissal on the ground that the indorsee had no standing alone, the second ground being treated as obiter, but that the decision should be considered as resting on both grounds, and was therefore a judgment on the merits.

4. SAME—FOREIGN JUDGMENT—CONCLUSIVENESS.

Where a judgment of the French court dismissing a suit by an indorsee of a bill of exchange against the drawee was on the merits, it was not subject to re-examination in a suit in the federal courts of the United States by the payee against the drawer, in the absence of proof of fraud or want of jurisdiction of the French court, or that France so treats the judgments of the courts of the United States, but plaintiff, if bound by such French judgment at all, was estopped to question its grounds either in law or fact.

5. COURTS—DECISIONS AS PRECEDENTS—LAWS OF FOREIGN COUNTRIES—PROOF.

A finding of the French law with reference to the conclusiveness of the judgments of American courts is not binding on different parties to another action involving the same question, it being necessary that the foreign law be proved in every case as a fact.

6. JUDGMENTS—FOREIGN JUDGMENTS—CONCLUSIVENESS—PARTIES.

The indorsee of a bill drawn on bankers in France sued them on a duplicate of the set, the original having been paid under a forged indorsement, in which action a judgment was rendered against the indorsee, whereupon the payee took up the duplicates from the indorsee and sued the drawers in the federal court of the United States, who pleaded payment of the originals in defense. *Held* that, since neither the drawers nor the payee were parties or privies to the French judgment, it was not conclusive against the payee that the payment of the original by the drawee was sufficient to discharge the bills.

7. SAME—FOREIGN JUDGMENT—FINDINGS—CONSTRUCTION—"ORDINARY COURSE OF BUSINESS."

In an action in France on a foreign bill by the indorsee against the drawee, the original of which the latter had paid under a forged indorsement, the court found that the drawee made such payment in the ordinary course of business over the counter, and without notice that the original bills had been lost, and without opposition or objection to such payments, and that there was no evidence that the payments were made in bad faith. *Held*, that the use of the phrase "paid in the ordinary course of business" construed with the balance of the finding merely meant that payment was made to the holder of the original drafts against their surrender at the drawee's bank on a business day, in banking hours, in the same way it usually paid drafts, and was insufficient to exclude an

inference of negligence in the drawees, arising from their failure to detect a variance in the indorsement which was forged.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, p. 5042.]

**8. SAME—FOREIGN JUDGMENT—FOREIGN LAW—CONCLUSIVENESS.**

A foreign judgment against an indorsee of a foreign bill of exchange, in an action against the drawee holding that the latter was discharged by a payment of the original under a forged indorsement, was not conclusive evidence of the law of France, as applied to the facts that the drawee was not negligent in paying the bill as to persons who were neither parties nor privies to such judgment.

**9. BILLS AND NOTES—FOREIGN BILLS—FORGED INDORSEMENT—PAYMENT—NEG-LIGENCE—FOREIGN LAW.**

Evidence held to justify a finding that the failure of the drawee of a bill payable in France to observe that the chain of indorsement was broken by an indorsement which obviously did not correspond to the name called for in the prior indorsement, and which was in fact a forgery, was such negligence as to deprive the drawee under the French law of the protection of the French Code de Commerce, art. 145, providing that a party who pays a bill of exchange at maturity without receiving notice of opposition [objection] is presumed to be legally discharged.

Noyes, Circuit Judge, dissenting in part.

In Error to the Circuit Court of the United States for the Southern District of New York.

Guthrie, Cravath & Henderson (William D. Guthrie, E. C. Henderson, and Joseph P. Cotton, Jr., of counsel), for plaintiffs in error.

Noble, Jackson & Hubbard (Herbert Noble and Hartwell P. Heath, of counsel), for defendant in error.

Before COXE, WARD, and NOYES, Circuit Judges.

WARD, Circuit Judge. Kessler & Co., bankers of New York City, drew two sets of drafts, original and duplicate, one only to be paid, to the order of the Armstrong Cork Company on a bank in Paris, and put the bank in funds to pay the same. The Cork Company sent the originals by mail, duly indorsed, to the order of Matas Hermanos, but the same were stolen, and presented to the drawee with a forged indorsement in the name of Mata Hermanos, omitting the final "s" in Matas, to the order of B. Lauriez. The drawee paid the person presenting the drafts, who was unknown to it, and who was not B. Lauriez. By another mail the Cork Company sent the duplicates to Matas Hermanos, and the same duly indorsed having been presented to the drawee on behalf of Hijos de G. Matas payment was refused on the ground that the originals had been paid.

By the law of France, when the drawer has put the drawee in funds the latter becomes the principal debtor, and may be sued directly by the holder. Accordingly, Hijos de G. Matas brought suit against the drawee in the Tribunal de Commerce of the Seine, a court of competent jurisdiction, in which it was so proceeded that the court on two grounds, viz., that Hijos de G. Matas, not being on the original drafts, had no standing to criticise the payment thereof, and on the further ground that the payee was discharged by the law of France by the payment of the originals, dismissed the claim "entirely," and "as in all respects inadmissible and ill founded." The Cork Company, payee of

the drafts, then took up the duplicates from Hijos de G. Matas, and brought the present suit against Kessler & Co., the drawers, who pleaded payment of the originals in defense. As the drafts were payable at Paris, the law of France determined what constituted payment.

At the trial each party moved for a direction, and the trial judge held that the French judgment, under the case of *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95, was not conclusive; that the drawee was guilty of negligence in paying the originals without observing that the chain of indorsements was broken by omission of the final "s" from the word "Matas," and directed a verdict for the plaintiff, to which Kessler & Co., the defendants, duly excepted. The two sets of drafts are in law to be regarded as but one, and when the plaintiff produced the duplicates duly protested with notice of demand given, it made out a *prima facie* case. No duty lay upon it to account for the originals. If the originals had been paid, that fact was a defense to be affirmatively proved by the defendants. *Downes v. Church*, 13 Pet. 286, 10 L. Ed. 127. The defendants sought to prove payment by offering the French judgment in evidence, against which the plaintiff made various objections.

First it said that it was merely a dismissal on the ground that Hijos de G. Matas had no standing, and therefore that it was not a decision on the merits. We cannot agree to this, because the court expressly rested its judgment, not only on the ground that the plaintiffs had no standing, but likewise on the ground that the drawee had discharged its liability by payment of the originals, all the charges of negligence against it having been considered by the court. Because either ground would have been sufficient without the other, we do not think that one must be held to be *obiter dictum*. The Supreme Court, speaking by Brewer, J., of one of its earlier decisions which was rested, not simply on the contracts between the parties involved in the case which only had been discussed in the court below, but also on a statutory obligation which the court itself for the first time suggested, refused to consider the latter ground as *obiter*, saying:

"We are unable to yield our assent to these contentions. While the claim of the plaintiffs in that case was founded directly upon the contracts, yet, if there were a statutory duty to let them into the joint use of the bridge and its approaches, that was enough to sustain a decree in their favor, and the contracts might be regarded as simply relieving the court of the work of settling minor matters, such as method of use, compensation therefor, and matter of control. Indeed, the alleged invalidity of the contracts was rested largely on the scope of the statutes, and the duties to the government and the public imposed thereby on the railroad company. Of course, where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter*, but each is the judgment of the court and of equal validity with the other. Whenever a question fairly arises in the course of a trial, and there is a distinct decision of that question, the ruling of the court in respect thereto can, in no just sense, be called mere dictum. *Railroad Companies v. Schutte*, 103 U. S. 118, 143, 26 L. Ed. 327, in which this court said: 'It cannot be said that a case is not authority on one point because, although that point was properly presented and decided in the regular course of the consideration of the cause, something else was found in the end which disposed of the whole matter. Here, the precise question was properly presented, fully argued, and elaborately considered in the opinion. The decision on this question was as much a part of the judgment of the court as was that on any other of the several mat-

ters on which the case as a whole depended.' " *Union Pacific R. Co. v. Mason City & Ft. D. R. Co.*, 199 U. S. 160, 165, 26 Sup. Ct. 19, 20, 50 L. Ed. 134.

The plaintiff further objected that the French judgment, even if on the merits, was *prima facie* proof only, and could be re-examined to the bottom, but this is not so in the absence of proof of want of jurisdiction, of fraud, or that France so treats the judgments of our courts. Gray, J., summed up the law in the *Hilton Case* at page 202 of 159 U. S., page 158, 16 Sup. Ct., 40 L. Ed. 95, as follows:

"In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that where there has been opportunity for full and fair trial abroad before a court of competent jurisdiction conducting a trial upon regular proceeding after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal upon the mere assertion of the party that the judgment was erroneous in law or in fact."

Applying this to the case in hand, the plaintiff, if bound by the judgment at all, was prevented from questioning its correctness either in point of law or of fact. In the *Hilton Case* the defendant pleaded and offered to prove that the French courts treated the judgments of our courts as *prima facie* evidence only, and re-examined them to the bottom on the merits. The trial judge having excluded this proof, the Supreme Court reversed the judgment on the ground that if such a situation were proved, our courts would not be bound in comity to treat French judgments in any different way. But in the present case there was no offer to prove the French law on the subject of foreign judgments, it being apparently supposed that what had been said by the Supreme Court in the *Hilton Case* was sufficient evidence of it. But in that case not only was the French law not proved, but the judgment was reversed because such proof had been excluded. And even if the French law had been proved, a finding of it in that case would not be binding on the parties to any other action involving the same question, because foreign law must be proved in every case as a fact.

The plaintiffs finally objected that neither Kessler & Co. nor the Cork Company were privies to the French judgment. Of course, payment by the drawee, who is the principal debtor, would discharge all the other parties to the drafts secondarily liable. Such payment would be a defense to one sued as secondarily liable, like Kessler & Co. in this case, by a subsequent holder, like the Cork Company. But the defense cannot be proved by the judgment in favor of the drawee in the action between it and *Hijos de G. Matas* because neither Kessler & Co. nor the Cork Company were parties or privies to the judgment. There are a number of authorities to the contrary, as may be seen cited in 23 Cyc. 1266. *Levi v. McCraney*, *Morris* (Iowa) 124; *Durham v. Giles*, 52 Me. 206; *Hackleman v. Harrison*, 50 Ind. 156; *Leslie v. Bonté*, 130 Ill. 498, 22 N. E. 594, 6 L. R. A. 62. They proceed largely upon the

theory that it would be very unreasonable to expose the principal debtor, after he had been discharged in a suit by one holder, to successive suits by all prior holders on the same grounds, which might result in different judgments in different actions. However, the law of the federal courts, which is binding upon us, is very clearly stated in *Railroad Co. v. National Bank*, 102 U. S. 14, 26 L. Ed. 61. In that case the railroad company had issued a note for \$5,000 payable to its own order, and indorsed by Palmer & Co. as accommodation indorsers, which finally came, through Hutchinson & Ingersoll, into the hands of the bank as collateral security for a prior indebtedness of Hutchinson & Ingersoll. The bank sued Palmer & Co. in the Supreme Court of New York, where judgment was rendered in favor of the bank for \$601, apparently an amount due from the railroad company to Hutchinson & Ingersoll. Subsequently, the bank brought suit in the Circuit Court of the United States against the railroad company, and recovered judgment for the full amount of the note less what it had recovered from Hutchinson & Ingersoll. The difference between these two judgments was due to the difference between the law of New York under *Coddington v. Bay*, 20 Johns. 637; 11 Am. Dec. 342, and of the federal courts under *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865, the former holding a pre-existing debt not to be a sufficient consideration to enable a holder to recover on a note not valid between the parties, whereas the latter regarded a pre-existing debt to be as effective a consideration as a new payment in excluding all equities of prior parties. Harlan, J., said:

"The first proposition of the plaintiff in error is that there has been a final determination by a court of competent jurisdiction between the same parties or their privies upon the same subject-matter as that here in controversy. This contention rests upon the judgment of the Supreme Court of New York, in the action instituted by the bank against Palmer & Company, as the indorsers of the note in suit. The judgment in the state court clearly constitutes no bar to the present action. Personal judgments bind only parties and their privies. The railroad company was not a party to the separate action against Palmer & Company, nor did it receive notice from the latter of the pendency of that suit. It was, therefore, in no manner affected by the judgment. Had the company received such notice in due time, it would, perhaps, although not technically a party to the record, have been estopped, at least as between it and its accommodation indorsers, from saying that the latter were not bound to pay the judgment, if obtained without fraud or collusion. Being, however, an entire stranger to the record, it had no opportunity or right in that proceeding to controvert the claim of the bank, to control the defense, to introduce or cross-examine witnesses, or to prosecute a writ of error to the judgment. If, in the action against Palmer & Company, the bank had obtained judgment for the full amount of the note, and, being unable to collect it, had sued the railroad company, the latter would not have been precluded by the judgment in that action, to which it was not a party, and of the pendency of which it had not been notified, from asserting any defense it might have against the note. This being so, it results that the company cannot plead the judgment in the state court as a bar to this action. An estoppel arising out of the judgment of a court of competent jurisdiction is equally conclusive upon all the parties to the action and their privies. It may not be invoked or repudiated at the pleasure of one of the parties, as his interest may happen to require. The liability of the makers and indorsers was not joint, but several, and therefore a judgment in an action against the indorsers, upon the contract of indorsement, could not bar a separate action by the bank against the maker—certainly not where the maker was without notice from the indorsers of the pendency of the action against him."



This brings us to the last question in the case, namely, what was the legal effect under the law of France of what the drawee did?

The parties have entered into an agreed statement of facts which contains, among other things, photographic copies of the drafts and the indorsements thereon; a statement that the drawee paid the drafts to an unknown person; that the indorsement "Mata Hermanos" was a forgery; that the drawee "made said payments in the ordinary course of business and over the counter and without notice that such original bills had been lost, and without opposition or objection to such payments; and there is no evidence that such payments were made in bad faith"; and a translation of the French judgment and of extracts from the French Code de Commerce referred to in said judgment. The defendants contend that the finding that the drafts had been "paid in the ordinary course of business" excludes any inference of negligence in the drawees. We cannot agree to this. The phrase must be read in connection with the rest of the agreed statement of facts. So read, it obviously means that the drawee paid the holder of the original drafts against their surrender at its bank on a business day, in banking hours, in the same way it usually paid drafts. The phrase should not be taken to deprive the other facts agreed upon of all significance; for example, that the indorsement of Mata Hermanos was obviously defective in omitting the letter "s," and that the person to whom the drafts were paid was unknown to the drawee.

The defendants further contend that even if the parties to this suit were not parties or privies to the French judgment, still it is conclusive evidence of the law of France applying to the facts of the case. They refer us to and quote from a number of cases, no one of which we think justifies the extreme position taken. The language used by the judges must be read in connection with the facts in each case. No foreign judgment was involved in *Elmendorf v. Taylor*, 10 Wheat. 152, 6 L. Ed. 289, *Mutual Reserve Association v. Phelps*, 190 U. S. 156, 23 Sup. Ct. 707, 47 L. Ed. 987, or *Cahen v. Brewster*, 203 U. S. 543, 27 Sup. Ct. 174, 51 L. Ed. 310. The opinions delivered simply laid down the rule that the courts of another state or nation must be supposed to know their own law, and that their law is to be found in their decisions. In *Laing v. Rigney*, 160 U. S. 531, 16 Sup. Ct. 366, 40 L. Ed. 525, a foreign judgment was involved, and the question was whether the court had jurisdiction of one of the parties to it. This depended upon whether by the practice of New Jersey it was necessary to serve a subpoena in the case of a supplemental bill. There was no statute nor any decision of the Supreme Court of the state on the subject, and the court had to determine the law either by adopting the action of the chancellor in entering the decree against the party in question, or by adopting the opinion of a New Jersey lawyer, who thought that, no subpoena having been served, there was no jurisdiction of him. The court adopted the law as declared by the chancellor. In *Donglioni v. Crispin*, L. R. 1 H. L. 314, the parties to the action were actual parties to the foreign judgment in question. In *Messina v. Petrocchino*, 4 P. C. App. 144, the foreign judgment was in rem binding upon all the world. In *Dent v. Smith*, 4 Queen's Bench, 464, the court said it had no concern with the correctness or incorrectness

of the judgment of a Russian consular court, the only question being whether the plaintiff had been thereby compelled to pay the money which he was seeking to recover as a loss under a policy of marine insurance. In *Carr v. Francis Times & Company* [1902] A. C. 176, a proclamation of the Sultan of Muscat authorized certain seizures within the territory of Muscat, and it was held to be a defense against the plaintiff's claim. None of these cases shows that the French judgment is to be regarded as more than evidence of the French law.

Article 145 of the Code de Commerce provides:

"A party who pays the bill of exchange at maturity, and without receiving notice of opposition (objection) to the payment, is presumed to be legally discharged."

If this presumption is a violent one, then, evidently, under the agreed statement of facts that the drawee did pay "without opposition or objection to such payments" it is discharged as principal debtor, and so are Kessler & Co. and all the others secondarily liable on the duplicate drafts. But the decisions of the Cour de Cassation and the opinions of legal writers cited by the parties and the opinions of the experts examined by them showed that this presumption is rebuttable, and that the person who pays such drafts without notice of opposition may be liable if guilty of negligence sufficient to overcome the presumption.

In the case of *Pujol v. Jordaan & Cohen, Dalloz, 1896-2-80*, the court, speaking of a forged indorsement whereby the drawee was deceived, said:

"Whereas, the falsification of the check, and the erasure of the words 'Ruffen & Sons' and their substitution by the words 'Elene Paviani' are scarcely apparent; whereas, there exists between the form and the color of the letters composing the words 'Elene Paviani' and the form and color of the other letters of indorsement no such characteristic or striking difference as it would have been inexcusable not to remark; that the imitation is, on the contrary, so perfect that it is very difficult, even after a careful examination, to perceive it; that Pujol was wrong in contending that Jordaan & Cohen failed in the exercise of prudence in not verifying the identity of Elene Paviani," etc.

In the case of *Bank of France and Richter-Linder v. De la Roche, Dalloz, 1871-2-27*, the court said, among other things:

"Whereas, by the terms of article No. 145 of the Code of Commerce, the drawee who pays a bill of exchange at maturity is presumed to be legally released; whereas, this presumption can only be overcome by proof of collusion, fraud, or gross negligence; but, whereas, in this case, the good faith of the bank is not contested, but it is admitted, on the contrary, that it took the usual precautions in assuring itself as to the residence of the holder of the order, and making him present the stamped envelope in which the order was sent to Paris; that the only fault charged to it was in not having noticed that the signature of the receipt did not conform to the name of Richter-Linder, given in the letter of transmittal; whereas, if the initial letter of the word 'Linder' in the signature placed at the bottom of the receipt resembled rather a 'P' than an 'L,' it is not correct to say that it differed in a noticeable manner from the same letter as written in the indorsement of the order, and of which it rather appeared to be the facsimile," etc.

M. Edmond Kelly, an expert examined by the defendants, testified:

"Q. The article of the Code of Commerce to which you refer, namely 145, provides merely that there will be a presumption of payment, will it not? A. If it is proved that gross negligence was incurred in the payment of the note, article 145 would not apply."

M. Goirand, writer, says at page 210 of his book, speaking of article 145:

"The drawee must, on presentation of the bill, examine it in order to convince himself that the holder is the rightful owner. He must verify the chain of indorsements and, if it be broken, refuse payment. In other words, he must examine if all the signatures of the indorsers follow each other regularly and correspond, and whether each indorsement is followed by the signature of the indorser whose name is mentioned in the preceding indorsement."

M. Le Sourd, an expert examined by the plaintiff, testified:

"Q. What are the usual precautions which the law imposes upon a banker in making payment of bills of exchange, having reference particularly to the apparent right of ownership in the person presenting the draft for payment and his identity? A. After looking at the draft itself and the date and the amount of the draft, he must look very carefully at the signature and at all the line of indorsements. If there is in the indorsements, or in the signatures, the slightest doubt, he must require from the person who presents the draft all the necessary explanation so as to be as sure as possible that the person to whom he pays has the right to cash the draft. \* \* \*"

He went on to testify that in his opinion the bank had not been guilty of negligence in this case.

The French judgment being not conclusive, but only admissible to show that the drawee did take up the original drafts under the circumstances stated, and that the Tribunal de Commerce of the Seine was of opinion that it was not guilty of such negligence as would overcome the presumption created by article 145, the trial judge was left to determine upon all the facts whether by the law of France the drawee was guilty of such negligence. He could consider the decision in the French case as being the opinion of an inferior tribunal, and could give it such weight as he thought it was entitled to under the opinions of the Cour de Cassation which were cited. Doing this, he thought that the failure of the drawee to observe that the chain of indorsements was broken by an indorsement which obviously did not correspond to the name called for in the prior indorsement was such negligence as under the French law would deprive the drawee of the protection of article 145.

We discover no error in this, and the judgment is affirmed.

NOYES, Circuit Judge (dissenting). While unable to reach the same conclusion as the majority of the court, I agree with them in their preliminary propositions, which may be thus summarized: (1) As the drafts were payable in France, the law of that country determined what constituted payment. (2) The burden of showing that the original drafts were duly paid was upon the defendants. (3) The judgment of the French court was a judgment upon the merits of the case, standing upon two grounds. (4) The decision of the Supreme Court in *Hilton v. Guyot*, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95, is inapplicable. (5) The French judgment does not constitute *res adjudicata*. And so in the same way as the majority of the court, I come to the same final question: What was the legal effect under the law of France of what the drawee—the French bank—did?

The majority reach the conclusion that, under the French law, the bank was negligent, and was not discharged by its payment of the

first of exchange. On the other hand, I think that the French judgment holding the bank discharged should be followed here. The authoritative evidence of the nonstatutory law of a country is the decisions of its courts. The construction given by the courts of a country to its statutes will be adopted in other countries. The decisions of foreign lower courts upon the identical facts will be followed here, unless they be shown to contravene the decisions of higher courts. These propositions are conservative. The authority for them may be found in the following illustrative cases: In *Elmendorf v. Taylor*, 10 Wheat. 159, 6 L. Ed. 289, decided in 1825, Chief Justice Marshall said:

"This court has uniformly professed its disposition, in cases depending on the laws of a particular state, to adopt the construction which the courts of the state have given to those laws. This course is founded on the principle, supposed to be universally recognized, that the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government. Thus, no court in the universe, which professed to be governed by principle, would, we presume, undertake to say, that the courts of Great Britain, or of France, or of any other nation, had misunderstood their own statutes, and therefore erect itself into a tribunal which should correct such misunderstanding."

In *Laing v. Rigney*, 160 U. S. 543, 16 Sup. Ct. 368, 40 L. Ed. 525, where the question was as to the effect to be given by a New York court to a decision of a New Jersey court in a matter of New Jersey law, the Supreme Court said:

"In the absence of any statutory direction on the subject, and of any reported decision of the Supreme Court of that state, we are justified in finding the law to be as declared in the very case in hand, where the chancellor of the Chancery Court of New Jersey has entered a final decree based upon an original bill, the process under which was served upon the defendant within the state, and upon a supplemental bill, a copy of which with a rule to plead was served upon the defendant without the state. So long as this decree stands, it must be deemed to express the law of the state."

In *Carr v. Francis Times & Co.* [1892] A. C. 180, the House of Lords said of a decision of the Sultan of Muscat:

"He has authorized it and declared authoritatively that it was a perfectly lawful act according to the law of Muscat, and I am of the opinion that no English tribunal is capable of going behind that declaration and saying that the Sultan of Muscat was wrong in his exposition of his own law."

In *Dent v. Smith*, L. R. 4 Q. B. 446, Cockburn, C. J., said of a Russian judgment:

"Then it is said that they applied the law erroneously. Again, I think we have not to deal with that. We are not to sit here as a court of appeal against any judgment pronounced by a court which must be taken to be one of competent jurisdiction in the administration of the Russian law, and, whatever was substituted, became for the time Russian law in respect of matters of maritime law. The proper tribunal to appeal to, if there was any ground for appeal, was to the court of St. Petersburg."

In *Dogliani v. Crispin*, L. R. 1 H. L. 314, Lord Cranworth distinguished between a case where the precise point upon the identical facts has been determined by a foreign court and a case where it is necessary to take the testimony of learned foreigners as to the law upon such point:

"It does not always happen, as is the case here, that the claim of the party litigating in our courts has been actually raised and decided in the courts of the country of the domicile. It is, therefore, often matters of necessity that our courts should receive evidence from learned foreigners as to what the law of the domicile is. Such evidence is in general far from satisfactory, but it often happens that no better evidence can be obtained, and then the courts here must ascertain from conflicting testimony, as well as they can, what the law is on which they must act. But here we are left in no doubt. The title of the respondent has been fully adjudicated upon by the courts of his domicile after long and careful consideration, and by their decision we are bound."

And, showing the distinction between the use of a judgment as *res adjudicata* and as evidence, Lord Cranworth in the same case also said:

"The respondent is not insisting here on the Portuguese decision as a bar to the appellant's demand on the mere ground that it is *res adjudicata*, but on the ground that it is the decision of a court of exclusive jurisdiction—a decision which we are bound to receive without inquiry as to its conformity or nonconformity with the laws of the country where it was pronounced."

To the same effect are the words of Lord Lindley in *Carr v. Francis Times & Co.*, *supra*:

"The Court of Appeal, from whose judgment I feel compelled to dissent, appear to have thought that, as at the time of seizure the destination of the cargo seized was Muscat, the seizure was unlawful under the law of Muscat, and that the defendants had failed to prove that the seizure had been subsequently legalized. This view of the finding of the Muscat court, and its approval by the Sultan, ignores its value as evidence of the law of Muscat. I agree with the Court of Appeal that there was no judgment in our sense of the word either *inter partes* or *in rem*."

It appears from the French judgment that the question presented to the court there as to whether the drawee was discharged by reason of its payment of the first of exchange was upon the identical facts shown upon the present record. The French court was a court of competent jurisdiction. However constituted, it was created by the French people for the determination of their differences. After a full hearing, the court rendered its judgment upon the merits of the case. It took into consideration article 145 of the French Code of Commerce, which provides as follows:

"The party who pays a bill of exchange at maturity, and not receiving notice of opposition (objection) to the payment, is presumed to be legally discharged."

The court then considered the evidence, and held that the bank had committed no fault in paying the first drafts and was therefore discharged, no opposition to the payment having been made. The parties accepted the decision as correctly stating the French law, for no appeal seems to have been taken. In my opinion this judgment of the French court, upon the identical facts now appearing, is authoritative evidence of the law of France upon the question here arising. The vital point there as here was whether in view of the provision of the Code the bank was negligent and, consequently, not discharged. In such a case the facts are all-important. A different decision upon different facts may not arise from any different construction of the law, but because the facts are different. After a careful examination of

the French cases cited by the plaintiff, it does not appear to me that the facts are so similar that in any of them the decision is necessarily contrary to that of the French court upon the present facts. Nor can I accept the opinion of the witness learned in the French law as superior to the judgment of the French court. In the language of Hayes, J., in *Dent v. Smith*, *supra*, "One would think that the exposition of a court is about the best evidence you can have of the law of a country." It follows, therefore, that under the French law the payment of the first of exchange was valid, and the defense of payment in the present action established.

It is proper to say, moreover, that I reach the same conclusion if I ignore the French judgment altogether. In other words, I think the facts shown upon this record are insufficient to overcome the presumption under article 145 of the French Code, that the bank, by reason of its payment, was discharged.

In the agreed statement of facts this appears:

"The Société Generale made said payments in the ordinary course of business, and over the counter, and without notice that said original bills had been lost, and without opposition or objection to such payments; and there is no evidence that said payments were made in bad faith."

This statement places the bank precisely within the provisions of the Code. It paid a bill of exchange at maturity, without receiving notice of objection to the payment. As we have seen, the Code provides that, under such conditions, a drawee "is presumed to be legally discharged."

The expert witnesses agree that negligence must be clearly shown to overcome the presumption in the bank's favor. The parties agree that the bank's payments were made over the counter in the ordinary course of business, without notice and without bad faith. In my opinion the record fails to affirmatively show negligence. Certainly it fails to show the gross negligence, which one of the experts says must be shown.

It is urged, however, that negligence must necessarily be found from the fact that the forged indorsements omit the letter "s" in the word "Matas." But this would not in itself indicate forgery. A forger would naturally copy the forged name correctly when it was before his eyes, and not make the same mistake twice. While, of course, the indorsements are forgeries, to my mind they bear more the appearance of corrected signatures. But it is said that the irregularity of the indorsements should have put the bank officials upon inquiry. Conceding this, there is nothing upon the record to show that they failed to make inquiries. The agreed statement is silent upon this subject. It cannot be assumed from the mere fact that the record fails to state that the officials did anything that they did nothing. No assumption can be made, one way or the other. The presumption under the Code is in favor of the bank. The fact, standing by itself, that the forged indorsements were irregular, does not in my opinion overcome that presumption. And I cannot read anything more by way either of omission or commission into the agreed statement.

For these reasons, I think that there was error in the judgment of the Circuit Court, and that it should be reversed.

## GREAT WESTERN SUGAR CO. v. PRAY.

(Circuit Court of Appeals, Eighth Circuit. December 20, 1908.)

No. 2,646.

## MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENT USE OF APPLIANCE.

Where a master furnished an appliance for use by an employé, which actual experiment demonstrated to be effective for the purpose of accomplishing the work, and not dangerous to the employé when carefully used according to the directions given by the master, and the employé voluntarily accepted the same, and received an injury by not observing the directions which he fully understood, as well as the danger of departing therefrom, which was obvious, the master was not chargeable with negligence, nor liable for the injury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 759.]

In Error to the Circuit Court of the United States for the District of Colorado.

Charles W. Waterman (Joel F. Vaile, on the brief), for plaintiff in error.

Harvey Riddell (L. R. Rhodes, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The defendant in error (hereinafter designated the plaintiff) recovered judgment below in the sum of \$6,000 against the plaintiff in error (hereinafter designated the defendant) for personal injury. For some time prior to and on the 9th day of January, 1906, the defendant was the owner of and operated a sugar factory at Ft. Collins, Colo. Since the 3d day of November, 1905, up to January 9, 1906, the plaintiff was in the employ of the defendant; at first in and about the bins shoveling and trucking sugar on the first floor, after which he went upon the second floor, where the injury occurred, and was engaged in sweeping, etc. On the 27th day of December, 1905, he entered upon the work of operating the machinery, consisting of two centrifugals, Nos. 1 and 2, and so continued until the injury. These centrifugals revolved from left to right, the construction of which was substantially as follows: There was an outer stationary metal cylindrical shell about 30 inches high and 36 inches in diameter, permanently fastened to the floor. The top of this shell or casing bent and projected inward about 4 inches, forming a sort of hood; otherwise the top of this shell was open. Within this stationary metal shell was the centrifugal proper, consisting of a metal basket, perforated, and when hanging at rest, or when moving without vibration, was about 4 inches from the outer shell aforesaid. Inside of this basket was a screen resting back close against the inner side of the basket, made of wire, the apertures of which were about the size of a lead pencil. Inside of this screen was another wire screen or sieve, fitting closely to the outer one, the apertures of which were about

the size of a pin. The basket and screens conforming to it were cylindrical in form. The basket at the bottom was attached to a smooth shaft or spindle  $3\frac{1}{2}$  or 4 inches in diameter, extending from the bottom of the basket up through its center to the gearing shaft above, from which the power of revolution was received. This shaft or spindle was attached at its upper end to this gearing, and at its lower end the basket was attached rigidly so as to revolve with the shaft. A little above the shoulders of the person operating the centrifugal was a friction brake and clutch, by means of which the centrifugal was operated, set in motion, stopped, and its speed regulated. The centrifugal when at full speed revolved at the rate of 800 to 1,000 times a minute. The device was for the purpose of forcing out the molasses or syrup from the mass of sugar; that is to say, the screens held inside of them the granulated portion of the sugar, while the motion of the centrifugal forced the syrup or molasses through the sieves outside of the basket and next to the outer case or shell, where it was kept apart from the granulated portion of the sugar. Above the basket to the right of the shaft was a spout by means of which the materials to be operated upon in the centrifugal were received from above and emptied into the centrifugal. The operator determined the amount of sugar to be received into the centrifugal, after which the centrifugal was thrown in gear, the circular motion started, and was continued until the complete separation of the syrup from the granulated mass. During the time the plaintiff was operating the centrifugal he had been using a long-spouted sprinkler for washing down the sugar on its inner surface, while the centrifugal was in motion at its height of speed. This was done by inserting the spout of the sprinkler to some extent inside of the centrifugal. On the day preceding the accident, as well as on that day, the plaintiff encountered some difficulty in separating the molasses or syrup from the granulated sugar in the centrifugals he was operating. For aiding the separation in question ordinarily there were, outside of the machine itself, steam pipes, with cocks, by means of which steam was conveyed into the centrifugals between the outer stationary shell and the basket, whereby to some extent it was forced against the surface of the sugar nearest the basket, through its perforations. This, on the occasion in question, did not prove sufficient to bring about a complete separation, and thereupon the assistant superintendent, Scranton, after investigation, concluded to inject steam into the inner surface of the sugar material in order to hasten and aid the desired separation, by means of a steam hose which was attached to the steam pipe aforesaid.

The evidence was that when the centrifugals are "charged"—that is, loaded with sugar—the motion causes the sugar to climb the sides of the inner screen of the basket and distribute itself evenly on that surface. The steam hose in question was a thick 5-ply hose, with an orifice of  $1\frac{1}{4}$  inches or  $1\frac{1}{2}$  inches, with a nozzle of an improvised gas pipe inserted some 6 or 8 inches, with an orifice of about an inch. This hose was from 30 to 40 feet, perhaps, in length. After attaching the hose to the steam pipe Scranton himself oper-



ated it for about an hour on the sugar in the centrifugals. This he did by inserting the nozzle end of the hose or gas pipe inside of the basket, and moving it up and down so as to apply the steam directly to the surface of the sugar on the left-hand side of the machine, the sugar revolving away from the point of application, holding the nozzle within two or three inches of the sugar. This method proved successful. The plaintiff was aware of what was being done by Scranton, who, after his experiment, delivered the hose to the plaintiff with directions to use it for the same purpose, in the manner he had used it, by holding the nozzle within two or three inches of the sugar. The evidence showed that after the plaintiff took the hose he used it for some time on both centrifugals, first on No. 2 and then on No. 1—where the accident occurred. Applied as Scranton used it, and as he directed the plaintiff to do, the steam, according to his testimony, was carried up by the revolving shaft without interfering with the vision in directing it. No one saw the accident, but the plaintiff testified that when he started to use the nozzle in No. 1 "something struck it and lopped it right around the shaft. It was just like a thunderbolt to me." In some unexplained manner his left arm was torn loose by this hose as it wrapped around the spindle. The explanation which occurs to us is that the plaintiff must have held the hose with his left hand so that that arm was around it, the hose being too inflexible to admit of wrapping it around the arm.

In its charge to the jury the court said:

"The plaintiff sues the defendant for damages on account of alleged negligence. That negligence, as charged in the complaint, and to which the case must be confined, is that the defendant furnished the plaintiff a hose twenty-five or more feet long, to be used by him for the purpose of injecting steam into the so-called centrifugal, which revolved at the rapidity of 700 or more revolutions per minute. You will consider no other negligence so far as the defendant is concerned."

This charge was predicated of the following allegations of the complaint:

"That said hose and nozzle in manner and length as the same was furnished him with which to work was an unsafe and dangerous device; that defendant was negligent in furnishing this plaintiff with a hose of an extra length unnecessary to reach from the fitting in the steam pipe to said centrifugals with the nozzle, and by reason of this extra length of said hose the same was a dangerous device, and that said defendant was negligent and guilty of gross negligence in furnishing the same to this plaintiff with which to work, and that this fact was unknown to this plaintiff; that he did not know or appreciate the danger and hazard thereof, nor could he have by exercise of reasonable care known of the risk and hazard incident thereto; that he did not have opportunity to examine the same, and that he was deficient in knowledge, skill and experience in handling such device, and did not know nor could have known of the danger incident to the use thereof with ordinary care and observation."

While the defendant excepted to the foregoing charge of the court, inasmuch as the plaintiff acquiesced therein and presumptively secured the verdict on that issue, he is in no position to gainsay it.

Exactly how the length of the hose, whether 10 or 40 feet, could be the basis of actionable negligence is not apparent. What had the

length of the hose to do with the wrench to the plaintiff's arm? Beyond question the accident came by reason of the nozzle held by the plaintiff, with his right hand forward and left back, being suffered to pass too far around the spindle, and to come in contact with the basket while revolving from 800 to 1,000 times per minute, thereby throwing it around the spindle. Had the hose been of just sufficient length to reach the lower part of the basket, in the nature of physical law, the effect would have been none the less forcible and disastrous. In performing the work there had to be more or less play for the hose. The plaintiff himself testified in this particular:

"From where we would have to raise the hose up out on the floor to get it above the machine we would have to have about 10 or 12 feet of hose raised clear off the floor in order to turn this nozzle into the machine."

If mere speculation is to be indulged, had the hose been just sufficiently long to reach from the point of connection with the steam pipe to admit of being freely worked up and down in the basket, had the heavy nozzle been suffered to pass so far around the whirling shaft as to be caught by it, the impact—the wrenching jerk—would probably have been even more violent, as there would have been less length and coil back of it for the play of the shock. The only danger in the use of the nozzle in doing the work designed lay in not keeping it free from contact with the revolving basket spindle. That was a fact so obvious to the average intelligent mind as to place it in the category of common knowledge. The plaintiff's testimony shows that he fully comprehended this fact:

"Q. And he [Scranton] told you to hold it down in there so that the end of the nozzle would be an inch and a half or two inches from the sugar? A. Two or three inches from the sugar. Q. You understood that to mean that you should not get the nozzle up next to the sugar? A. Of course I understood it. \* \* \* Q. You didn't intend to get the hose so it would strike the sugar, did you? A. No, sir. Q. You were attempting to avoid that, weren't you? A. Certainly. Q. And you didn't intend to get that hose to touch against this revolving spindle or shaft on the centrifugal? A. No, sir. Q. You understood what directions Mr. Scranton did give you to mean that in the operation of this device—this hose—that you should avoid getting it in contact with any of the moving things inside of that centrifugal? A. Yes, sir; I think I understood him. Q. You knew enough to do that yourself, didn't you? A. Why, I think I would. Q. You knew enough to keep it away from these moving matters inside the centrifugal, yourself? A. Yes, sir."

This presents the very kernel of the plaintiff's right of recovery, even upon a broader ground based upon the allegation "that he did not know or appreciate the danger and hazard thereof, nor could he have by exercise of reasonable care known of the danger and hazard incident thereto; that he did not have opportunity to examine the same, and that he was deficient in knowledge, skill, and experience in handling such device, and did not know nor could have known of the danger incident to the use thereof with ordinary care and observation."

The plaintiff's testimony shows that he was quite familiar with the method of operating the centrifugals and their entire functions; he knew how to feed the sugar, and how to gear the machinery, and put it in motion; how to regulate its revolutions, and how to stop it. He

well understood the process by which the molasses or syrup was separated from the granulated sugar, and the facilitation of this end by the application of steam to the surface of the coagulated or hardened sugar. He not only understood the office of the steam pipe, arranged back of the basket, for aiding in this work, but he further understood that this appliance at times proved inadequate to the accomplishment of its purpose, and that in such contingency resort was had to the hand sprinkler, through the long spout of which the water was injected upon the sugar, in miniature manner of the application of the steam through the hose and nozzle. As he had so used such sprinkler in his work he had learned the size and depth of the basket, and how the application of the artificial steam should be applied to reach the sugar. He was further advised before the accident that on account of the condition of the sugar the effective operation of the centrifugals was interfered with, and the separation of the molasses and syrup was obstructed. He also knew that, to remedy this, Scranton, the assistant superintendent, resorted to the expedient of injecting steam upon the sugar surface by means of the hose and nozzle. With that appliance Scranton himself worked for about one hour, with successful result. And that the plaintiff knew what Scranton was doing is too palpable for tolerant cavil. At the end of this experiment Scranton told the plaintiff to continue the use of the hose.

Under such circumstances there is no foundation for invoking the doctrine of warning to a novice. There is not even an allegation in the petition of the absence of such warning; and if it had been made it would be unavailing for the reason that Scranton advised the plaintiff how to use the appliance, which he admits. By actual experiment just made, Scranton had demonstrated the safety of the appliance in the manner suggested to the plaintiff. That there was no probable, necessary danger in so using it is demonstrated by the fact that the plaintiff used it successfully on centrifugal No. 2, just before he turned to No. 1. As shown by his testimony above, he knew that he was not to place the nozzle against the sugar, and that it would not do to allow the nozzle "to touch against the revolving spindle or shaft on the centrifugal," and that Scranton so gave him to understand. He, therefore, not only had due warning, but was advised and understood how to avoid the danger. As no harm could come to him save by disregarding instructions and carelessly handling the appliance, the case-made is this: The master furnished an appliance which actual experiment demonstrated to be effective for the purpose of accomplishing the work, not dangerous to the employé when carefully used according to direction given by the master, which the employé voluntarily accepted, and received an injury by not observing the directions, when the danger of departing therefrom was plainly obvious to his senses. As applied to such situation, the law is that:

"The master is not liable for injury happening to the servant in the performance of dangerous work without the scope of his engagement for service, merely because he has been directed by the master to perform such work. If the servant is possessed of knowledge and experience sufficient to comprehend the danger, and without objection undertakes the service, the master is not liable for injury received by the servant in such new and more dangerous

employment. *Cole v. Railway Co.*, 71 Wis. 114, 37 N. W. 84, 5 Am. St. Rep. 201; *Paule v. Mining Company*, 80 Wis. 350, 50 N. W. 189; *Dougherty v. Steele Company*, 88 Wis. 343, 60 N. W. 274; *Buzzell v. Manufacturing Company*, 48 Me. 113-121, 77 Am. Dec. 212. The liability of the master in cases of injury to the servant received in a dangerous employment outside of that for which he had engaged arises, therefore, not from the direction of the master to the servant to depart from the one service and to engage in the other and more dangerous work, but from failure to give proper warning of the attendant danger in cases where the danger is not obvious, or where the servant is of immature years, or unable to comprehend the danger." *Reed v. Stockmeyer*, 74 Fed. 186, 188, 190, 20 C. C. A. 381; *O'Connor v. A. T. & S. F. Ry. Co.*, 137 Fed. 503, 70 C. C. A. 87.

While the law devolves upon the master the duty of exercising ordinary care to furnish the servant a reasonably safe place in which, and reasonably safe machinery or appliances with which, to work, the responsibility of the master attaches for injury "through a defect of machinery which was or ought to have been known to him, and was unknown to the employé or servant." *Washington & Georgetown Railroad Company v. McDade*, 135 U. S. 554, loc. cit. 570, 10 Sup. Ct. 1044, 34 L. Ed. 235. In other words, the master is not liable for the consequences of danger, but only for the consequences which ensue from his negligence. *Smith v. Foster*, 93 Ill. App. 139, 140. So that, when conducting his business in a way that seems to him best, although a different way may be less dangerous, he furnishes the servant machinery or appliances reasonably safe for the servant's use, "such as under reasonable care upon the part of the servant can be used without danger except such as is incident to the business in which such instrumentalities are employed," he is not answerable for injury resulting from such use. *Reed v. Stockmeyer*, supra; *The Chico*, 140 Fed. (D. C.) 568. The master has the right, in putting an adult, intelligent man at work with a given appliance, after explaining to him its use and operation, to rely upon the presumption that the servant will observe the directions, take cognizance of obvious dangers, and will exercise due precaution and care in the use of the appliance to avoid dangers. *American Bridge Company v. Seeds*, 144 Fed., loc. cit. 609, 75 C. C. A. 407, and authorities cited.

Though no such fact is alleged in the petition, the plaintiff in extenuation of his act in suffering the nozzle to so pass around the revolving spindle as to come in contact therewith, whereby the severe wrench came to his arm, testified that the steam so filled the cage that its fumes blinded him. If he discovered, from the manner in which he was applying the nozzle, that the steam spread and rose so as to prevent him from determining where the nozzle was in the basket, the dictates of the sense of self-preservation should have impelled him to withdraw it and to decline to use it. The danger of holding the nozzle, consisting of a rigid piece of pipe eight inches long, attached to a hose two inches or more thick, near to a spindle shaft revolving at the rate of 800 to 1,000 times per minute, when by reason of the fumes of steam in the basket he could not see where the nozzle was, presented such an obvious danger as constituted a gross act of negligence, making him the author of his own misfortune. However sincere may be our sympathy for this unfortunate man, and however strong may be his

claim upon the defendant for some charitable provision, our office is simply to declare the law as we find it to be, and to follow where it leads.

It is our conclusion that the request made by the defendant at the close of the evidence for a directed verdict should have been granted. It is, therefore, unnecessary to pass upon other assignments of error urged for consideration.

It results that the judgment of the Circuit Court must be reversed, and the cause remanded, with directions to grant a new trial.

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UNITED SHOE MACHINERY CO. v. ABBOTT.

(Circuit Court of Appeals, Eighth Circuit. January 29, 1908.)

No. 2,559.

1. DAMAGES—LIQUIDATED DAMAGES—CONTRACTS FOR PENALTIES FOR FAILURE TO PAY MONEY WHEN DUE, VOID.

A contract by a vendor to pay an amount in excess of lawful interest in the event of his default in the payment when due of a simple contract debt is a contract for a penalty, is against public policy, and unenforceable.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 154-178.]

2. SAME—CONTRACTS FOR DISCOUNTS FOR PAYMENT BEFORE DUE, VALID.

But an agreement in a contract for the sale or lease of property to give the debtor a discount in excess of legal interest in the event of his payment of the agreed price or rental before it is due is not obnoxious to public policy, is not a contract for a penalty, and is enforceable in the courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, §§ 154-178.]

3. BAILMENT—COMPENSATION OF BAILOR—CONTRACT—CONSTRUCTION—PENALTIES.

A. leased machines to B. for agreed monthly rentals due at the ends of the months succeeding those in which they were earned respectively, and agreed to give him a discount of 50 per cent. upon each month's rental that was paid 15 or more days before it fell due. The lessor accepted payment of several months' rent after it was due, and allowed the discount thereon, *held*,

(1) The agreement to allow the discount was not a contract for a penalty and was valid.

(2) Acceptance of several months' rent after it was due less the discount did not evidence a construction of the contract inconsistent with its terms, nor waive the right of the lessor to collect the agreed rentals for subsequent months.

Adams, Circuit Judge, dissenting.

(Syllabus by the Court.)

Appeal from the District Court of the United States for the Eastern District of Missouri.

D. W. Robert (E. S. Robert, on the brief), for appellant.

Arthur E. Kammerer (Lee W. Grant, Leo Rassieur, B. Schnurmacher, and Theodore Rassieur, on the brief), for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The appellant, the United Shoe Machinery Company, leased certain patented machines for the lives

of the patents to the Tennent Shoe Company, the bankrupt, under a contract whereby the lessee agreed to pay certain rentals at the ends of the months succeeding those in which they were earned, and the lessor agreed that in every case in which the lessee should pay the rentals earned in any month on or before the 15th of the succeeding month, or 15 days before they became due, the lessor would grant a discount of 50 per cent. in consideration of such payment. The rentals for the months of December, 1905, January and February, 1906, amounted to \$2,247.52, and they have never been paid. The lessor proved this amount as a part of its claim against the estate of the lessee, and the court below reduced it one-half, on the ground that the agreed discount for prompt payment was a penalty which could not be recovered. The argument in support of this conclusion is that the actual debt was 50 per cent. of the agreed rentals; that, while the contract is not so by its terms, it is in reality an agreement to pay the larger sum, the agreed rentals, in case of default in payment of one half that sum, and hence the other half, the agreed discount, is a penalty for the failure to pay the first half, and cannot be recovered.

Legal interest is the measure of damages for the failure to pay debts when they are due, and hence a contract to pay an amount in excess of such interest on account of a default in the payment of money when it is due is an agreement for a penalty which the courts will not enforce. But interest is not the measure of the discount a creditor may lawfully make for the payment of his claim before it is due and this lease is a contract for such a discount, and not for the payment of a larger sum for default in the payment of a debt when due. The practice of merchants to sell their goods at fixed prices on credits of many days and months with agreed discounts far in excess of legal interest, discounts varying from 2 to 60 per cent. for payment in less time or for cash, is too general and patent for the courts of a commercial people to be oblivious of it. If a purchaser of goods at a fixed price on a credit of six months with an agreed discount of 50 per cent. for payment in 30 days should fail to pay at all, it would be a novel defense that he was liable for but half the price, and that the other half was a penalty for his default of payment within the 30 days, and a court would hesitate long to sustain it.

Public policy, evidenced by the decisions of the courts and the statutes of the states, prohibits the enforcement of contracts to pay more than lawful interest for the breach of a simple contract to pay a debt at the time agreed, but it does not forbid creditors from making enforceable agreements to grant their debtors discounts far in excess of lawful interest for the payment of their obligations before they are due. It wisely leaves them free to make their own contracts in this regard, because the subject and the consideration of such agreements is the extension of credits, and not the mere delay or forbearance of collection of overdue debts. It is for this reason that such agreements do not fall under and are not governed by the rule applicable to contracts of the latter class.

Counsel argue that the actual debt was the agreed rentals less

the discount. But the parties to this agreement were competent to contract and they expressly agreed to the contrary. If agreements for discounts were vulnerable as penalties there could be but one criterion of their validity, and that would be their relation to lawful interest. If the parties were not free to contract for such discounts as they chose, then agreements for them in excess of lawful interest must be void, and those not so in excess alone valid. There could be no other standard by which to try them. And a rule of law to the effect that notwithstanding the express agreement of the parties the actual debt, when an unearned discount is agreed upon, is the agreed debt less the discount, would avoid every contract for a discount in excess of lawful interest, and would strike down thousands of commercial contracts that are now valid and enforceable.

After the rentals for several months fell due the lessor accepted payment of them less the discounts, and it is said that this fact evidences a construction by the parties that the contract was for a penalty and a waiver of the right to collect the agreed rentals for subsequent months. But the acceptance of a part of an overdue claim for the whole is not persuasive evidence that the written contract that the whole was owing, did not mean that which it declared, nor is it a waiver of a right to enforce an agreement for the payment of a subsequent debt not then due. The basis of waiver is estoppel; where there is no estoppel there is no waiver, and there is no element of estoppel here. *Insurance Company v. Wolff*, 95 U. S. 326, 332, 24 L. Ed. 387; *Assurance Company v. Building Association*, 183 U. S. 308, 357, 22 Sup. Ct. 133, 46 L. Ed. 213; *Equitable Life Assur. Society v. M'Elroy*, 28 C. C. A. 365, 372, 83 Fed. 631, 640.

The parties to this transaction deliberately contracted in writing that the rentals here in question should be due at the ends of the respective months succeeding those in which they were earned, that they should be \$2,247.52, and that if they were paid respectively 15 days before they became due the lessor would grant the lessee the discount of 50 per cent. A contract by a debtor to pay an amount in excess of lawful interest in the event of his default in the payment when due of a simple contract debt is a contract for a penalty, against public policy, and unenforceable. But an agreement in a contract for the sale or lease of property to give to the debtor a discount in excess of lawful interest in the event of his payment of the agreed price or rental before it is due is not obnoxious to public policy, is not a contract for a penalty, and is valid and enforceable in the courts. The lease under consideration is of the latter class, and the lessor is entitled to the allowance of its claim for the full amount of the agreed rentals. In the consideration of this case the following authorities which directly or indirectly relate to the question at issue have been considered: *Longworth v. Askren*, 15 Ohio St. 370; *May v. Crawford*, 142 Mo. 390, 44 S. W. 260; *Loudon v. Taxing District*, 104 U. S. 771, 26 L. Ed. 923; *Missouri Edison Electric Company v. Steinberg Hat & Fur Company*, 94 Mo. App. 543, 68 S. W. 383; *Missouri Edison Elec-*

tric Company v. Bry, 88 Mo. App. 136; Missouri Electric Light & Power Company v. Carmody, 72 Mo. App. 534; 19 American & English Encyc. of Law (2d Ed.) 418.

The case of Goodyear Shoe Machinery Company v. Selz, Schwab & Company, 157 Ill. 187, 41 N. E. 625, Id., 51 Ill. App. 390, upon which counsel for the trustee seem to rely chiefly, has also been carefully examined. So far as it is inconsistent with the views which have been expressed it does not commend itself to our judgment. In our opinion, however, the contract in that case provided for a discount of 50 per cent. for the payment of the agreed rents within 15 days after they fell due, and in that way imposed a penalty of 50 per cent. for a delay of payment more than 15 days after the due date, so that the case fell under the first rule. On the other hand, in the case at bar the agreement is to grant the discount in case the payments are made more than 15 days before they become due, so that it falls under the second rule. It is said that this feature of the contract makes it a mere sham and an evasion of the first rule, and that its legal effect is the same as that of the contract in the Goodyear Shoe Machinery Company Case. The argument proves too much. By the same mark, every contract for a discount in excess of legal interest would be a sham and an evasion of a contract for a penalty. The truth is that this contract is valid on its face, that the parties to it had the right under the law to make such a contract for a discount, and they made it. It is only by transforming it into what it is not—into an agreement for a penalty for a failure to pay a debt when due—it is only by disregarding the agreement the parties actually made, and making a new agreement for them that they did not make, that the contract can be brought under the rule against penalties. There was no fraud or mistake in the making of this agreement. It was deliberately executed by competent parties, and it is not the province of the court to reform it in order to destroy it.

The lessor proved an item of \$230 for estimated freight on the machines under a provision of the contract that at the termination of the lease the lessee should deliver the machines to the lessor at its office or factory. The factory of the lessor was in Boston and the machines were in St. Louis. This \$230 was the estimated freight upon them from the latter to the former city. But the measure of the lessee's liability was the injury inflicted upon the lessor by the former's failure to deliver the machines in Boston, and there was no proof of any injury on this account. The proof was that upon the failure of the lessee the lessor leased the machines to another manufacturer in St. Louis upon the terms of the lease here in issue, and while there was some evidence that a few of the machines had been returned to Boston, there was no evidence of the cost of their return. There was no substantial evidence to support the claim of this estimated freight, and the item was rightly disallowed.

The order challenged by the appeal is reversed, and the case is remanded to the court below with instructions to modify the order of the referee so that it shall reduce the proved claim of the appellant \$230 and no more.



ADAMS, Circuit Judge (dissenting). I am unable to give my assent to the conclusion reached by the majority on the first question discussed in the opinion. The provision for reduction of rent 50 per cent. in case of payment 15 days instead of 30 days after it was earned is so obviously out of all proportion to the value of the use of the money for that short period of time as to fairly warrant but one conclusion. The real contract as contemplated by the parties, in my opinion, was that the lessee should pay only one-half of the stated monthly rental for the use of the machines in question. The conduct of the parties, as payments were subsequently made, amounts to a contemporaneous construction of the contract. The lessee paid only 50 per cent. of the stated rental, and the lessor accepted the same without objection, notwithstanding the fact that the rent was not paid in time to entitle the lessee to the 50 per cent. deduction according to the letter of the contract. The agreement by which the rental is doubled if not paid at the time agreed upon is to my mind clearly a provision for a penalty, and ought not to be enforced.

In other respects I agree with the conclusion reached by the majority.

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CARPENTER v. BOROUGH OF YEADON et al.

(Circuit Court of Appeals, Third Circuit. February 28, 1908.)

No. 12.

1. CEMETERIES—POWER TO REGULATE—PENNSYLVANIA BOROUGH ACT.

An ordinance passed by a borough council in Pennsylvania prohibiting the enlargement of existing cemeteries "by adding thereto or using for purposes of interment ground not now owned by the owners of such cemeteries," and prohibiting the interment of any human body in any place within the borough "except in ground now used as a cemetery or burying ground," is within the power conferred upon boroughs by Act 1851 (P. L. 322) to prohibit within the borough all interments or within partial limits, and such act is within the undoubted power of the Legislature.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Cemeteries, § 1.]

2. SAME—LANDS CONSTITUTING CEMETERY.

Evidence considered and *held* insufficient to establish that either of two tracts of land were owned by the owners of a cemetery or used as a cemetery or burying ground within the meaning of such ordinance at the time of its passage, because of an option for their purchase then outstanding through which they were afterward acquired by the owner of another tract which was then so used.

Gray, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 151 Fed. 879.

E. Waring Wilson and John G. Johnson, for appellant.

O. B. Dickinson, Isaac E. Johnson, and Dwight M. Lowrey, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Joseph L. Carpenter, Jr., a citizen of Delaware, filed a bill in equity against the

borough of Yeadon, Delaware county, Pa. Carpenter bought 87 acres of land in said borough in 1898. In 1904, he attempted to inter a human body therein, but was refused a burial permit by the borough by virtue of its ordinance of July 29, 1895, which, *inter alia*, provided:

"Sec. 2. The enlargement of the existing cemeteries or burying grounds within the borough, by adding thereto or using for purposes of interment of ground not now owned by the owners of such cemeteries or burying grounds respectively, is hereby prohibited.

"Sec. 3. The interment of any human body in any place within the borough of Yeadon except in ground now used as a cemetery or burying ground, or without the requirements of the borough board of health having been complied with, is declared to be a nuisance, and is hereby prohibited."

Thereupon this bill was filed to test the validity of this ordinance and its applicability to said land. On final hearing the court below held the ordinance valid; that Carpenter's ground did not come within its exception, and dismissed the bill. Thereupon he appealed to this court.

Turning first to the validity of this ordinance, it is clear the power of the state of Pennsylvania to control and prohibit burials in municipalities cannot be controverted. In *Kincaid's Appeal*, 66 Pa. 423, 5 Am. Rep. 377, the Supreme Court of that state said:

"No one can doubt the power of the Legislature to prohibit all future interments within the limits of towns or cities. In ancient times, in Greece and Rome, such was the universal rule. It was one of the laws of the twelve tables '*hominem mortuum in urbe ne sepelire neve vicinitate.*' It is much to be regretted that it was not adopted as our policy at an early period. This is no invasion of any right of property. Every right, from an absolute ownership down to a mere easement, is purchased and held subject to the restriction that it shall be so exercised as not to injure others. Though at the time it may be remote and inoffensive, the purchaser is bound to know at his peril that it may become otherwise, by the residence of many people in its vicinity, and that it must yield to laws for the suppression of nuisances. If conditions or covenants, appropriating land to some particular use, could prevent the Legislature from afterwards declaring that use unlawful, legislative powers necessary to the comfort and preservation of populous communities might be frittered away into perfect insignificance."

Such a power the state may exercise through municipalities. In *Klinger v. Bickel*, 117 Pa. 326, 11 Atl. 555, it was said:

"Nor can it be doubted that the Legislature may confer the same power upon municipal corporations, such as cities and boroughs. They are but subdivisions of the state, created by the state, for the comfort and convenience of the citizens, dwelling therein. The state confers upon them a portion of its sovereignty for the purpose of enabling them to control their local affairs."

By its general borough act of April 3, 1851 (P. L. 322), under which Yeadon borough was formed, the state conferred upon it power "to prohibit within the borough the burial or interment of deceased persons, or within such partial limits within the same as they may from time to time prescribe," and, in pursuance thereof, the borough enacted an ordinance which prohibited "the interment of any human body in any place within the borough of Yeadon except in ground now used as a cemetery or burying ground." The act of 1851 having conferred a defined and unqualified power, viz., "to prohibit all interments, or interments within partial limits, of boroughs," this ordinance, which fixes limits within which interments shall or shall not be made, is an exer-

cise of such defined power, and therefore, its propriety or reasonableness is not open to judicial question. "In other words, what the Legislature distinctly says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy." Dillon on Municipal Corporations (4th Ed.) § 328. To the same effect are *District of Columbia v. Waggaman*, 4 Mackey (D. C.) 328; *Haynes v. Cape May*, 50 N. J. Law, 56, 13 Atl. 231. "The local government," says the Supreme Court of Pennsylvania, in *Livingston v. Wolf*, 136 Pa. 533, 20 Atl. 552, 20 Am. St. Rep. 936, "must keep within the limits that bound its jurisdiction as they are defined by the Constitution and the laws of the state; but subject to these restrictions, it may determine what is best calculated to promote the security, the comfort, and the convenience of the inhabitants."

The ordinance, then, being valid, it remains to consider whether the land in question is excepted from its provisions. This depends on whether, at the date of its passage, Carpenter's land was "now used as a cemetery or burying ground." These are plain, simple words. There is no question as to their meaning. The ordinance test is not ownership or intention to use, but actual use. Now, at the date of this ordinance no person had been buried in either tract. It is true a promoter's plot of 75 acres of this tract had been made, but even this was never recorded, staked on the ground, or adopted by any one. In point of fact these tracts were then under lease for farming purposes to one Ralston, whose rent for 1895 was \$750, and Carpenter's predecessors in title, who are alleged to have used the ground as a burying ground, took title under an agreement in which they "agreed that the premises are in tenure of a tenant under a yearly lease, and will be conveyed subject to said lease." The fact then being that, at the date of the ordinance, the land was not used as a cemetery or burying ground, it did not come within the ordinance exception. It is contended, however, that the equitable title to this property was, at the date of this ordinance, vested in the North Mount Moriah Cemetery Company by virtue of an article of agreement between Harding and one Dutton for its sale, and that the legal title which the cemetery company acquired on December 20, 1895, related, through such equitable ownership, to the date of the article—July 6, 1894. After a careful study of all the proofs, we find that in point of fact the cemetery company acquired no equitable interest in the 87 acres here involved by such article. The money paid on account was not that of the corporation, but of Dutton and those comprising his syndicate, and that the money had not, when this ordinance was passed, or indeed, thereafter, been repaid or assumed by the cemetery company. Later than the date of the article one Wilkinson and his syndicate, of whom Carpenter was one, became interested in the land. These two syndicates, viz., Wilkinson's and Dutton's, removed some 15,000 bodies from a Philadelphia cemetery and reinterred them in a three-acre tract of the North Mount Moriah Cemetery Company adjoining the property in dispute, and received in payment therefor the proceeds from the sale of such abandoned Philadelphia cemetery. The proceeds of this venture belonged to the two syndicates, and was applied by them to the

purchase money of the land here in question. A settlement in writing was made December 20, 1895, of the \$70,427.91 of purchase money by these two syndicates with Harding, the owner of the land, in which Harding gave credit for \$30,000 paid to him in stock (which stock was furnished by the Dutton's syndicate), and "from C. B. Wilkinson the above balance of forty thousand four hundred and twenty-seven and <sup>91</sup>/<sub>100</sub> dollars," as appears in Harding's receipt to Wilkinson. The conveyance was made by Harding's deed to one Costello, and the latter, on the day of this settlement, for a consideration of \$62,000 conveyed the premises to Charles S. Baker, who on the same day deeded the same for \$300,000 to the North Mount Moriah Cemetery Company, subject to \$99,000 of mortgages. The North Mount Moriah Cemetery Company never had any money with which to purchase this land or any means of raising it. It paid the \$300,000 in stock, not to Harding, but to Baker, and his stock went to the two syndicates. The land was subsequently sold from the cemetery company on foreclosure of mortgage. The proofs satisfy us that this cemetery company acquired no interest in these tracts prior to the deed to it from Baker of December 20, 1895, and that Costello and Baker were the representatives, not of the cemetery company, but of the syndicates of Wilkinson and Dutton. It will thus be seen that the land in question falls within the prohibition of section 3 of the ordinance, as being at the time of its passage not "now owned by the owners of such cemeteries or burying grounds."

This view renders it unnecessary for us to discuss in detail the evidence to support the conclusion reached by the court below, with which we agree, that "the scheme was purely speculative, then, a promoter's enterprise, lacking the needful funds to carry it through, and nursed along in the hope that the money might be found by and by."

It follows, therefore, the decree of the court must be affirmed.

GRAY, Circuit Judge, dissents.

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WEBSTER v. CHICAGO, B. & Q. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. November 27, 1907.)

No. 2,590.

1. RAILROADS—HIGHWAY CROSSINGS—MUTUAL RIGHTS OF RAILROAD AND PUBLIC.

By a grant of a right of way to a railroad company, through the exercise of the right of eminent domain or otherwise, to lay its tracks and operate its road across an established highway, the state has necessarily declared that the use of the highway for these purposes is a public use consistent with the other uses to which it is ordinarily subject in favor of the traveling public; neither the public nor the railroad company has the paramount right in such use, but each may use the portion of the highway affected by the grant for all proper purposes subject to proper consideration for the concurrent rights of the other.

2. SAME—FRIGHTENING ANIMALS—REMOVAL OF HAND CAR UPON HIGHWAY.

The removal of a hand car from a railroad track upon a highway at a crossing, for a sufficient time to permit the passing of an approaching

train, by a section foreman who was using such car in the course of his duty, was a reasonable and permissible use of the highway incidental to the enjoyment by the railroad company of the right to operate its road over the same, and not an invasion of the rights of the general public, and created no liability on the part of the railroad company for the injury of a traveler on the highway whose horse became frightened at the hand car.

In Error to the Circuit Court of the United States for the Western District of Missouri.

J. H. Harkless (W. J. Nelson, Beardsley, Gregory & Kirshner, and Harkless, Crysler & Histed, on the brief), for plaintiff in error.

Hale Holden (O. H. Dean, W. D. McLeod, H. C. Timmonds, James E. Kelby, and J. W. Deweese, on the brief), for defendant in error.

Before VAN DEVANTER and ADAMS, Circuit Judges, and RINER, District Judge.

ADAMS, Circuit Judge. The record discloses the following brief and undisputed facts: Plaintiff's horse was frightened by a hand car which the section foreman of defendant company had been using in the discharge of his duties, and which he had removed from the rails at a street crossing and temporarily allowed to stand within the limits of the highway, which was also defendant's right of way, while a train running over his section passed. The derailling of the hand car was occasioned by the approach of a train, and no claim is made that it was derailed any too soon to avoid collision. Plaintiff was driving along the highway in the direction of the crossing and reached it just after the hand car had been derailed and just before the train passed. As a result of her horse's fright, she was injured, and subsequently brought this suit in the court below for damages alleged to have been occasioned by defendant's negligence in leaving the hand car on the street and thereby exposing her to danger. It resulted in an instructed verdict in favor of defendant, and this writ of error is prosecuted by plaintiff.

The only question necessary for consideration is whether the Circuit Court erred in directing the verdict. This depends upon whether there was any substantial evidence of negligence in the case. Plaintiff's counsel contend that the highway was for the use of the general public; that it was not a permissible place for conducting the operations of the railway company; that defendant unlawfully obstructed it by derailling the hand car and leaving it there while the train passed by, and is responsible for the natural consequences of its unlawful act; among them, the frightening of horses of ordinary gentleness and the injury resulting therefrom. This contention involves a consideration of the relative rights of a railroad company and the traveling public to the use of that part of the highway which intersects the right of way of the former.

An argument is made in favor of the plaintiff on the assumption that the rights of the railway company in cases like this are subordinate to the rights of the traveling public. Is this assumption correct? By the grant of a right of way to the railway company through the exercise of the right of eminent domain or otherwise to lay its tracks and operate its road across an established highway, the state has neces-

sarily declared that the use of the highway for these purposes is a public use consistent with the other uses to which the highway is ordinarily subject in favor of the traveling public. Both the railway company and the public may use the highway for their respective and appropriate purposes. The traveling public, whether driving, riding, or afoot, may use it therefor and for all other necessarily incident purposes. The traveler is not a trespasser when crossing the railway tracks at a public crossing on the highway, but is exercising an undoubted personal right. So, too, the railway company, whether in propelling a train of cars or a hand car over its tracks on the highway, repairing its tracks or doing any other thing requisite and necessary for the proper conduct of its business at that place is not a trespasser, but is exercising its lawful right. Instead of one having a right paramount to the other, the rights of each are of equal dignity as far as they go, and must be enjoyed subject to the embarrassment, if any, which the exercise by the other of his rights creates. Each is entitled to the use of the street for the legitimate purposes of its business, subject always to proper consideration for the concurrent rights of the other.

In *Piollet v. Simmers*, 106 Pa. 95, 51 Am. Rep. 496, the Supreme Court of Pennsylvania observed concerning the subject now under consideration:

"There is a certain right of property owners, which we will discuss presently, to leave objects on or along a highway, in front of their premises, temporarily, and for special purposes, and where that right exists, it is of equal grade, before the law, with the right of travelers to journey on the highway. \* \* \* As we understand the law there is an absolute right in a property owner to use a portion of the public highway for certain purposes for a temporary period and in a reasonable manner, and this right may be exercised in derogation of the right of the traveling public."

In *Loberg v. Town of Amherst*, 87 Wis. 634, 58 N. W. 1048, 41 Am. St. Rep. 69, which was an action for damages alleged to have accrued to the plaintiff by the fright of his horse occasioned by mortar boxes obstructing the street in front of a residence owned by the defendant, which he had been using for plastering his house, the Supreme Court of Wisconsin observed:

"He" [the owner] "had a right to use temporarily a reasonable portion of the street for the deposit of the mortar boxes, etc., while necessarily used in plastering his house. This right is born of necessity and justified by it. \* \* \* As fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time; and, because building is necessary, materials proper and adapted to that purpose may be placed in the street, provided it be done in the most convenient manner; and so, as to the repairing of a house, the public must submit to the inconvenience necessarily incident thereto, but, if prolonged for an unreasonable time, such use of the street becomes unlawful."

In *Golden v. Railway Co.*, 84 Mo. App. 59, the railway company was engaged in repairing a bridge over its tracks. Old boards had been taken out and piled on the side of the highway within a few feet of the traveled track. Plaintiff's horse driven on the highway toward the pile of lumber was frightened by it, and he was injured. The court said:

"We recognize that a public highway or street is not exclusively for travel thereon; that they may be used temporarily, for placing material and for other purposes connected with the adjoining property."

In *District of Columbia v. Moulton*, 182 U. S. 576, 21 Sup. Ct. 840, 45 L. Ed. 1237, a steam roller had been employed to keep streets in repair. The court said:

"The use of an appliance such as a steam roller was a necessary means to a lawful end—a means essential to the performance of a duty imposed by law. It must therefore follow that, if in the legitimate and proper use of such machine, with reasonable notice to the public of such use, an injury is occasioned to one of the public, such injury is *damnum absque injuria*."

Judge Dillon in his work on *Municipal Corporations* (4th Ed.) vol. 2, § 730, lays down the general doctrine as follows:

"It is not every obstruction, irrespective of its character or purpose, that is illegal, even although not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations and restrictions. The carriage and delivery of fuel, grain, goods, etc., are legitimate uses of a street, and may result in a temporary obstruction to the right of public transit. So the improvement of the street or public highway itself may occasion impediments to its uninterrupted use by the public. And so of the improvement of adjoining lots by digging cellars, by building, etc.; this may occasion a reasonable necessity for using a part of the street or sidewalk for the deposit of material. Temporary obstructions of this kind are not invasions of the public easement, but simply incidents to or limitations of it. They can be justified when, and only so long as, they are reasonably necessary."

To this text, he cites many cases to which reference is called. See, to the same effect, *Jones v. Railroad Co.*, 169 Pa. 333, 32 Atl. 535, 47 Am. St. Rep. 916; *Farrell v. Oldtown*, 69 Me. 72; *Nichols v. Athens*, 66 Me. 402; *Howard v. Union Freight Railroad*, 156 Mass. 159, 30 N. E. 479.

In view of the principles enunciated above, the question decisive of this case is whether the use of the highway by the section foreman, as and in the circumstances disclosed by the record, is one of the uses incidental to the enjoyment of the conceded right of the railway company to operate its tracks across the highway. If so, it was no invasion of the easement belonging to the general public but only a limitation of it. Hand cars propelled on the tracks of a railroad company afford the usual, customary, and appropriate means for the locomotion of the section foreman in the discharge of his duty over his section of the road. He carries in them his tools and supplies for repairing the road, and they must of necessity be removed from the tracks whenever and wherever a train approaches them. It follows from these facts, in our opinion, that the right of lodgment of the hand car whenever occasion requires its removal is necessarily implied in the grant to operate a railroad, and is a necessary incident to the enjoyment of the grant. Such being the case, when that lodgment is reasonably required to be made and is made on the highway it is not an unlawful obstruction, and does not ipso facto confer a right of action upon one whose horse is frightened by it. On the contrary, it is a consistent and permissible use of the highway for a time reasonably sufficient to enable the train to pass and the operator to restore the hand car to the

tracks. The record makes it very clear that the hand car in question was not removed until common prudence demanded its removal. The train was in sight, and the highway then just reached by the section foreman operating the hand car, presented a level and convenient place to derail it. Indeed, there is no evidence that any other place in the near proximity was as suitable or convenient for that purpose as it, and there is no evidence that the foreman did not exercise reasonable care in derailling it, provided he had a lawful right to do so at that time and place. The case of *Ohio & Mississippi Ry. Co. v. Trowbridge*, 126 Ind. 391, 26 N. E. 64, relied on by plaintiff's counsel, does not disclose that the hand car involved in that case was left on the highway for any purpose incidental to the defendant's business. It is true the Supreme Court of Indiana said:

"The right of using a highway for the storage of cars, or even as a place for the temporary deposit of cars, is not possessed by any railroad company."

But it immediately added:

"Possibly an emergency might arise excusing, or justifying, the temporary use of a highway for such a purpose. \* \* \* The act of the appellant in placing the hand car on the highway was, in this instance, unlawful, and calls for an explanation from the authors of the wrong. We find no satisfactory explanation nor any reasonable excuse in the facts exhibited by the answers to special interrogatories."

We cannot doubt that if the emergency which confronted the section foreman in this case had appeared to the Supreme Court of Indiana it would have regarded it as an emergency which justified a reasonably brief obstruction of the street. In *Railway Co. v. Bridges*, 16 Tex. Civ. App. 64, 40 S. W. 536, also relied on by plaintiff's counsel, there is no showing that the hand car was deposited in the highway in the line of business or because of any pressing emergency. On the contrary, the language of the court excludes that possibility. It said:

"The use of the track by the appellant in no way required that the hand car should be thus operated."

*Railway Co. v. Williams*, 56 Kan. 333, 43 Pac. 246, is also a case which sanctions the obstruction of a highway by a railroad company for a necessary and reasonable purpose.

Without particularly referring to any of the other numerous cases which the industry of counsel has brought to our attention, it suffices to say that we find in none of them any doctrine which militates against that of the cases first cited by us when applied to facts of the kind disclosed by this record.

The vigorous contention of counsel that the case should have been submitted to the jury for its consideration and determination is clearly without merit. There was nothing for a jury to pass on. The controlling facts were undisputed and a question of law only was presented, namely, whether on those facts a legal liability arose against the defendant for plaintiff's injury. The learned trial judge in the exercise of his undoubted function and in the discharge of a duty properly belonging to him held that no such liability arose out of the facts. In doing so, he committed no error and the judgment is accordingly affirmed.



In re HORGAN et al. In re REAGAN. BALLOU, U. S. Marshal, v.  
HORGAN et al.

(Circuit Court of Appeals, First Circuit. December 20, 1907.)

No. 745 (Original).

1. BANKRUPTCY—PROCEEDING AGAINST "ADVERSE CLAIMANT"—JURISDICTION.

A surety on a bail bond of a bankrupt with whom the bankrupt, before the commencement of the bankruptcy proceedings, deposited money to indemnify him against liability, is an adverse claimant of such money, within the meaning of Bankr. Act July 1, 1898, c. 541, § 23, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], and the court of bankruptcy is without jurisdiction to proceed against him summarily therefor without his consent.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, p. 7567.]

2. SAME—CONSENT.

An adverse claimant brought into a court of bankruptcy by citation and ordered to turn over property, and who before entry of final decree against him specially objects on the ground that the court is without jurisdiction, cannot be held to have consented to such jurisdiction.

Patrick P. Curran (Richard B. Comstock and Comstock & Canning, on the brief), for petitioners.

J. Jerome Hahn (Ralph T. Barnefield, on the brief), for respondent.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

COLT, Circuit Judge. This is a petition for revision under Bankr. Act July 1, 1898, c. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432].

On August 14, 1907, John T. Reagan was arrested in an action of deceit on a writ issuing from the superior court of Newport county, R. I. On the same day he applied to the petitioners to become sureties upon his bail bond. The petitioners declined unless they were secured against liability, and thereupon he deposited with them \$12,000 as security. Reagan knew he was insolvent at this time, but the petitioners were not aware of it.

On August 17th, three days later, an involuntary petition in bankruptcy was filed against Reagan in the District Court for the district of Rhode Island, and on the same day the court issued a special warrant to the marshal, directing him to seize Reagan's property. Under this warrant the marshal made a demand upon the petitioners for \$12,000, which they refused to comply with. On August 22d the marshal filed a petition praying that the petitioners be ordered to pay the sum of \$12,000 into his hands as receiver, and thereupon the court enjoined the petitioners from disposing of this money until the further order of the court. The court also issued a citation to the petitioners on the petition, returnable August 26th, and the petition was heard by the court on that day.

From the proceedings at this hearing, which are made a part of the record before us, it appears that the District Court took the view that the claim of the petitioners was not adverse, because they were under no obligation on the bail bond which they could not discharge at once by the surrender of their principal, and that, having

first given the petitioners a reasonable time to relieve themselves from their obligation, they should be directed to pay the money into the registry of the court.

On August 29th the counsel for the petitioners asked leave of court to enter their appearance specially for the petitioners, reserving all right to object to the jurisdiction of the court and to its right to proceed on the matters set forth in the petition. At the same time they asked leave of court to file a motion for reargument. The grounds set forth in this motion were that the court had no jurisdiction without the respondents' consent, that the respondents never consented, that the respondents were adverse claimants, and that the court had neither power nor jurisdiction to proceed with or without their consent.

On August 31st Reagan was adjudged a bankrupt, and on the same day the District Court entered the following decree on the petition of the marshal:

"This cause came on to be heard on the petition of Daniel R. Ballou, United States marshal, who has been ordered to seize the property of the alleged bankrupt, that Patrick H. Horgan and Patrick J. Murphy, both of Newport in said district, be ordered and decreed to pay to him, the said Ballou, the sum of \$12,000 which is held by said Horgan and said Murphy to secure them against loss by reason of acting as bail in a certain action of deceit brought against said Reagan by Armour & Co.; and thereupon, after a hearing upon the merits and the taking of oral testimony, the said respondents appearing by counsel, and objecting that the court was without power to make the following order upon consideration thereof, it appearing that said sum of \$12,000 was deposited by said Reagan with said Horgan and said Murphy on August 14, 1907, at which time said Reagan was insolvent, and that thereafterwards on the seventeenth day of August, 1907, an involuntary petition in bankruptcy was filed against said Reagan, upon which said petition said Reagan was on the thirty-first day of August, 1907, adjudicated a bankrupt, and that, by surrendering the body of said Reagan to the court from which the writ in said action of deceit issued, said Horgan and said Murphy might have been and may be relieved from all obligation as bail, and that by refusing to surrender the body of the said Reagan to the court from which the writ in said action of Armour & Co. was issued and thereby be discharged as bail, said Horgan and said Murphy are, for said bankrupt's sole benefit, causing said \$12,000 to be retained from said bankrupt's estate and subject to their own use and control with the liability that should said bankrupt in the future not respond to the execution, if one be issued in said case, that the amount of said bail would be forfeited, and thereby cause a loss of said sum of \$12,000 to said bankrupt's estate.

"Wherefore and by reason whereof, it is ordered, adjudged and decreed as follows: That said Patrick H. Horgan and said Patrick J. Murphy, having had reasonable opportunity to discharge themselves from all liability as bail for said bankrupt, and having refused and neglected so to do, be and they thereby are ordered, directed and decreed to pay said sum of \$12,000 into the registry of this court on or before September 5, 1907."

The first question we have to consider is whether the District Court had jurisdiction to proceed summarily against the petitioners, or whether resort must be had to a plenary suit. If the petitioners are adverse claimants within the meaning of section 23 of the bankruptcy act, the District Court was without jurisdiction to pass upon their rights in summary proceedings unless with their consent. We have thus presented two questions: First, have the petitioners, in whose hands this fund was deposited to secure them against liability

on a bail bond, such a substantial claim against the fund as to make them adverse claimants within the meaning of section 23 of the bankruptcy act? Second, have the petitioners consented to the jurisdiction of the District Court?

Upon the first question, *Jaquith v. Rowley*, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620, is a direct and controlling authority, unless that case can in some way be distinguished from the case at bar. In *Jaquith v. Rowley* the Supreme Court held that a surety in whose hands money was deposited to indemnify him for his liability on a bail bond was an adverse claimant within the meaning of section 23, Bankr. Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431]. In the opinion, Mr. Justice Peckham, speaking for the court, said:

"The proceeding was a summary application to the court in bankruptcy to grant an order in a matter, the result of the granting of which would be to immediately take from the surety moneys which had been deposited with him before the commencement of the proceedings in bankruptcy; and thus compel him to come into the bankruptcy court for the litigation of questions as to his right to retain the money claimed by him. \* \* \* The surety in whose hands the money was deposited to indemnify him for his liability on the bail bond was an adverse claimant within the meaning of that section of the act, and could not be proceeded against in the bankruptcy court unless by his consent, as provided for therein. It is not necessary in order to be an adverse claimant that the surety should claim to be the absolute owner of the property in his possession. It is sufficient if, as in the present case, the money was deposited with him to indemnify him for his liability upon the bail bond and that liability had not been determined and satisfied. If the trustee desire to test the question of the right of the surety to retain the money he must do so in accordance with the provisions of the section of the bankrupt law above referred to. \* \* \* The surety claims the right to hold the money as against everybody until his liability on the bail bond is satisfied, and that claim is adverse to any claim that the trustee may make upon him for the money which is to indemnify him as stated. \* \* \* If the trustee has the right to obtain possession of the money from the surety, he must assert it in accordance with the provisions of section 23 of the bankruptcy act, and not by this summary proceeding in bankruptcy. \* \* \* Our conclusion is that the District Court was without jurisdiction in the matter submitted to it in the petition of the trustee, and its decree dismissing such petition for want of jurisdiction is, therefore, affirmed."

In order to distinguish *Jaquith v. Rowley* from the case at bar, it is contended by the respondent that in the former case the liability of the bail had already attached. An examination of the record in that case discloses that such is not the fact. It is there shown that judgments only had been rendered against the defendant, and executions issued thereon. On the subject of bail the law of Massachusetts is the same as the law of Rhode Island, and under the law of both states the surety on the bail bond may surrender his principal at any time before final judgment against the surety as bail on *scire facias*. No such judgment had been entered in *Jaquith v. Rowley*.

It was open, therefore, for the surety in *Jaquith v. Rowley*, as in the case at bar, to escape liability by surrendering his principal. Rev. Laws Mass. c. 169, § 9; Gen. Laws R. I. 1896, c. 258, §§ 1, 2. The only other distinction relied upon between the two cases is the length of time which elapsed between the giving of the bail bond and the commencement of proceedings in bankruptcy. We regard

this circumstance as entirely immaterial on the question of the jurisdiction of the District Court to proceed summarily.

It is true the petitioners can relieve themselves of all liability on the bail bond by surrendering the bankrupt, and thereby committing him to jail unless he is able to procure other bail. It is also true that, in the event of such surrender, the petitioners would have no substantial claim against the fund, and the bankruptcy court could seize it in summary proceedings. But it is quite a different proposition whether the bankruptcy court can summarily seize the fund before such surrender, upon the ground that it is the duty of the petitioners to take such action after reasonable notice, because this question of duty involves a question of substantial right. The petitioners claim the right to hold this fund against everybody until their liability on the bail bond has been determined and satisfied, and if this claim is to be tested, it must be in a plenary suit in the federal or the state courts. *Jaquith v. Rowley*, ante.

Upon the question of consent, it is shown that the petitioners did not voluntarily appear in the District Court, that they objected to the power of the court to make the order at the hearing, and that subsequently, and before the entry of the final decree, they specifically objected to the jurisdiction of the court to proceed summarily. This was clearly sufficient under the decisions of the Supreme Court. Upon this point it is only necessary to cite *Louisville Trust Company v. Comingor*, 184 U. S. 18, 26, 22 Sup. Ct. 293, 46 L. Ed. 413.

The decree of the District Court is reversed, with costs for the petitioners in this court.

## AMERICAN WINDOW GLASS CO. v. NOE.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1908.)

No. 1,322.

### 1. WRIT OF ERROR—ORDER DENYING NEW TRIAL—REVIEW.

An order of a federal court denying a new trial is not reviewable on a writ of error to the Circuit Court of Appeals.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3860-3865.]

### 2. TRIAL—TRIAL OF CAUSES TOGETHER—DISCRETION OF COURT.

Where the plaintiff in each of two actions was injured in the same accident, and the same evidence, except as to the extent of the injuries, was determinative of both cases, it was a proper exercise of the trial court's discretion to consolidate the cases for trial over defendant's objection relating only to the disparity between the injuries of the two plaintiffs, under Rev. St. § 921 [U. S. Comp. St. 1901, p. 685], authorizing the consolidation of cases for the purpose of trial "when it appears reasonable to do so."

### 3. MASTER AND SERVANT—INJURIES TO SERVANT—PLANS OF WORK—DUTY OF MASTER.

A master, in dismantling a building, while free to adopt and carry out its own plans therefor, owed to its servants the legal duty of exercising the standard of care prescribed by law for their safety.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, § 173.]

**4. SAME—NEGLIGENCE OF MASTER.**

Plaintiff, a laborer employed to remove material taken from defendant's building in process of destruction, was injured by the collapse of a standing portion which had been detached from the main building. Defendant's superintendent knew that such standing portion was out of plumb, and had been greatly weakened by the sawing of braces and the removal of the nuts from rods which were left in place, and with this knowledge ordered plaintiff to go within reach of such insecure mass shortly before it fell. *Held*, that defendant was not free from negligence as a matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 1010-1031.]

**5. SAME—SAFE PLACE TO WORK—DUTY OF MASTER.**

In tearing down buildings, the employer does not owe to the workmen the specific duty of providing them with a safe place to work.

**6. SAME—ASSUMED RISK.**

While plaintiff, a laborer engaged in the removal of material from a building in process of destruction, who was injured by the collapse of a standing portion, assumed all the risks naturally incident to the extra-hazardous work, he did not assume the risk of the negligence of the superintendent of the work in ordering him into a position where he would be struck by the collapse of a standing portion of the building, which had been weakened by the sawing of braces and the removal of nuts from rods left in place without plaintiff's knowledge, giving such standing portion a false appearance of solidity.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 610-612.]

In Error to the Circuit Court of the United States for the District of Indiana.

Plaintiff in error, defendant below, seeks a reversal of a judgment for damages on account of the personal injury of the plaintiff by the alleged negligent acts of the defendant. The assignments are that the court erred in overruling the demurrer to the complaint; in consolidating this action with that of another plaintiff against this same defendant and requiring the defendant to try the two cases together; in overruling defendant's motion for a directed verdict; in giving certain instructions to the jury; and in overruling the motion for a new trial.

John W. Kern and L. B. Simmons, for plaintiff in error.

Pierre Gray and William J. Houck, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge, delivered the opinion of the court: The action of the court in refusing to grant a new trial is not reviewable. No exception was taken to any of the instructions to the jury. As there was no substantial difference between the case as pleaded and as proven, the only questions are whether the court erred in compelling the trial of this case with another, and whether the evidence affords a legal basis for the verdict.

Section 921, Rev. St. [U. S. Comp. St. 1901, p. 685] authorizes the consolidation of cases for the purpose of trial "when it appears reasonable to do so." The ground of plaintiff's motion was that he and the other plaintiff were injured in the same accident, and that the same evidence, except as to the extent of the injuries, was determinative of both cases. The only stated reason of defendant's opposition was the disparity between the injuries, the other plaintiff being comparatively

unhurt, while this plaintiff was rendered utterly and forever helpless. Undoubtedly the condition of this plaintiff made a very strong appeal to the sympathies of the jury; but the record contains nothing that affords a basis for concluding that the verdict was other than it would have been if this case had been tried alone. The possibility, or our conjecture, that a separate trial might have resulted differently is no warrant for holding that the trial judge in sustaining the motion abused the discretion that is lodged in him by the statute. If ever this discretion may fitly be exercised in sustaining a contested motion of this character, it would seem to be when the parties agree that all questions except as to the amounts of the claims are covered by the same evidence. *Denver Tramway Co. v. Norton*, 141 Fed. 599, 73 C. C. A. 1; *Mutual Life Ins. Co. v. Hillmon*, 145 U. S. 285, 12 Sup. Ct. 909, 36 L. Ed. 706.

Defendant was engaged in taking down one of its factory buildings, a frame structure 200 feet long, 80 feet wide, 50 feet high. The skeleton was made up of bents or trusses about 20 feet apart, supported on posts about 20 feet high, and knit together by a system of rafters, braces, and rods. There was evidence tending to prove that prior to the accident all of the siding and roofing and sheeting had been removed, and that four or five bents had been taken down one at a time by cutting them loose and pulling them away from the remaining standing portion; that the next bent was pulled down, in obedience to the express command of defendant's superintendent, towards and against the standing portion; that at this time a large proportion of the rafters, braces, and rods in the remainder of the building had already been loosened or detached; that while plaintiff and some others, in obedience to the express command of defendant's superintendent, were taking apart and removing the materials of the bent last pulled down, other laborers were going on with the work of loosening the rafters, braces, and rods of the standing portion, and thereupon the collapse occurred in which plaintiff was injured; that while plaintiff was so at work defendant's superintendent was notified that the standing portion was somewhat out of plumb; that the aforesaid conditions of the standing portion were in fact unknown to plaintiff, and were not obvious because rafters were loosened at one end and allowed to remain in position, braces were sawn in two and retained the appearance of solidity, and nuts were removed from rods that were left in place.

Defendant, citing *Mississippi Co. v. Schneider*, 74 Fed. 195, 20 C. C. A. 390, insists that the judgment must be reversed because there was no evidence that the methods employed in dismantling the building were not the usual and customary methods. The evidence, however, was unequivocal that there was no usual or customary method of dismantling buildings of the class in question. The cited case illustrates the rule that evidence of a defendant's failure to do a thing in the customary way may be admitted as tending to establish the defendant's failure to exercise that degree of care which a person of ordinary prudence would exercise under like circumstances; but it does not decide that a customary way is the only nonnegligent way, and much less does it lend countenance to the claim that a thing can never be negligently done before custom has established a prudent way of doing it.

Defendant was free to adopt and carry out its own plans for dismantling the building. In doing the work, however, defendant owed to its employes the legal duty of exercising care for their safety. The standard of care was that which is prescribed by the law. Ordinarily the jury, under instructions from the court as to the legal standard of care, should be left to decide whether or not the defendant's conduct measures up to that standard, for it may well be assumed that the united judgment of 12 average citizens correctly gauges the conduct of the "person of ordinary prudence." Some lines of conduct of the "person of ordinary prudence" are, however, so instinctive or have been so thoroughly characterized in the common, or at least the preponderant, sentiment of mankind, that a court cannot but know that it would be impossible for a jury in a case of that class to return a verdict for the plaintiff without rejecting the conduct of the person of ordinary prudence as the standard and setting up one of their own for that particular case. In such instances it is proper for the court to direct the verdict. Here the defendant's superintendent knew that the standing portion of the building was out of plumb, and had already been greatly weakened. While the remaining braces and stays were being removed under his supervision, he ordered the plaintiff, a common laborer, to go within reach of the insecure mass. We fail to perceive how the court could rightly have charged the jury that the defendant's conduct was not negligent.

The final contention is that a verdict for the defendant should have been directed, because the evidence discloses that the plaintiff assumed the risk of receiving the injury he complained of. In tearing down buildings it would be manifestly unfair to hold an employer to a specific duty to provide his workmen a safe place in which to do the dismantling. *American Bridge Co. v. Seeds*, 144 Fed. 605, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041; *Ry. Co. v. Brown*, 73 Fed. 970, 20 C. C. A. 147; *Ry. Co. v. Jackson*, 65 Fed. 48, 12 C. C. A. 507. But the exemption from that specific duty does not excuse the employer's failure to perform his general duty of exercising for his employe's safety the prudence of the ordinary person. Plaintiff undoubtedly assumed all the risks that naturally inhered in this extrahazardous work; but he did not assume the risk of its being made still more hazardous by defendant's negligence. *Hawley v. Ry. Co.*, 133 Fed. 150, 66 C. C. A. 216. When plaintiff was ordered by the superintendent to work under the standing portion of the building, he had the right to believe that he would not be subjected to injury by the superintendent's failure to exercise ordinary care in directing other parts of the work. Was the risk so obvious that plaintiff should have refused to obey the superintendent's order? The whole structure was open to his view. He saw that while he was at work on the down timbers other men were getting other bents ready to be pulled down. But appearances of braces and stays and rods, as heretofore stated, were deceptive. Plaintiff was not bound to assume, as against his primary right to rely on the superintendent's direction, that braces which had the appearance of solidity were sawed in two and that nuts had been removed from rods which were in normal position.

The judgment is affirmed.

## AMERICAN WINDOW GLASS CO. v. ARNOLD.

(Circuit Court of Appeals, Seventh Circuit. January 7, 1908.)

No. 1,323.

In Error to the Circuit Court of the United States for the District of Indiana.

John W. Kern and L. B. Simmons, for plaintiff in error.

Pierre Gray and William J. Houck, for defendant in error.

Before BAKER, SEAMAN, and KOHLSAAT, Circuit Judges.

PER CURIAM. This is the companion case referred to in No. 1,322, American Window Glass Co. v. Noe, 158 Fed. 777. The assignments of error being the same that were there found untenable, the judgment is accordingly affirmed.

## LOWELL v. INTERNATIONAL TRUST CO.

(Circuit Court of Appeals, First Circuit. December 17, 1907.)

No. 732.

**1. BANKRUPTCY—RIGHTS OF TRUSTEE—ENFORCEMENT OF TRUST AGREEMENT.**

A trustee in bankruptcy has no interest which he can enforce for the benefit of general creditors in an arrangement between the bankrupt and certain creditors by which money deposited with one, which was a bank, was to be held in trust and distributed pro rata between them, and which was not prohibited by the bankruptcy statute.

**2. SAME—VOIDABLE PREFERENCE.**

The fact that accounts assigned by a bankrupt to a creditor as collateral security more than four months prior to the bankruptcy were collected within the four months period does not entitle the trustee to recover such collections as preferences.

**3. SAME—BANKS—RIGHT OF SET-OFF—"PREFERENTIAL TRANSFER."**

New York Bank v. Massey, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380, applied.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 6, pp. 5498, 5499; vol. 8, p. 7759.]

In Error to the District Court of the United States for the District of Massachusetts.

James A. Lowell and John Lowell, for plaintiff in error.

William M. Richardson (Robert M. Morse, on the brief), for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This writ of error originated in an action brought by the trustee in bankruptcy of the Thomas & Pike Coal Company against the International Trust Company, seeking to recover amounts received by the International Trust Company from the bankrupt within four months prior to the filing of the petition in bankruptcy, and the receipts of which were alleged to be of a preferen-



tial character. The plaintiff's declaration contained two counts, each of which is based on section 60 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445], as amended by that of Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 [U. S. Comp. St. Supp. 1907, p. 1031]. The District Court ordered a verdict for the defendant, and the trustee thereupon sued out this writ of error.

Portions of the propositions submitted to us by the trustee allege that the bankrupt had been insolvent for a considerable time, and that during that period it had been struggling along with its business with some support from its creditors, and with an understanding between the International Trust Company and some other creditors by virtue of which all of them, including the International Trust Company, should receive certain pro rata benefits out of whatever funds might come from the Thomas & Pike Coal Company. Therefore, it is claimed that the funds now sued for are held by the International Trust Company in a quasi trust, enforceable by the trustee. Aside from the fact that this action is based on the statute, it is, on principles of the common law, whether strictly legal or equitable, too plain to need discussion that a trustee in bankruptcy has no interest in an arrangement of the character described which he can enforce.

One of the counts of the declaration is based on the receipt by the International Trust Company, within four months of the filing of the petition in bankruptcy, of funds coming from certain accounts which had been assigned to it before that period commenced. It is difficult to perceive on what ground this claim rests, because the substantial rights of the parties were fixed at the time the assignment was made, and the collections were only incidents thereof.

The other count involves a more serious matter. The transactions all occurred within the preferential period, and are described in the plaintiff's offer of proof on the strength of which the District Court directed a verdict for the defendant, as follows:

"The coal company sold all its coal, horses, and other property to the Suffolk Coal Company, and on April 27th it deposited in the trust company where it kept its bank account a check from the Suffolk Coal Company of \$41,824.25. There was before that on that day the balance of about \$1,000 in the trust company. The coal company drew a check for \$40,185.14 in favor of Townsend. This check was presented to the trust company, but refused. Subsequently, on the same day, the trust company charged up the two demand loans of \$17,000 and \$2,500 on which no demand had been made, and paid itself the sum of \$18,056.24, which was the amount of the two loans with interest, less a credit of \$1,527.94 for coal furnished.

"At all times since February 1st the coal company had been insolvent and the trust company had known it, and the trust company had received much more than its proportionate share of any payments made by the coal company; and even if the check to Townsend had been paid, he still would not have received as large a proportion of his debt as the trust company had up to that time received. The trust company had notice from the coal company before it made the appropriation of the money to pay its own loans that the coal company intended to apply substantially the whole of the deposit to Townsend.

"The trust company applied the deposit thereafter without notice to the coal company or to Townsend on the demand notes which it held on which no demand had been made. Immediately after this the trust company reported the transaction to the coal company, which took no action to disapprove it, and treated the deposit account as diminished to that extent."

With reference to this offer of proof two minor observations are to be made. First, by the law in Massachusetts, and probably throughout all the New England States, so-called "demand notes" are payable and snable without any actual demand being made. Second, a considerable portion of this proof has more or less relation to the propositions which we have said the plaintiff submitted, namely, that there was a quasi trust binding the International Trust Company, as to which we make no further observation than we have already made.

Undoubtedly the District Court, in ordering a verdict for the defendant, felt compelled thereto by *New York Bank v. Massey*, 192 U. S. 138, 24 Sup. Ct. 199, 48 L. Ed. 380. We are unable to perceive how we can substantially distinguish the two cases.

The plaintiff calls to our attention *Traders' Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832; but that was distinguished in *New York Bank v. Massey*, at page 146 of 192 U. S., at page 201 of 24 Sup. Ct. (48 L. Ed. 380), as follows:

"In *Traders' Bank v. Campbell*, 14 Wall. 87, 20 L. Ed. 832, the right of set-off was not relied upon, but a deposit was seized on a judgment which was a preference."

Turning to *Bank v. Campbell*, 14 Wall., pages 89 and 97, 20 L. Ed. 832, make this clear. The creditor there had obtained an execution against the debtor before he became bankrupt. After it took out its execution, certain collections made by it from drafts placed by the bankrupt in its hands in the ordinary course of business were turned over to the sheriff, and levied on under the same execution under which other property involved in the same litigation had been levied on. In other words, the bank clearly did not rely at all on its relations to the bankrupt as its customer, but it put itself entirely on its rights as an execution creditor, which rights, as the law then stood, were under the circumstances ineffectual.

The plaintiff also urges on us that, in *New York Bank v. Massey*, the bank took no action formally or otherwise, but merely left it to the law to offset the deposit made by the bankrupt against his indebtedness, while in the case at bar we must accept the statement that the defendant charged up its demand loans against the deposit, or, in other words, went through the formalities of certain alleged journal entries. This, however, was ineffectual either way, whether to benefit or prejudice the International Trust Company. It only gave expression to what the law itself would accomplish, that is, it cleaned up the set-off and left it where the law itself would have left it. At law, it takes two parties to accomplish an effectual payment, both a payor and a payee. Sometimes, of course, the law appropriates moneys in payment, or permits the creditor to do it; but that is in consequence of some express or implied understanding between the parties. In such instances an intention on the part of both parties to make payment on some indebtedness underlies what the law accomplishes, and the law is called in only because, while payment is intended, the particular item of indebtedness to which it shall be appropriated is not specifically pointed out. In no sense, however, is a deposit like the deposit here payment, or intended as payment. This is the first condition of the

decision in *New York Bank v. Massey*, and a vital one; because, if a deposit in the usual course of business may be in the nature of a payment, an unlawful preference would necessarily be involved under the circumstances of either *New York Bank v. Massey* or the case at bar, a suggestion of a possibility which the Supreme Court was compelled to negative.

What the International Trust Company did in the case at bar more than what was done in *New York Bank v. Massey* was, as we have said, simply to give form to what the law itself accomplished in substance. Moreover, if what was done by the International Trust Company in distinction from what was done by the creditor in *New York Bank v. Massey*, accomplished a preference, and for that reason was invalid or has been invalidated, the condition prior to the charging up the demand loans would have been restored by force of law, and the deposit would remain with the International Trust Company, precisely as it did in the case before the Supreme Court, and also the law would be left to operate in precisely the same manner. All this, therefore, raises no substantial difference which we can discover to relieve us from the conclusions of the Supreme Court in the case on which the International Trust Company relies.

In addition to the above, we refer to the decision of the Circuit Court of Appeals in the Seventh Circuit in *Re George M. Hill Co.*, 130 Fed. 315, 64 C. C. A. 561, 66 L. R. A. 68. This case was decided only a few months after *New York Bank v. Massey*, and at page 318 of 130 Fed., at page 564 of 64 C. C. A. (66 L. R. A. 68), it was rested thereon. In that case it appears, at page 317 of 130 Fed., at page 563 of 64 C. C. A. (66 L. R. A. 68), that two days before the filing of the petition in bankruptcy the creditor bank appropriated the balance of the deposit account precisely as was done in the case before us. No distinction was made by the Circuit Court of Appeals on that account. It is true that the attention of the court does not seem to have been specifically called thereto; but the facts indicate that none of the parties to that litigation perceived any distinction on account thereof.

The judgment of the District Court is affirmed, and the appellee recovers its costs of appeal.

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SWITZER et al. v. HENKING.

(Circuit Court of Appeals, Sixth Circuit. January 22, 1908.)

No. 1,719.

**BANKRUPTCY—DEBTS PROVABLE—IMPLIED CONTRACT—"WARRANTY."**

A good faith "representation and warranty" made by one joint purchaser of timber to his co-purchasers as an inducement to the purchase, as to the quantity of lumber which could be cut from such timber, is not within the rules as to "warranties" in sales of property or insurance contracts to the extent of implying a promise to reimburse his co-purchasers for loss on account of the failure of the tract to cut as much as represented, so as to create a liability therefor on an implied contract provable against his estate in bankruptcy under Bankr. Act July 1, 1898, c. 541, § 63a (4), 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447].

[Ed. Note.—For other definitions, see Words and Phrases, vol. 8, pp. 7396-7404, 7833.]

Appeal from the District Court of the United States for the Eastern Division of the Southern District of Ohio.

Roscoe J. Mauck, for appellants.

E. D. Davis, for appellee.

Before LURTON and RICHARDS, Circuit Judges, and KNAPPEN, District Judge.

KNAPPEN, District Judge. The appellants filed a claim against the estate of the bankrupt above named, alleging that claimants entered into an agreement with the bankrupt whereby claimants were to purchase from the Clendenin Coal & Coke Company all the merchantable timber on a certain tract of land described, and to pay for the same the sum of \$2,250, the timber to be lumbered on joint account by claimants, the bankrupt, and a fourth person (the two latter having charge of the operations), the capital for such operation to be obtained by loan through the joint and several obligations of the four parties; that after paying claimants the \$2,250 purchase price advanced, claimants together were to have one-third of the net profits, and each of the other parties a third; that the bankrupt was an experienced timber man; that "as an inducement (to claimants) to enter into said contract and purchase said timber the said bankrupt, at and before the time of the making of said contract, represented and warranted that the timber standing and growing upon the lands aforesaid would cut and manufacture a million feet or more of merchantable lumber," when in fact said timber contained but 500,000 feet of merchantable lumber; that claimants entered into the contract referred to and purchased, and paid for the timber in sole reliance upon such representations and warranty, believing therefrom that the timber would cut the amount stated; that the title to said timber was taken in the name of one of the claimants, the manufacturing and marketing of the same being done by a corporation organized for the purpose by the four parties concerned; that the timber has been cut and marketed, yielding but 500,000 feet of merchantable lumber, and that claimants have thereby lost \$1,000. The petition asks that the claim be referred to a competent court for liquidation, and that when so liquidated it be allowed. The claim was rejected as not provable. The appeal is from that action.

The sole question presented is whether the claim as stated is provable. If provable, it must be under subsection 4 of section 63a of the bankrupt act, which provides for proof of debts founded "upon a contract express or implied," in connection with the provision in that section for the liquidation of unliquidated claims prior to proving and allowance. It is unnecessary to consider whether a claim arising in tort is provable under the bankrupt act, on the theory of waiver of tort or otherwise. Not only is there no charge that the alleged misrepresentations were known to the bankrupt to be untrue, but the brief of appellants' counsel expressly disclaims any charge of fraud or bad faith, and plants the claim squarely and solely upon "an express warranty, arising out of and a part of an express contract." The claim is for reimbursement of claimants on account of the shortage in the

timber purchased. The specific question thus presented is, does the claim state a promise, express or implied, on the part of the bankrupt to so reimburse? The bankrupt is not alleged to have in terms promised to make such reimbursement. If any such promise is to be found, it must therefore be because implied in the term "represent and warrant." The term "represent" is not claimed, and cannot well be claimed, to imply a promise to reimburse. The discussion may therefore be limited to the meaning of the term "warrant." Anderson's Law Dictionary defines the term thus: "To give assurance of the existence of a fact; as, of the quality of goods sold, the validity of a title, the description and uses of insured property." The term "warrant" has, with respect to three classes of transactions, viz., conveyances of real estate, sales of personal property, and contracts of insurance (both marine and fire), a settled and technical meaning. As applied to these classes of transactions, an agreement on the part of the warrantor to indemnify the warrantee against damages on account of a breach of the warranty is implied in the term "warrant," the definition of which thus includes such promise to indemnify. But this technical use of the term seems to be confined to these three classes of cases. Thus: The American & English Encyclopædia of Law, in stating "the general scope of the subject," says:

"The term 'warranty' is used in several distinct connections: in insurance law, to indicate an undertaking on the part of the insured that certain alleged facts are as he represents them to be; in the law of real property, to indicate a covenant on the part of the grantor in the conveyance to protect the title conveyed to his vendee; in the law of sales of personal property, to indicate a collateral undertaking on the part of the seller as to the quality of or title to the subject of the sale. Warranties of this last character may be either express or implied." 30 Am. & Eng. Enc. of Law, p. 128.

The law dictionaries of Bouvier, of Anderson, and of Rapalje and Lawrence, as well as Stroud's Judicial Dictionary, all divide their definitions on the subject of warranty, and their citations in respect thereto, under the three heads only of insurance, sales of personal property, and conveyances of real property. The case of sales of personal property is the only one of the classes mentioned under which it can be even plausibly suggested that the claim in question comes. Were this a claim against a vendor of property upon a warranty of quantity, it may safely be conceded, at least for the purposes of this opinion, that the law would imply an agreement to make good the damage caused by the breach, and that such claim would thus be provable in bankruptcy. But it is to be noted that the bankrupt is not charged to have been the owner or vendor of the timber in question, or even to have been in any way interested in the sale of the timber, either directly, or collaterally as surety, or guarantor for the seller. His interest in the purchase was of the same kind as that of claimants, viz., to procure a tract which could be profitably lumbered. We are cited to no authorities recognizing the extension of this doctrine of warranty beyond the three classes of cases mentioned, and we know of no authority which holds that a good-faith "representation and warranty" made by one partner or joint purchaser of property to his co-purchasers or copartners, as inducement for the making of such co-partnership contract and purchase, as to the value or quantity of the

thing to be purchased, or the profitableness of the enterprise contemplated, comes within the rules applicable to warranties in sales of property and insurance contracts; or, in other words, which hold that an implied promise is raised on the part of one so "representing and warranting" to reimburse his associates for any loss they may suffer from the failure of such representations.

Cases of warranty relating to representations by the vendor of property are cited in appellants' brief. They do not support the proposition necessary to the provability of the claim here in question, viz., that the term "represent and warrant," used under the circumstances stated, implies a promise to respond in damages for failure of the representations to hold good. Had the bankrupt added to his assurance an express promise to make good to claimants any loss they might suffer through the failure of the tract to cut the quantity represented, it may be conceded that a claim founded upon such promise would be provable in bankruptcy, as it would be suable had not bankruptcy intervened. To illustrate: In *Drummond v. Prestman*, 12 Wheat. 515, 6 L. Ed. 712, an engagement was made by a father "to guaranty to you the conduct of my son," and stating that "I shall hold myself liable, and do hold myself liable, for the faithful discharge of all his engagements to you." There a promise to indemnify was expressly stated. If claimants were demanding or expecting an assurance of indemnity against loss or damage through failure of the tract to cut as much lumber as represented, the natural course would have been to insist upon such express agreement. The cases cited by appellants' counsel in support of the right of one partner to sue another for breach of an express agreement contained in the articles of copartnership, or made as a condition precedent to the formation of the partnership, are not in conflict with the conclusion above reached that such promise to indemnify is not implied from the mere use of the term "warrant," under the circumstances existing here. Thus: In *Robinson v. Bullock*, 58 Ala. 618, the action was brought upon an express promise by a copartner to supply certain timber for manufacture. In *Owen v. Meroney*, 136 N. C. 475, 48 S. E. 821, 103 Am. St. Rep. 952, the action was for failure of an express agreement to furnish money and equipment to run a mill. In *Cook v. Canny*, 96 Mich. 398, 55 N. W. 987, it was held that a partner can maintain an action at law upon the agreement of his copartner, contained in the articles of partnership, to pay a certain sum for an interest in a patent which was to form the basis of their subsequent partnership relations and dealings. In *Grant v. Bryant*, 101 Mass. 567, by the partnership articles A. expressly "guarantees to B. the sum of \$10,000 towards such profits, notwithstanding losses to any extent." The \$10,000 so guaranteed was required to be paid, not by the partner so guaranteeing, but out of the partnership funds before division. In *Magilton v. Stevenson*, 173 Pa. 560, 34 Atl. 235, the partnership articles provided that one of the partners should in no event be put to a loss of more than a given amount, and contained an express promise that in case of a greater loss the balance should be made up to such partner by the other partners. In *Whitehill v. Schickle*, 43 Mo. 537, the defendant had expressly promised in terms to indemnify the plaintiff for any losses which

should occur in the business during a given period, and to pay him the amount of such losses. In the case here presented, had such express promise to indemnify been made a different case would be presented.

The claim has been twice stated, the second time with knowledge of the view of the court below that the term "represent and warrant" did not imply a promise to reimburse the claimants for damages on account of the failure of the tract to cut as much lumber as represented. The fact that the restated claim, as conspicuously as the original statement, fails to allege a promise (even by implication) to indemnify the claimants, suggests that the ground of alleged liability cannot be more definitely or more strongly stated, and that reliance is had by claimants only upon a supposedly necessary legal implication of a promise from the use of the language "represent and warrant." It cannot be so held.

The conclusion reached is that the claim does not state a cause of action. The order rejecting the claim is affirmed.

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In re DEXTER. In re NEW ENGLAND THREAD COMPANY. Ex parte BARDEN.

(Circuit Court of Appeals, First Circuit. December 20, 1907.)

No. 742 (Original).

1. BANKRUPTCY—DEBTS ENTITLED TO PRIORITY—WAGES OF "TRAVELING SALESMAN."

Claimant was employed by the bankrupt as a salesman under a contract which assigned him certain territory and cities throughout the country in which he obligated himself to take proper care of the trade. He was paid entirely by a commission on sales made, and established an office in Boston at his own expense. A circular was sent out by the bankrupt announcing his employment as its special representative in the United States, and directing that all orders be sent to his office. He exercised full discretion as to when and where he should travel and also received orders at his office. *Held*, that he was a traveling salesman within the meaning of Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], as amended Act June 15, 1906, c. 3333, 34 Stat. 267 [U. S. Comp. St. Supp. 1907, p. 1034], and entitled to priority thereunder for commissions earned within three months prior to the bankruptcy not exceeding \$300.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 536.

For other definitions, see Words and Phrases, vol. 8, pp. 7082, 7820.]

2. SAME—"WAGES."

Commissions paid to a traveling salesman for his services are "wages," within Bankr. Act July 1, 1898, c. 541, § 64b (4), 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], as amended Act June 15, 1906, c. 3333, 34 Stat. 267 [U. S. Comp. St. Supp. 1907, p. 1034].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 536.

For other definitions, see Words and Phrases, vol. 8, pp. 7369-7373, 7831.]

Petition for Revision of Proceedings of the District Court of the United States for the District of Massachusetts, in Bankruptcy.

Mendell W. Crane (Roscoe M. Dexter, on the brief), for petitioner.  
Hugh J. Carroll, for respondent.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

COLT, Circuit Judge. This petition for revision presents the single question whether the District Court erred in allowing priority in the sum of \$300 to the claimant, Thomas H. Barden, as a traveling salesman, employed by the bankrupt, the New England Thread Company. Among the debts entitled to priority under section 64b of the Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], as amended June 15, 1906, c. 3333, 34 Stat. 267 [U. S. Comp. St. Supp. 1907, p. 1034], are:

"(4) Wages due to workmen, clerks, traveling or city salesmen, or servants which have been earned within three months before the date of the commencement of proceedings, not to exceed three hundred dollars to each claimant."

The District Court held, first, that Barden's compensation was "wages" within the meaning of this provision; and, second, that he was a "traveling or city salesman" within the meaning of this provision.

The contract under which Barden was employed reads as follows:

"Articles of agreement, made and entered into on the 5th day of December, A. D. 1905, by and between the New England Thread Co., a corporation lawfully existing and doing business in the city of Pawtucket, county of Providence and state of Rhode Island, hereinafter known as the first party, and Thomas H. Barden of the town of Hyde Park, county of Norfolk and state of Massachusetts, hereinafter known as the second party. \* \* \*

"Witness: \* \* \* That the second party agrees that he will during the terms of this agreement diligently and faithfully serve the first party, in the capacity of salesman in its business of manufacturing threads, tapes and other materials, and will therein perform the reasonable directions of said first party without disclosing any of the secrets of his employment or of said business to any person whatsoever.

"And the second party furthermore covenants and agrees that he will devote all the time necessary to the proper care of the trade in the territory mentioned herein, and that during the term of this contract he will not engage in the sale or manufacture of threads or tapes or any other materials that the said first party may be making at the time, with any other concern.

"And the said first party covenants and agrees that in remuneration for said services, it will pay to the second party, a commission of 5 per centum on all sales made in the territory and to the class of trade mentioned below, said commission to be paid on the 20th of each month for shipments made during the previous month.

"Sales of second party to be confined to the dry goods, notion and tailor trimming trade, in the following territory: The states of Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, and cities of New York, N. Y., Syracuse, N. Y., Rochester, N. Y., Buffalo, N. Y., Cleveland, O., Nashville, Tenn., Brooklyn, N. Y., Cincinnati, O., Chicago, Ill., Indianapolis, Ind.; Pittsburg, Pa., Omaha, Neb., Kansas City, Mo., Denver, Col., Louisville, Ky., Memphis, Tenn., New Orleans, La., St. Joseph, Mo., Albany, N. Y., Allegheny, Pa., Camden, N. J., Dayton, O., Duluth, Minn., Elizabeth, N. J., Erie, Pa., Evansville, Ind., Grand Rapids, Mich., Harrisburg, Pa., Hoboken, N. J., Jersey City, N. J., Milwaukee, Wis., Minneapolis, Minn., Newark, N. J., Paterson, N. J., Peoria, Ill., Reading, Pa., Richmond, Va., Scranton, Pa., St. Paul, Minn., Toledo, O., Trenton, N. J., Troy, N. Y., Utica, N. Y., Washington, D. C., Wilmington, Del., Wilkesbarre, Pa.



"Also such other territory as may be decided upon later, verbally or in writing, by the parties hereto.

"This agreement to become effective January 1st, 1906, and to remain in force for a period of two years from that date and thereafter until terminated by three months written notice from either party to the other."

The additional facts, as found by the referee, may be summarized as follows:

Barden engaged an office at 77 Summer street, Boston, and gave to the business of the New England Thread Company his whole time. The company sent out a trade circular announcing the engagement of Barden as its special representative in the United States, and directing that all orders should be sent to his Boston office to receive prompt attention, and further setting forth that his experience was at the service of the trade, and would be used fully as much in the interests of the customers as of the company. Barden testified that he had no other income from any source; that he sent a weekly list of sales in his territory to the company; that he was supplied by the company with a price list, from which he made his sales; that he was also supplied with a card bearing his name as special representative in the United States of the New England Thread Company; that he had earned during the first year of the contract \$4,000, and expected to do very much better than this during the second year if the company could have filled its orders. It also appeared that the office was hired by Barden personally, and the rent and all other office expenses, such as stenographer, telephone, and office supplies, were paid by him personally; and that the company in no way advanced him money for expenses. It further appeared that Barden called at the factory of the company as often as once a month, and used full and unlimited discretion as to when he was to travel and what routes to follow, and that he was not under the direction of any one employed by the company. The itemized bill filed by Barden in connection with his proofs shows sales in widely different parts of the United States on the same day; and it follows from this, as the referee finds, "that many of these sales could not have been made by Barden personally, but must have been upon orders taken either by others or sent by mail to his office in accordance with the instructions in the trade circular."

We will first consider the question whether, upon the facts here presented, Barden can be fairly classed as coming within the category of traveling salesmen.

A traveling salesman, as commonly understood, may be defined as a man who travels about the country soliciting orders for goods, which orders are sent to his employer for approval. This is the primary service for which he is employed, and it measures the full extent of his responsibility. He is not employed or authorized to fix prices. He cannot pass upon the credit or standing of customers. He does not collect accounts. He is not responsible for the quality, condition, or delivery of the goods. He makes no personal contracts, and he has no other interest in the sales than his compensation for those which are approved by his employer. But, while the field of service and responsibility of traveling salesmen is limited, the agreements which they make with their employers vary greatly in such details as the

form of compensation, the extent of territory, and in many other particulars. A traveling salesman may be paid a fixed sum per day, week or month, or a yearly salary, or a commission on the amount of goods sold, or both a fixed sum in the form of wages or salary, and, in addition thereto, a commission on the amount of goods sold when the sales exceed a certain amount. The territory assigned to him may be confined to a single city or state, or it may cover many cities or states. Commonly, the employer pays the salesman's expenses, but sometimes, especially if he works for a commission, he pays his own expenses. Sometimes the employer has a list of customers, and the salesman receives a commission upon all orders sent in by those customers. Sometimes he is allotted a certain territory, and he receives a commission upon all sales which are sent in from that territory. In some cases the employer may direct the routes he is to travel, and in other cases the salesman chooses his own routes. Sometimes the salesman sends the orders directly to his employer, and sometimes the customers themselves send in the orders to the employer.

We do not think any of these details takes a man out of the category of traveling salesman, because, under all these different arrangements, the service and responsibility of the salesman are substantially limited to the obtaining of orders in a certain territory, and having them sent to his employer. Tested by this rule, we think that Barden was a traveling salesman. The contract shows that he was hired as a "salesman," that his service was confined to a certain territory, and that his responsibility began and ended with the obtaining of orders in that territory from a price list furnished by the company, and having them sent in to his employer. That some of these orders were not solicited by Barden personally, but must have been taken, as the referee finds, "either by others or sent by mail to his office in accordance with the instructions in the trade circular," is not a circumstance which is sufficient to take Barden out of the category of traveling salesman, since a traveling salesman is sometimes entitled to commissions upon all the orders which are sent in from his allotted territory. Nor do the other facts, that Barden had an office in Boston and paid the expenses incident thereto, that all orders were first sent to this office, and that in the trade circular sent out by his employer he was called "its specially authorized representative in the United States," change in any material way the real character of the service for which he was employed.

The remaining question is whether the word "wages" in any way limits the class of traveling salesmen who are included within this provision of the bankruptcy act. If this provision had been restricted to "workmen" and "servants," it might perhaps be urged that "wages" should be construed in its narrow and popular sense as meaning the payment of a fixed sum per day, week, or month for manual labor, or other labor of a menial or mechanical kind. But since this provision also includes "clerks" and "traveling or city salesmen," if we construe "wages" in this narrow sense we necessarily limit the operation of the statute to those clerks and traveling salesmen who happen to be paid for their services in a particular way; in other words, the question of preference is made to turn upon the mode of payment rather

than upon the kind of service rendered. The result would be that a clerk who was paid a fixed sum per day, week, or month, which during the year amounted to \$1,000, would be entitled to a preference, while a clerk who was paid this sum in the form of a yearly salary would be excluded; and, further, a traveling salesman who was paid a fixed sum of \$100 or \$500 a month would be entitled to a preference, while a traveling salesman who only earned from \$30 to \$40 per month in the form of commissions would be excluded. It is plain, therefore, that "wages" must be construed in its broader and more general sense as meaning compensation for services rendered, since to hold otherwise would lead to glaring inconsistencies and manifest injustice.

There is a general argument of some force which has been brought to our attention against any construction of this provision which would include the present claimant. This argument is that Congress intended by this provision to carry out the policy of the law of giving a preference to those who serve in a subordinate or menial capacity, and who are therefore presumed to be dependent upon their earnings for their present support; and, such being the intention of Congress, this provision should not be held to cover the case of a man who earns \$4,000 a year as commissions for selling goods. While this argument is plausible, it will not bear analysis. Had Congress intended to give a preference only to a subordinate class of clerks and traveling salesmen, it should have so framed the statute as to limit the preference to clerks and traveling salesmen who received a comparatively small compensation for their services, and should not have used language which applies equally to all classes of clerks and traveling salesmen, without regard to the amount of their remuneration.

The decree of the District Court allowing the preferred claim of Thomas H. Barden is affirmed, with costs for Thomas H. Barden, the respondent, in this court.

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#### UNITED STATES v. BERNAYS et al.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1908.)

No. 2,531 (suit 1,797).

1. CUSTOMS DUTIES—CLASSIFICATION—"PERSONAL EFFECTS OF PERSONS ARRIVING IN THE UNITED STATES."

Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 697, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], provides for "personal effects of persons arriving in the United States," with a proviso relating to "residents of the United States returning from abroad." *Held*, that the first provision is only for immigrants, and that the proviso concerns Americans only.

2. SAME.

Tariff Act July 24, 1897, c. 11, § 2, Free List, par. 697, 30 Stat. 202 [U. S. Comp. St. 1901, p. 1689], provides in its final clause for the exemption from duty of "one hundred dollars in value of articles purchased abroad by \* \* \* residents of the United States, \* \* \* upon their return." *Held*, that this privilege does not extend to articles which are not personal effects, such as the "wearing apparel, toilet articles," etc., specified in the preceding portion of the paragraph, and that pictures, chairs, tables, and other small trinkets brought in by an American resident are therefore not within the paragraph.

**3. STATUTES—CONSTRUCTION OF PROVISIO.**

A proviso should be construed with reference to the subject-matter of the sentence of which it forms a part, unless it clearly appears to be designed by the Legislature for a broader or more independent operation.

**4. APPEAL—ASSIGNMENTS OF ERROR—PLAIN ERROR NOT ASSIGNED.**

The insufficiency of an assignment of errors may be disregarded where the question not raised lies at the very threshold of a case, and is necessarily involved in the assignment of errors as filed; or, even if a plain error has been committed, it should be noticed, though not assigned.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

The case as presented on this appeal involved consideration of No. 11 of the rules of the United States Circuit Courts of Appeals, 150 Fed. xxvii, 79 C. C. A. xxvii, the pertinent part of which reads as follows:

"11. Assignment of Errors. The \* \* \* appellant shall file \* \* \* an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. \* \* \* Errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

Truman P. Young (Henry W. Blodgett, U. S. Atty., and Edward P. Johnson, on the brief), Asst. U. S. Atty.

Joseph H. Zumbalen (Clinton Rowell, on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. A. C. Bernays, the intestate, prior to his death and while a resident of the United States, brought in from Yokohama when returning from a foreign tour certain articles of merchandise consisting of pictures, chairs, tables, and some other small trinkets, none of which are embraced within the terms "wearing apparel, articles of personal adornment, toilet articles, and similar personal effects." The surveyor of customs at the port of St. Louis, where entry was made, denied free entry because the merchandise was not brought in on the same ship with the importer, and because no claim of exemption was made at or before the time of entry. Protest against the denial of the claim followed in due time. This protest was heard by the Board of General Appraisers, and resulted in an order sustaining the ruling of the surveyor. In an appropriate proceeding instituted in the court below to secure a review of the order of the Board of General Appraisers, the Circuit Court reversed its decision, and directed the surveyor of customs to reliquidate the entry, and admit the merchandise free of duty. From that judgment an appeal was duly prosecuted to this court.

Whether the imported articles should have actually accompanied the importer upon the same ship upon which he returned to this country or whether the claim of exemption should have been made at or prior to the date of entry of the merchandise are questions which do not necessarily concern us. In the view we take of the underlying question, whether under the provisions of paragraph 697 of section 2 of the tariff act of 1897 (30 Stat. 194, 202 [U. S. Comp. St. 1901, p. 1689]), any merchandise as distinguished from wearing

apparel and personal effects is exempt from duty, these incidental questions become immaterial. Objection is made to our consideration of this fundamental question because of an insufficient assignment of error, but as it lies at the threshold of the case its consideration, in our opinion, is necessarily involved in the assignment of errors as filed, and even if it were not it seems that a plain error has been committed which under our rules we may and ought to notice.

The section and paragraph in question reads as follows:

"Sec. 2. That on and after the passage of this act unless otherwise specially provided for in this act, the following articles when imported shall be exempt from duty \* \* \* Paragraph 697. Wearing apparel, articles of personal adornment, toilet articles and similar personal effects of persons arriving in the United States; but this exemption shall only include such articles as actually accompany and are in the use of and as are necessary and appropriate for the wear and use of such persons, for the immediate purposes of the journey and present comfort and convenience, and shall not be held to apply to merchandise or articles intended for other persons or for sale: Provided, that in case of residents of the United States returning from abroad all wearing apparel and other personal effects taken by them out of the United States to foreign countries shall be admitted free of duty without regard to their value upon their identity being established under appropriate rules and regulations to be prescribed by the Secretary of the Treasury, but no more than one hundred dollars in value of articles purchased abroad by such residents of the United States shall be admitted free of duty upon their return."

Various views have been entertained of the meaning of this paragraph by the Board of General Appraisers, the Secretary of the Treasury, and the Attorney General. Some have expressed the view that the articles purchased abroad by residents of the United States and brought with them to this country when returning must consist exclusively of wearing apparel, articles of personal adornment, toilet articles and similar personal effects, in order to be entitled to free entry. G. A. 5,114 (T. D. 23,636), and T. D. 23,891. Others have held that any articles purchased abroad, whether personal effects like those just mentioned or any other kind of merchandise are exempt from duty when brought in by a returning traveler resident of this country to the extent of \$100 in value. Opinions of Attorneys General, vol. 25, p. 93.

The District Court of the Northern District of California in *United States v. Harts*, 131 Fed. 886, 889, held in effect that a returning resident's right to exemption from duty is limited to his personal effects. The Circuit Court of Appeals of the Second Circuit in *United States v. One Pearl Necklace*, 111 Fed. 164, 171, 49 C. C. A. 287, 56 L. R. A. 130, construed paragraph 697 as exempting articles from duty according to the citizenship of the persons bringing them into the country. The case holds that foreigners when coming into our ports may bring with them, duty free, all necessary and appropriate wearing apparel, articles of personal adornment, toilet articles, and similar personal effects, but restricts the right of our own citizens when returning home to bring back free of duty whatever of wearing apparel, etc., they carried out of the country when they left it, and in addition thereto articles purchased abroad not exceeding the value of \$100; but that court apparently expresses no opinion as to what kind of articles so purchased abroad can be brought in free of

duty. These varying views suggest some difficulty in the question, but afford us no controlling authority or any very definite guide. We must therefore approach the question anew and try to reach its true solution.

We notice at the outset that the only subject of consideration in the paragraph in question (certainly until we reach the last three lines) is wearing apparel and personal effects, such as ordinarily constitute the baggage of a passenger. A studied effort seems to be manifest to limit the paragraph to that subject, not only by repetition of the thought in one way or another, but by words directly excluding merchandise from its contemplation. How far and on what conditions the particular articles specified as "wearing apparel, articles of personal adornment, toilet articles, and similar personal effects," when imported into the United States, should be exempt from duty seems to have been the only subject of consideration. The first part of the paragraph lays down a general rule permitting all persons coming into this country from abroad to bring with them, free of duty, all necessary and appropriate wearing apparel, etc., without any limitation as to value. As frequently appears in legislative acts, an exception was deemed necessary, and a proviso was added to the effect that residents of the United States returning from abroad might bring in free of duty all the wearing apparel and personal effects (still dealing with the general subject under consideration) which they took out of the country when they went abroad, and then follows the clause now particularly under consideration: "But no more than one hundred dollars in value of articles purchased abroad by such residents of the United States shall be admitted free of duty upon their return." There seems to be manifest in this legislation a disposition to encourage a class of desirable immigrants by permitting them to bring into the country free of duty any quantity of wearing apparel and personal effects necessary and appropriate for their journey and for their immediate comfort and convenience; and we agree with the Circuit Court of Appeals of the Second Circuit in *United States v. One Pearl Necklace*, *supra*, that in view of the proviso the first portion of the paragraph makes provision for immigrants only, and that the latter portion contained in the proviso concerns our own residents exclusively. But whether the paragraph be for the benefit of one or the other of these classes we think its subject-matter—that which engaged the legislative attention—was wearing apparel and personal effects, and certainly not merchandise. The words "articles purchased" found in the proviso have immediate and natural relation to the subject of the legislation upon which the attention of Congress was centered, and should, in our opinion, be limited to it. *United States v. Scruggs*, V. & B. Dry Goods Co. (C. C. A.) 156 Fed. 940. This conclusion is in harmony with the general rule that a proviso should be construed with reference to the subject-matter of the sentence of which it forms a part unless it clearly appears to be designed by the Legislature for a broader or more independent operation. *Suth. Stat. Constr.* § 223; *Savings Bank v. United States*, 19 Wall. 227, 236, 22 L. Ed. 80; *Boston Safe Deposit & Trust Co. v. Hudson*, 68 Fed. 758, 15 C. C. A. 651. It

cannot be that Congress intended the proviso in question as an independent grant of a privilege to returning residents to bring in free from duty any kind of merchandise they might purchase abroad. Such an interpretation of the tariff act seems entirely inadmissible.

Unless the words "articles purchased abroad" are limited to the subject-matter of the particular paragraph in which they appear, confusion and repugnancy would characterize the whole act. Many if not all kinds of merchandise are in some paragraph made subject to a specific duty. Accordingly, unless the limitation just suggested is right, the paragraph under consideration would authorize a returning resident to bring in, duty free, any kind of merchandise which he might purchase abroad of the limited value of \$100 while another paragraph might impose a specific duty upon the same merchandise. Such repugnancy should be avoided if any other reasonable construction can be found. *Savings Bank v. United States*, supra. We think, as already indicated, that the true interpretation of the paragraph in question limits the articles, which may be brought into this country free of duty by residents returning from abroad, to all the wearing apparel and other personal effects originally taken by them out of the United States without regard to their value, and to other articles of wearing apparel, and similar personal effects which may have been purchased abroad by them not exceeding in value the sum of \$100. The articles brought in by the importer in this case did not fall within either of the classes just mentioned. As a result they were not entitled to free entry. The judgment of the Circuit Court is reversed, with directions to affirm the judgment of the Board of General Appraisers, and to take such other action as the case requires not inconsistent with this opinion.

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#### O'LEARY v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. December 17, 1907.)

No. 727.

**1. WITNESSES—DISQUALIFICATION BY PERJURY—CONSTRUCTION OF STATUTE.**

Under Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653], which, after defining the crime of perjury and prescribing the punishment therefor, provides that the person committing the offense "shall moreover thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed," the incapacity attaches only to persons who have been convicted under that section.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 108-114.]

**2. CRIMINAL LAW—REVIEW ON APPEAL—RULINGS ON ADMISSION OF EVIDENCE.**

The action of a trial court in admitting testimony over objections will not ordinarily be reviewed by an appellate court, where neither the purpose of the testimony nor the ground of the objections is shown by the record.

**3. CRIMINAL LAW—INSTRUCTIONS—APPLICABILITY TO ISSUES.**

On a trial for perjury, the refusal of the court to state in its charge the rule requiring two witnesses, or one witness and corroborating circumstances, to establish the material facts charged, was not error, where

the only facts averred, not established beyond controversy, related to the question of intent; the only real issue being as to whether defendant testified knowingly and intentionally or through mistake, to which issue the rule could not apply.

In Error to the District Court of the United States for the District of Massachusetts.

Harvey H. Pratt (James E. Cotter and Joseph P. Fagan, on the brief), for plaintiff in error.

William H. Lewis, Asst. U. S. Atty. (Asa P. French, U. S. Atty., on the brief), for the United States.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. The plaintiff in error was indicted for perjury under section 5392 of the Revised Statutes [U. S. Comp. St. 1901, p. 3653]. This is the general provision of the statutes of the United States with reference to prosecutions for perjury. In this particular case the perjury was in connection with the naturalization of one Holmes. By the record of the court where Holmes was naturalized, it appears that the proceedings, including O'Leary's affidavit, were on the 11th day of January, 1904. The indictment alleges that O'Leary made oath that he had known Holmes for over five years next preceding the 11th day of January, "during which time," as it further alleges O'Leary also made oath, "he, the said Holmes, had resided in Boston, in said district." It continues further:

"Whereas, in truth and in fact he, the said O'Leary, had not known the said Holmes for said five years, and said Holmes had not resided in Boston during said time, all of which he, the said O'Leary, at the time he so deposed, swore, declared, and testified as aforesaid, then and there well knew."

It appeared by the testimony of Holmes and his wife that they arrived together in the United States on the steamship Altonia on April 15, 1900; and they also both testified that they went to a friend of Holmes, Margaret Brown, at 107 Union Park street, Boston. The records of the immigrant inspector which were put in the case conform to that statement, even to the extent that the name and residence of the person whom Holmes and his wife were to join were given as "one Margaret Brown, Union Park street, Boston." Therefore there can be no question that Holmes and his wife were not in the country until 1900. O'Leary testified in his own behalf, and undertook to give the details of the beginning of his acquaintance with Holmes. He made no assumption that he knew Holmes before Holmes arrived in the United States; but he gave the place and time where and when he first met him as Roxbury in 1898 or 1899.

The first question arises from the claim that, if O'Leary resided at Boston at any time during the five years to which the indictment relates, then the portion of the indictment which alleges that he had not resided in Boston during said time was disproved. It is true that the specific words which should have been used were more properly "during the whole of said time," or "for said time"; the latter being the form usually found in indictments of this character. However, the allegations that O'Leary testified that he had known Holmes for five



years preceding the 11th day of January, 1904, and that he had not known him for said five years, were material, and, inasmuch as the jury returned a general verdict, they certainly found enough to sustain the judgment; so that, whatever might have been the result if there had been anything in the nature of a special demurrer or a motion to strike out, no error can be assigned on this account on this record.

On the same day on which O'Leary was tried, Holmes had pleaded guilty to an indictment based, as we understand, on section 5425 of the Revised Statutes [U. S. Comp. St. 1901, p. 3669]. He was thereupon offered as a witness by the United States, but O'Leary seasonably objected to his giving any testimony on the ground that, being guilty of perjury, he was disqualified by the closing words of section 5392 of the Revised Statutes, which, after directing the punishment to be imposed on one convicted thereunder, adds that he "shall moreover thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed." No reasonable construction of this statute according to the usual rules of interpretation would result in holding that this incapacity attached to any one who had not been found guilty of the offense under section 5392 in accordance with the forms of the law. That such incapacity could be set up in connection with merely proof of the facts required to convict under that section would be contrary to the universal practice under the circumstances contemplated by that and analogous statutes. Moreover, the word "thereafter," which the plaintiff in error failed to bring to our attention, makes it entirely plain that a conviction must precede the incapacity.

It appears that a series of questions of which the following was one, and all of which were of the same general character, were proposed on the cross-examination of O'Leary, namely: "Q. Are you on any other naturalization paper?" His counsel objected to this question, without assigning any reasons therefor. This objection was overruled, and the witness answered, "Yes"; and the examination went on, subject to like objections, the witness stating that he had been on 10 or 15 such papers. The record does not explain why this testimony was sought for by the United States, nor the grounds of the objections. Various reasons for calling out the testimony and for objecting to it may be surmised; but, unless an appellate tribunal can read from the record the pros and cons beyond mere surmise, it is well settled that justice alike to the court below and the party appealed against does not permit it to go into speculations in reference thereto. This rule has been so often stated by us that we feel no hesitation in applying it to this case, and in holding that these general objections do not require any attention from us.

The closing alleged error is based on a request for instructions as follows:

"It is not enough to convict the defendant if the jury believe the testimony of the witness Holmes to be true. The government must present another witness to the material facts stated by the witness Holmes in the case at bar, or strong corroborative circumstances."

The rule on this topic is sufficiently stated in section 257 of Greenleaf's Evidence and the notes thereto. It does not apply to all the facts

alleged in an indictment. *Commonwealth v. Pollard*, 12 Metc. (Mass.) 225, 228; 2 *Bishop's New Criminal Procedure*, p. 423. In this particular case it could not have been needed in connection with the length of time that Holmes had been in the United States, because that was proven alike by Holmes and his wife, supported by indubitable evidence from the records of the immigrant inspector; nor as to the length of time during which O'Leary, the plaintiff in error, had known Holmes, because he testified himself, as we have shown, that his acquaintance commenced in the United States, so it could not have gone back of April, 1900. It is difficult to comprehend to what particular facts of this case the rule relied on could apply. It seems beyond question that what was testified by O'Leary at the time Holmes was naturalized was not in accordance with the facts; so that the real issue was apparently only one of intent or forgetfulness on the part of O'Leary, and not in any sense as to anything to which corroborative proofs would relate. If this point is to be relied on, this difficulty should have been cleared up both to the trial court and to us. All the matters to which the rule of corroboration could apply were, so far as we can see, beyond question, as we have pointed out.

We believe this covers all the points brought to our attention.

The judgment of the District Court is affirmed.

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ROGERS et al. v. PETRIFIED BONE MINING CO. et al.

(Circuit Court of Appeals, Third Circuit. February 6, 1908.)

No. 4.

1. WRIT OF ERROR—REVIEW—PRESUMPTIONS—VERDICT.

Where, in an action to recover \$4,708.42 as the unpaid balance of the price of certain phosphate, defendants claimed a breach of warranty, and, though admitting that they had received the full market price for the phosphate from their vendees, claimed that they had been enabled to do so only by surrendering a claim against such vendees for \$5,747, and the jury found for plaintiffs for \$4,154.73, it would be assumed that the jury found that defendants had surrendered no valuable claim against their vendees, but that they had realized within \$600 of the market price.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 3755-3761.]

2. SAME—ADMISSION OF EVIDENCE—PREJUDICE.

Where, in an action for the unpaid part of the price of certain phosphate, defendants pleaded breach of an express warranty of quality, defendants were not prejudiced by the allowance of evidence that the phosphate was not sold by them to their vendees, but was taken by the latter pursuant to the terms of a settlement, the terms of which the answer did not disclose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4153-4160.]

3. WITNESSES—CROSS-EXAMINATION—SCOPE.

Where, in an action for the price of phosphate, defendants claimed a breach of warranty of quality, and a witness testified in chief that the cargo was of "no value," it was proper to show on cross-examination that purchasers from defendants accepted the cargo, and that it was regarded as having value in a settlement between them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 931-948.]

**4. SALES—DAMAGES—EVIDENCE—SETTLEMENT.**

Where, after the sailing of a vessel with a cargo of phosphate sold by plaintiffs to defendants, it was discovered that the phosphate did not comply with a warranty of quality, but defendants induced their vendees to accept the same, and made a settlement with them therefor, evidence of the settlement was admissible to show the extent of defendants' damage by the breach of warranty.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1271-1274.]

**5. WRIT OF ERROR—SCOPE OF REVIEW—FEDERAL COURTS—DENIAL OF NEW TRIAL.**

Refusal to grant a new trial is not assignable for error in federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 3864.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 150 Fed. 445.

John Houston Merrill and John Scott, Jr., for plaintiffs in error.

James Collins Jones, for defendants in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Petrified Bone Mining Company and two other companies (hereafter styled plaintiffs) jointly brought suit against George H. Rogers and others, doing business as Rogers, Holloway & Co., plaintiffs in error (hereafter styled defendants) to recover \$4,708.42, being the unpaid balance on contracts for the sale of phosphate by said companies to said Rogers, Holloway & Co. The phosphate in question was delivered to the latter at Pensacola, Fla.; they paid for it in part, and shipped it by the steamships Euterpe and Aristea to Venice. On analysis, but after she sailed, the cargo of the Euterpe was found to be below the contract warranty. Rogers, Holloway & Co. had sold both cargoes to Marinoni & Co., dealers at Venice, who, as testified by Francisco Marinoni, accepted the entire cargo, and paid for it in part. They refused to pay the balance, alleging the phosphate was below the guarantee of the defendants to them. A written settlement, dated February 3, 1903, was made between Rogers, Holloway & Co. and Marinoni & Co., by which the latter settled for the cargoes of both vessels. In the present suit the defendants not only contested plaintiffs' balance of \$4,708.42 sued for but claimed to recover, by reason of damages sustained by breach of warranty, a certified balance of \$12,756.09. This balance, as appears from defendants' special plea, which counsel during the trial stated they would stand on, was reached on the basis stated therein, "that the fair market value of the entire shipment, if in accordance with the contract, would have been twenty-five thousand five hundred and twelve and  $\frac{17}{100}$  dollars (\$25,512.17), whereas, in point of fact, the value of the phosphate actually shipped by the plaintiffs by the steamship Euterpe, and being the subject-matter of this suit, was not in excess of the amount of twelve thousand seven hundred and fifty-six and  $\frac{8}{100}$  dollars, and \* \* \* the defendants have on this account suffered loss and damage to the amount of twelve thousand seven hundred and fifty-six and  $\frac{8}{100}$  dollars (\$12,756.08),

being the difference between the fair market value of the phosphate rock agreed to be furnished by the plaintiffs under the contract in suit." On the trial it appeared that about the time of these transactions there was a considerable fall in the price of phosphate, and it was contended by plaintiffs that defendants had received the full market price of phosphate of the warranted quality when the settlement in question was made. The contention of the parties was thus stated by the court:

"There is other evidence here that, as a matter of fact, this rock was sold by the defendants for eight pence per unit in the market of Venice at that time. The defendants say: 'That is true, but the reason why it was sold at eight pence per unit of phosphate was because we had to give up some other valuable thing, some other valuable claim we had against Marinoni, who paid that amount to us; and, as a matter of fact, that was not the measure of the market value of that inferior rock, because while he was apparently paying us eight pence per unit he was getting from us a very valuable concession, which really was worth to us \$5,747—a claim we had against him; and that was the reason why he agreed to pay us eight pence per unit for this inferior article that we claim was actually worth nothing.'"

Not only was no objection or exception taken to the submission to the jury of the bona fides of this settlement, but such submission was requested by Rogers, Holloway & Co. in their point which the court affirmed, viz.:

"If the jury find that the settlement made by the defendants with their buyer in Venice was made in good faith, was necessary under the circumstances, and that the actual result of it was to minimize the loss and damage suffered by the defendants by reason of plaintiffs' breach of warranty, the defendants are entitled to set off against plaintiffs' claim the amount of loss actually suffered by defendants in such settlement."

The verdict being in favor of the plaintiffs for \$4,154.73, it must be assumed the jury found that defendants surrendered no valid claim against Marinoni & Co. in the settlement, and that in such settlement they realized within \$600 of the market price, by which sum the verdict reduced the plaintiffs' contract balance of \$4,708.42. The first assignment is:

"Because the learned judge erred in admitting the evidence responsive to the following question of counsel for plaintiff and in overruling the objection of counsel for defendant thereto: Q. Your firm, as a matter of fact, did sell the phosphate rock that was shipped to Venice on the steamship Euterpe to Marinoni & Company, did they not? I mean the shipment which we are now discussing. Mr. Scott: I object to that on the ground that where an article has been sold on an express warranty, and there has been, as has been proved here, a breach of that warranty, that evidence is inadmissible to show what we did with the article afterwards. I object to it unless it is limited to the date of November, 1902. (Objection overruled, exception noted for defendant by direction of the court.)"

By it the defendants now seek to convict the court below of error in not excluding all evidence of this settlement. But in point of fact the assignment does not raise the question sought to be raised in brief and argument. The answer of the witness Rogers to the question complained of merely was that the cargo was finally taken by Marinoni, "but was not sold; we made a settlement with them." Such answer did not disclose the terms of the settlement and did the defendants no harm. In point of fact, the invoice, which did embody the settlement,

had been already ruled out by the court, and when it was offered later by the plaintiffs there was no objection or exception by the defendants to its admission. Moreover, the question was clearly proper on cross-examination. The witness had in chief made the broad statement that the cargo was of "no value whatever," which answer it was manifestly proper to contradict or qualify on cross-examination by the fact that the cargo had proven to be of value in the settlement. But it was also admissible on other grounds. The cargo was accepted by Marini & Co. and it was not in the power of defendants thereafter to sell it; they alleged, moreover, there was no market or market value for it, and the loss they incurred in this settlement was one way of showing the damage sustained. In view of the pleadings, the position assumed by counsel during the trial, and the fact the defendants could not sell the cargo by reason of its acceptance by Marini & Co., we are clear no error was committed in admitting proof of the settlement. Its admission was necessary to an adjustment of the respective rights of the parties. The complaint of the defendant is in reality against the verdict of the jury, and this, by the second assignment, it seeks to set aside. But the authorities—*Pomeroy v. Bank of Indiana*, 68 U. S. 592, 17 L. Ed. 638; *Railway Company v. Heck*, 102 U. S. 120, 26 L. Ed. 58; *South Penn Oil Company v. Latshaw*, 111 Fed. 598, 49 C. C. A. 478—are too overwhelmingly against it to justify a discussion of the principle that refusal to grant a new trial cannot be assigned for error. Accordingly, the judgment of the court below is affirmed.

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FARBENFABRIKEN OF ELBERFELD CO. v. BERINGER.

(Circuit Court of Appeals, Third Circuit. January 29, 1908.)

No. 43.

1. LIBEL AND SLANDER—CONSTRUCTION OF PUBLICATION—WHEN QUESTION FOR THE COURT.

In an action for libel, where the designating or descriptive words in the alleged libelous publication are not equivocal, and there is no evidence from which it could be reasonably inferred that they were actually intended or understood to apply to plaintiff, the question is one of law, and the court may properly instruct the jury that they did not apply to plaintiff.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, § 360.]

2. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.

In an action for libel, the good faith of the defendant is immaterial, except as it may affect the question of damages recoverable, and where the jury has found that there was no libel, the exclusion of evidence offered by plaintiff to show want of good faith was not prejudicial even if error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4190.]

3. LIBEL AND SLANDER—ACTION BY CORPORATION—DAMAGES.

In an action by a corporation for either slander or libel, the question of the right to recover compensatory damages depends upon whether or not plaintiff has suffered damage to its business.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 32, Libel and Slander, §§ 343-345.]

## 4. SAME—EVIDENCE—JUSTIFICATION.

Evidence may properly be received in an action for libel in support of a plea of justification, although it goes to only a part of the alleged libelous matter where the parts are severable.

In Error to the Circuit Court of the United States for the District of New Jersey.

Robert H. McCarter, for plaintiff in error.

Thomas B. Hall and Gilbert Collins, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. In the Circuit Court for the District of New Jersey, the plaintiff in error (a corporation) brought an action against the defendant in error to recover damages for defamation, and in conformity with the unquestioned practice in the courts of the state of New Jersey, a count for slander and a count for libel were united in the declaration. The count for slander alleged the oral publication of certain words averred to be defamatory, and the charge of libel was based upon the subsequent printed publication of the address in which, as alleged, those words had been spoken. After a demurrer to the count for libel had been overruled, and the pleading which ensued had terminated in a joinder of issue upon both counts, the cause was tried before a jury, a verdict of "not guilty of either libel or slander" was rendered, and judgment was entered for the defendant. Thereupon a writ of error was sued out, and the case thus brought to this court will now be decided upon the points submitted in the brief of the plaintiff in error, without referring in detail to the 35 specifications, or pausing to consider the objections which have been urged against some of them.

1. The court below did not exclude portions of the article which was averred to be defamatory from the consideration of the jury. On the contrary, the jurors were told that they should read the whole of it, and the instruction that certain parts clearly did not refer to the plaintiff, and therefore could not be either slanderous or libelous of and concerning it, was correct both in fact and in law. An innuendo cannot alter the plain meaning of common words not shown to have been used or apprehended in a peculiar sense, and as in this instance the designating or descriptive words ruled upon by the learned judge were not equivocal, and there was no evidence from which it could have been reasonably inferred that they were actually intended or understood to apply to the plaintiff, the only question was one of law, and, as we have said, that question was rightfully and properly decided by the court.

2. The objection to the admission of evidence of the significance which the defendant ascribed or meant to ascribe to the term "blood tax" need not be critically examined. It is enough to say of it that the record makes it manifest that even if that evidence might properly have been excluded, yet no substantial wrong was done or injury to the plaintiff occasioned by its admission. The connection in which these words were used shows plainly that they were directed against certain statutory enactments rather than against the plaintiff, who, indeed, was charged with nothing more culpable in this connection than keeping within the letter of the law.

3. The rejection of the offer said by counsel for plaintiff in error to have been made "upon the theory that it tended to indicate the absence of good faith on the part of the defendant in uttering the slander" is now unimportant. Good faith is not a material element in a case such as this, unless, perhaps, as it may affect the measure or quantum of damages, and as the jury found that there had been neither slander nor libel, the subject of damages was not reached.

4. The doctrine at one time prevalent, that a corporation may neither recover nor be made liable for a tort, has long been exploded, and it is now settled that such a body may be injured by defamation, and therefore can maintain an action for either slander or libel. But the hurt which a wrong affecting reputation may do to a corporation is not co-extensive with that which it may inflict upon a natural person, and the legitimate constituents of compensatory damages are not necessarily the same in the one case as in the other. The words complained of by the corporation plaintiff in this instance were not slanderous in the legal sense, unless they manifestly tended to prejudice it in its business, and this for the reason, which the familiar definition of slander supplies, that they did not impute either crime or disease, and their utterance was not shown to have caused any special damage. The specific wrong of libel is of greater scope, inasmuch as any written statement tending to incite to hatred, contempt, or ridicule may constitute it; but as a corporation, from its nature, is incapable of being damaged by written any more than by spoken calumny, otherwise than in or through its business, the practical question under both counts was whether the complaining corporation in the present case had been so damaged, and, as that question was fairly submitted to the jury, the fourth point of the plaintiff in error is without substantial merit.

5. The court below did not err in receiving evidence in justification, because, as is contended, the pleas of justification went only to a part of the matter counted upon as defamatory. It is rightly conceded by the learned counsel who make this point that "the question in any given case is whether the parts are severable," and that question, when raised upon the trial of this case, was, in our opinion, correctly disposed of by the learned judge, who, in deciding it, said:

"I think a plea of justification may justify as to some of the language alleged to have been used, providing it is separable from the language not justified, and I think it is in this case. I think the plea of justification may stand as to the language to which it applies."

The judgment of the Circuit Court is affirmed.

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HEROLD, Internal Revenue Collector, v. BLAIR.

(Circuit Court of Appeals, Third Circuit. January 28, 1908.)

No. 48.

INTERNAL REVENUE—LEGACY TAXES—CONSTRUCTION OF STATUTE.

A testator, his son and others entered into a partnership in 1890, the partnership agreement providing *inter alia* that, in consideration of a sum paid the testator by his son and other considerations moving from the other parties, in case of the testator's death during the existence of the

partnership, it should not thereby be dissolved, but his interest therein should pass to and become vested in his son, and should remain in the business, his son taking his place. Testator died in 1899, during the partnership term, leaving a will, by which he made the son his residuary legatee. *Held*, that his interest in the partnership property passed to the son by contract based on a sufficient consideration, and not by the will, and became vested in the son on the making of the contract subject to defeasance only in case testator lived beyond the partnership term, and that the property was not taxable under the war revenue act of June 13, 1898, c. 448, § 29, 30 Stat. 464 [U. S. Comp. St. 1901, p. 2307], as property "transferred by deed, grant, bargain, sale, or gift made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer," the purpose of which provision was to prevent the evasion of the tax imposed on legacies and distributive shares, which purpose could not be imputed to a contract made so long before its enactment.

In Error to the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 150 Fed. 199.

Harrison P. Lindabury, for plaintiff in error.

James Byrne, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. The defendant in error was the plaintiff in an action brought to recover a sum of money paid by him as executor, as and for a tax levied (as claimed by the defendant) under section 29 of the act of June 13, 1898, c. 448, 30 Stat. 464, entitled "An act to provide ways and means to meet war expenditures, and for other purposes." U. S. Comp. St. 1901, p. 2307. That section is in part as follows:

"Sec. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be: \* \* \*

The tax in question was assessed upon the interest of De Witt Clinton Blair in a certain copartnership which had been created by articles dated April 18, 1890, between John I. Blair, DeWitt Clinton Blair, James A. Blair, Oliver C. Ewart, and Clinton L. Blair; and the material clauses of those articles are:

"(8) It is hereby mutually agreed that in consideration of the mutual stipulations of these articles and for the further considerations of one hundred dollars (\$100) paid by DeWitt C. Blair (the receipt whereof is hereby acknowledged by said John I. Blair), and the love and affection borne by the said John I. Blair to his son, the said DeWitt C. Blair, and for divers other good and valuable considerations received by the said John I. Blair from the other parties to this agreement, that upon the death of the said John I. Blair, should the same happen during the period herein or hereafter agreed for the con-



tinuance of said copartnership, all of the rights, title, share, equities and demands whatsoever, then theretofore owned and remaining, or then held, or claimed by the said John I. Blair in the said capital, or any increase or profits thereon, or of, in or to any of these assets or rights of said firm, shall, upon such death, become transferred to, vested in, and owned by the said De Witt C. Blair, absolutely, as his property.

"(9) In consideration of the premises, it is further agreed by all the parties hereto that, upon the happening of the contingency provided for in article 8 above, the said share, rights and property so accruing to the said DeWitt C. Blair from the said John I. Blair, at the latter's death, shall continue and be retained in the said copartnership business during the term or terms of its continuance herein or hereafter agreed upon between the said parties. And the said DeWitt C. Blair shall succeed to all of the benefits, rights and relations under such accruing right, title and share in the same manner as said John I. Blair would have been entitled to if living; said DeWitt C. Blair taking the place of his said father."

In pursuance of stipulation filed, the case was tried by the court without a jury, and the learned judge, in an opinion to which but little, if anything, need be added, reached the conclusion that the plaintiff below was not taxable as had been supposed, and accordingly entered the judgment in his favor, which this court is asked to reverse. *Blair v. Herold* (C. C.) 150 Fed. 199.

It is well settled that a taxing statute should be liberally interpreted on behalf of those alleged to be subject to the burden it imposes; and it is a familiar rule of general applicability "that a thing may be within the letter of the statute and yet not within the statute, because not within the intention of its makers." With these principles in mind, it may be conceded that the argument for the plaintiff in error, predicated upon the letter of the act and a literal reading of the partnership agreement, is not without force, although we are constrained to reject it because, in our opinion, it would be unreasonable to believe that Congress intended to include in the section under examination such a transaction as this case presents. *Holy Trinity Church v. United States*, 143 U. S. 459, 12 Sup. Ct. 511, 36 L. Ed. 226. The primary purpose was to tax "legacies and distributive shares." The heading thus describes what is taxed; and, whilst not conclusive, that description is proper to be considered. *Knowlton v. Moore*, 178 U. S. 41-65, 20 Sup. Ct. 747, 44 L. Ed. 969. It indicates—what we think would be apparent without it—that the maxim "*noscitur a sociis*" is applicable to the provision for transfers "by deed, grant, bargain, sale, or gift," and that the real object of that provision was the prevention of evasion of the tax imposed on legacies or distributive shares, by putting "a like burden on gifts which may have been made in contemplation of death, and otherwise than by last will and testament." *Knowlton v. Moore*, 178 U. S. 65, 66, 20 Sup. Ct. 757, 44 L. Ed. 969.

It cannot be supposed that this partnership agreement was designed to circumvent a statute enacted several years after it was made. It was entered into in good faith, and the rights of the plaintiff then accrued. As was said by the learned District Judge, "they were absolute and irrevocable so far as the parties were concerned, and were contingent only upon the happening of an event which did happen." They were acquired by contract, and not by gift made by last will and testament, or otherwise.

The judgment of the Circuit Court is affirmed.

## BOCKMANN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 130 (4,215).

## CUSTOMS DUTIES—CLASSIFICATION—HAUTEVILLE STONE—"LIMESTONE"—"MARBLE."

In Tariff Act July 24, 1897, c. 11, § 1, Schedule B, par. 114, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635], the term "marble" is used according to its more precise definition as a limestone having a granular and crystalline structure, rather than in its broader sense of being a limestone susceptible of a high polish. Therefore, Hauteville stone, which, though an ornamental, polishable high-grade limestone, is not crystalline, is not dutiable under said provision, but under paragraph 117, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636], as "limestone."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4366.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal from a decision affirming a decision of the Board of General Appraisers—G. A. 6,298 (T. D. 27,157)—which affirmed the action of the collector.

For decision below, see 154 Fed. 1000.

Comstock & Washburn (J. Stuart Tompkins, of counsel), for the importer.

D. Frank Lloyd, Asst. U. S. Atty.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

NOYES, Circuit Judge. The merchandise in question is what is generally called "Hauteville stone." It is a limestone, and takes its name from the district in France where it is quarried. It is extensively used for building purposes abroad and, to a limited extent, for such purposes in this country. The tariff precludes its extensive use for building purposes here. The present importation is in the form of undressed blocks.

The importer claims that the merchandise is undressed limestone, and comes within paragraph 117 of the tariff act of 1897, c. 11, § 1, Schedule B, 30 Stat. 159 [U. S. Comp. St. 1901, p. 1636]:

"Freestone, granite, sandstone, limestone, and other building or monumental stone, except marble and onyx, unmanufactured or undressed, not specially provided for in this act, twelve cents per cubic foot."

The government, on the other hand, claims that the merchandise is marble in blocks, and thus within the exception in the paragraph quoted and subject to duty under paragraph 114 of said act:

"Marble in block, rough or squared only, sixty-five cents per cubic foot."

The only question in the case, therefore, is whether Hauteville stone is marble or limestone within the meaning of these paragraphs. The stone is limestone, and falls within the limestone paragraph, unless shown to be that species of limestone called marble. The term "marble" is sometimes broadly used to describe any limestone susceptible

of a high polish. There is some testimony of such commercial usage of the term. But as used in the tariff act wherein articles are classified with some exactness, we think a more precise definition should be adopted. The best authorities define marble as a limestone having a granular and crystalline structure. It is crystalline limestone. Now, according to the weight of the testimony, Hauteville stone is not a crystalline limestone at all. It is a high-grade limestone, ornamental and polishable; but we think that it is not sufficient to take it out of the limestone and put in into the marble paragraph. It is unquestionably limestone. It can only be called marble by giving that term a broad, indefinite, and uncertain meaning.

The decision of the Circuit Court is reversed.

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UNITED STATES v. AMERICAN EXPRESS CO.

(Circuit Court of Appeals, Second Circuit. February 11, 1908.)

No. 124 (1,800).

1. CUSTOMS DUTIES—CLASSIFICATION—ROOTED ROSE CUTTINGS—"PLANTS"—  
"CUTTINGS OF SHRUBS OR PLANTS."

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 252, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1650], relating (1) to "rose plants," and (2) to "cuttings" of "shrubs" and of "plants," rooted rose cuttings that have been placed in sand to facilitate handling, but have never been in soil, fall within the latter provision as cuttings of shrubs or plants.

2. WORDS AND PHRASES—"SEEDLINGS."

The word "seedlings" includes all trees or plants grown from seed, irrespective of their age.

Appeal from the Circuit Court of the United States for the Western District of New York.

The decision below affirmed a decision by the Board of United States General Appraisers, which had sustained the importers' protest against the assessment of duty by the collector of customs at the port of Buffalo.

The opinion of the Board of General Appraisers is as follows:

WAITE, General Appraiser. The merchandise consists of rooted rose cuttings of the same character as those passed upon in Board decision in *Re American Express Company*, G. A. 5,645 (T. D. 25,211). They were assessed for duty at 2½ cents each, under the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 252, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1650], for "rose plants, budded, grafted, or grown on their own roots," and claimed to be dutiable at 25 per cent. ad valorem, under the last subdivision in the same paragraph. In the case cited the Board held that cuttings of this character were not rose plants within the meaning of the paragraph, but were dutiable at the rate claimed as "cuttings of plants commonly known as nursery or greenhouse stock"; construing the language of the last part of paragraph 252 as though the expression "stocks, cuttings, and seedlings," by which it is introduced, qualified all the following matter. It is hardly necessary to restate here the reasons for that conclusion. Additional evidence has been introduced in this case, and the argument is now made that the construction adopted by the Board in G. A. 5,645 is erroneous, in that it would exclude some mature trees, shrubs, plants, and vines from the provision in question, and thus narrow its operation beyond what Congress intended. This argument apparently rests upon the theory that the words "stocks, cuttings, and seed-

lings" are not sufficiently comprehensive to embrace every form in which the plants named in such provision are imported. The Board is not satisfied that such is the case. The word "seedlings" has been construed to include all trees or plants grown from seed, irrespective of their age. In *re Rolker*, G. A. 5,305 (T. D. 24,305). The word "stocks," used in its broadest sense, is not restricted to stems for grafting, as will appear from the following definition of the word "stock" given by the Century Dictionary: "The stock, stem or trunk of a tree or other plant; the main body or fixed and firm part. A stem in which a graft is inserted, and which is its support; also, a stem, tree, or plant that furnishes slips or cuttings." It is believed that no sufficient evidence and no adequate reason have been presented for changing the conclusion reached in G. A. 5,645. We accordingly hold the goods in question to be dutiable at 25 per cent. ad valorem, under said paragraph 252, as "cuttings \* \* \* of \* \* \* plants, \* \* \* commonly known as nursery or greenhouse stock." If there is error in this, it is quite probable that they are included in the same provision as "cuttings \* \* \* of \* \* \* shrubs."

The protest is sustained, and the collector's decision reversed.

Lyman M. Bass, U. S. Atty.

Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. Judgment affirmed.

NOTE.—The following is the opinion of Hazel, District Judge, in the Circuit Court:

HAZEL, District Judge. The questions submitted arise upon a protest filed with the collector by the importer, who claims that the articles in question are rose cuttings and dutiable at 25 per cent. ad valorem under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 252, 30 Stat. 170 [U. S. Comp. St. 1901, p. 1650]. The importation was returned by the appraiser as rose plants, and assessed for duty at 2½ cents each.

I have read the testimony, together with the opinion of the Board and the former decision of the Board in G. A. 5,645 (T. D. 25,211), and I think the Board correctly decided upon the evidence presented that the importation consists either of cuttings of shrubs or "cuttings of \* \* \* plants \* \* \* commonly known as nursery or greenhouse stock," and as such is dutiable at 25 per cent. ad valorem. It appears by the evidence of Mr. Carey, witness for the protestant, that the cuttings in question are put in sand in preparation for shipment, but that they have never in fact been in soil. The provisions of paragraph 252 are not absolutely clear, but the omission of Congress to specifically mention cuttings or plants of the hybrid rose persuasively indicates, I think, that a broad interpretation of said paragraph was intended. I concur in the conclusions and reasoning of the Board, whose decision is hereby sustained.

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## ZEIGER v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit. January 20, 1908.)

No. 34.

### 1. DEATH—ACTION FOR WRONGFUL DEATH—RIGHT OF ACTION UNDER PENNSYLVANIA STATUTE.

Under the settled construction placed by the Supreme Court of Pennsylvania upon Act April 15, 1851 (P. L. 674), giving a right of action for wrongful death, as amended by Act April 26, 1855 (P. L. 309), giving such right of recovery to the next of kin of deceased, such statute does not confer a right of action on a nonresident alien.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Death, §§ 47, 48.]

2. COURTS — FEDERAL COURTS — AUTHORITY OF STATE DECISIONS CONSTRUING STATUTES.

A decision by the highest court of a state, placing a limitation upon the scope of a state statute, whether based upon a construction of its language or upon considerations of public policy, is in either case an interpretation of the statute which must be followed by the federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 956, 957.

State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 151 Fed. 348.

A. Leo Weil, for plaintiff in error.

M. W. Acheson, Jr., for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

DALLAS, Circuit Judge. The plaintiff in error brought an action to recover damages for the death of his son, which, it was alleged, had been caused by the negligence of the defendant in the operation of a train of cars upon which that son was a passenger. The declaration having set forth that the plaintiff was a citizen and resident of the Kingdom of Hungary, the defendant demurred upon the ground that a nonresident alien parent could not maintain such an action. The demurrer was sustained, and thereupon this writ of error was sued out.

The argument of the plaintiff in error is:

"(1) A nonresident alien should be given the remedy provided by the Pennsylvania acts of 1851 (P. L. 674) and 1855 (P. L. 309). (2) The federal court is not bound by the Pennsylvania decisions denying the remedy to nonresident aliens."

1. It is conceded, as it must be, that, without the Pennsylvania acts referred to, the plaintiff in error could not have maintained his action below; and that those acts did not entitle him to do so we think was clearly shown in the opinion that was filed by the learned District Judge. *Zeiger v. Penna. R. R. Co.* (C. C.) 151 Fed. 348. To have held otherwise would have been to hold that the state of Pennsylvania had conferred a right of action in the courts of the United States which could not be asserted in its own courts. *Deni v. Penna. R. R. Co.*, 181 Pa. 525, 37 Atl. 558, 59 Am. St. Rep. 676; *Maiorano v. Baltimore & Ohio R. R. Co.*, 216 Pa. 402, 65 Atl. 1077, 116 Am. St. Rep. 778.

2. The contention that the Pennsylvania decisions should not have been regarded as conclusive is founded upon two assumptions, neither of which can be accepted. What was said in *Deni v. R. R. Co.*, supra, upon the subject now under consideration, was not obiter dictum. The suggestion that in that case the point here in question had not been considered by the court of first instance is a mistaken one. It was dealt with by Judge McMichael in the last paragraph of his opinion as reported in the *Legal Intelligencer* of January 15, 1897, at page 26. The theory that the decisions of the Supreme Court of Pennsylvania, to which we have referred, "do not construe a statute," but "enunci-

ate a supposed policy of the law," is ingenious, but unsound. The Deni Case (as was said in *Maiorano v. Railroad Co.*, supra) "expressly decides that a nonresident alien has no standing to maintain an action under the act of April 26, 1855 ((P. L. 309), for the recovery of damages for injury to another, causing death"; and whether this limitation of the scope of the statute was or was not founded upon considerations of policy is unimportant. The decision was unquestionably an interpreting one. It put a construction upon the statute, and we are "no more at liberty to depart from that construction than to depart from the words of the statute. \* \* \* The construction given by the courts of the several states to the legislative acts of those states is received as true, unless they come in conflict with the Constitution, laws, or treaties of the United States." *Elmendorf v. Taylor*, 23 U. S. 158, 6 L. Ed. 289.

The judgment is affirmed.

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MILLS NOVELTY CO. v. PECK.

(Circuit Court of Appeals, Third Circuit. January 30, 1908.)

No. 51.

**1. TRIAL—INSTRUCTIONS—REFUSAL OF REQUEST.**

The refusal of the court to give a requested instruction is not error where it is covered in substance in the charge given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 651–659.]

**2. APPEAL AND ERROR—REVIEW—HARMLESS ERROR.**

The sustaining of an objection to a question asked a witness as not proper cross-examination was not prejudicial error where the party asking the question subsequently placed the witness on the stand as its own, but did not ask such question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4187–4193.]

In Error to the Circuit Court of the United States for the District of New Jersey.

Hartshorne, Insley & Leake, for plaintiff in error.

Robert B. Honeyman, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the defendant in error, Edward M. Peck, recovered a verdict against the Mills Novelty Company, the plaintiff in error and defendant below. The recovery was for money paid in advance to the Mills Company by the Standard Trading Company (the latter having later assigned to Peck) on a contract by the former company to manufacture and deliver certain gum vending slot machines to the latter company. As the case was tried, the points in dispute (we quote plaintiff in error's brief) were:

"(1) Whether the sale was by sample. Defendant affirmed that it was. Plaintiff denied it. (2) Whether the contract of sale included a guarantee that the goods would be satisfactory to the buyers. Plaintiff affirmed, defendant

denied, that there was such a guarantee. (3) Whether (if there was such a guarantee) the goods were rejected by vendees in good faith because they were dissatisfied with them. Defendant insisted that the alleged dissatisfaction was feigned—was a mere pretext; and that the real reason for rejecting the goods was that vendees were unsuccessful in business; wished to give it up and to escape from their contract."

These issues were submitted to the jury in a charge, of which no complaint is made, and were found in favor of Beck. It is contended, however, error was committed in the court's omission to answer a point submitted by the Mills Company, which read:

"Even if the defendant agreed to make the machines satisfactory to the buyers or to make a perfect machine for the buyers, this would not entitle the buyers to refuse to accept the machines from caprice or upon a mere pretext."

If the case really involved a denial of such point, the plaintiff in error might complain, but the charge shows the trial judge, in substantial form, adopted the principle of this point in affirming a companion one, that:

"If the jury believe that the machines were made according to the sample and according to the contract, and that the buyers refused to accept them, not because the machines were unsatisfactory, but because the buyers wished to escape from their contract, then the verdict should be for the defendant."

The point thus affirmed covered what, as we have seen above, was the third matter in dispute. Under this submission counsel had a right, and presumably availed themselves thereof, to endeavor to convince the jury that the objection by the Standard Company was not bona fide dissatisfaction, but a mere pretext. Having already charged the jury that the Mills Company was entitled to a verdict if they found the objection "was not because the machines were unsatisfactory, but because the buyers wished to escape from their contract," it was a needless repetition for the court to affirm and read the unanswered point that the same result would follow if the refusal was based on "a caprice, or upon a mere pretext."

As to the refusal of the court to permit the witness Gittleman, on cross-examination, to answer the question whether "It is possible to make a machine which cannot be robbed by an expert," we agree with the trial judge the question was not cross-examination with respect to the testimony in chief. Moreover, when Gittleman was called by the plaintiff in error as its witness, it neither asked or proposed to ask him for the information it had erroneously sought to elicit from him on cross-examination.

Neither of the assignments disclosing error, the writ is dismissed, and the judgment below affirmed.

THOMSON-HOUSTON ELECTRIC CO. v. WESTERN ELECTRIC CO.

(Circuit Court of Appeals, Second Circuit. November 6, 1907.)

No. 64.

APPEAL—INTERVENTION IN APPELLATE COURTS—PATENT SUIT.

A Circuit Court of Appeals will not permit an intervention in a patent cause which is ready for hearing on appeal for the purpose of having the case remanded for the taking of further proofs, on the ground of collusion between the parties, where the record does not support such charge, and where the petitioner had full opportunity to intervene in the court below.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 2, Appeal and Error, § 1836.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

On petition of Sterling-Meaker Company to intervene.

Wm. A. Jenner, for petitioner.

L. F. H. Betts, D. C. Turner, George P. Barton, George E. Folk (Thomas B. Kerr, of counsel), for respondent.

Before COXE, WARD, and NOYES, Circuit Judges.

PER CURIAM. This is a petition presented by the Sterling-Meaker Company, after this cause was reached on the regular call of the calendar and is ready for argument, asking that the petitioner be permitted to intervene, and that the cause be remanded to the Circuit Court to take testimony upon the question of the complainant's laches. The petitioner was fully informed of the pendency of this action, and declined an opportunity to intervene when the case was pending in the Circuit Court.

The basis of this application is collusion between the parties to the suit. Upon an examination of the record we are unable to find any proof to sustain the charge of collusion. The most that can be said is that the testimony bearing upon the question of laches was not presented as fully as it might have been. The proof is wholly insufficient to warrant the extraordinary relief asked for by the petitioner, assuming the power of the court to grant such relief.

The petition is denied.

The court will be glad to receive a brief from the petitioner's counsel if he desires to present one at or subsequent to the argument.

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THOMSON-HOUSTON ELECTRIC CO. v. WESTERN ELECTRIC CO.

(Circuit Court of Appeals, Second Circuit. December 4, 1907.)

No. 64.

1. PATENTS—VALIDITY OF REISSUE—LACHES.

The question whether two patents are for the same invention is one of law, to be determined by a comparison of the documents themselves, no extrinsic evidence being necessary, and hence the decision of a Circuit Court of Appeals holding the later patent void for double patenting al-



though rendered on an appeal from an interlocutory order granting a preliminary injunction, is in effect a final decision for the purpose of advising the owner of the invalidity of the patent, and any delay thereafter in applying for a reissue for the purpose of curing such invalidity is at his peril.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 201.]

2. SAME.

The owner of a patent which has been declared void by the decision of a Circuit Court of Appeals cannot thereafter continue litigation thereon for years in other circuits, and, if finally defeated, then apply for and obtain a valid reissue.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 201.]

Time for application for reissue, see note to *United Blue-Flame Oil Stove Co. v. Glazier*, 55 C. C. A. 560.]

3. SAME.

The Van Depoele reissue patent No. 11,872 (Original No. 495,443), for a traveling contact for electric railways, is void for laches in applying for the reissue.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This is an appeal from a decree of the Circuit Court for the Southern District of New York dated April 5, 1907, dismissing the bill with costs. No opinion was written, as the Circuit Court followed the decision of the Circuit Court of Appeals of the Sixth Circuit (*Milloy Case*, 148 Fed. 843, 78 C. C. A. 533) holding the patent void because of laches in applying for the reissue. Since 1895 the original patent and the reissue, in controversy here, have been the subject of protracted litigation, no less than 22 decisions being reported. A history of this litigation, concisely stated, will be found in the opinion of Judge Lanning in the *Sterling-Meaker Case* (C. C.) 150 Fed. 589.

Thomas B. Kerr and L. F. H. Betts, for appellant.

George P. Barton, De Witt C. Tanner, and George E. Folk, for appellee.

Before COXE, WARD, and NOYES, Circuit Judges.

COXE, Circuit Judge. This is an infringement suit founded upon reissued letters patent No. 11,872, granted November 13, 1900, to the complainant, as assignee of the administrators of Charles J. Van Depoele, deceased, for improvements in traveling contacts for electric railways. The original patent No. 495,443 was dated April 11, 1893, and the application for the reissue was filed September 28, 1900, 7 years, 5 months and 17 days thereafter. On July 21, 1897, this court, in an action by complainant against Hoosick Ry. Co. upon an appeal from an order granting a preliminary injunction (82 Fed. 461, 27 C. C. A. 419) decided that claims 6, 7, 8, 12, and 16, were invalid for double patenting, the same invention being described in letters patent No. 424,695 to Van Depoele April 1, 1890, upon a divisional application. In reaching this conclusion the court decided the following propositions:

First. Upon an appeal from an order granting an injunction, the Circuit Court of Appeals is at liberty to re-examine the decision of another circuit court, which ruling, the court granting the injunction felt constrained to follow, and dispose of the questions of law, conformably to its own convictions.

Second. The question whether two patents are for the same invention is to be determined by a comparison of the documents themselves, no extrinsic evidence being necessary to enable the court to ascertain their meaning and true construction.

Third. The two patents, No. 424,695 and No. 495,443, are unambiguous and even the file wrappers, which were in the record, are of little value as extrinsic evidence.

Fourth. The matter sought to be covered by the later patent is inseparably involved in the matter embraced in the earlier patent and, therefore, the claims in controversy are void. *Miller v. Mfg. Co.*, 151 U. S. 198, 14 Sup. Ct. 310, 38 L. Ed. 121.

The changes of phraseology between the claims of the two patents import nothing of substance into the claims of the later patent which, in different language, describe the same combinations covered by the claims of the earlier patent. This decision was announced 3 years, 2 months and 7 days prior to the application for the re-issue.

On April 7, 1898, in an action by complainant against the Union Railway Co., 86 Fed. 636, 30 C. C. A. 313, this court, on appeal from an order granting a preliminary injunction, held that claims 2 and 4 of the later patent No. 495,443 were invalid for double patenting. This decision was announced 2 years, 5 months and 20 days prior to the application for the reissue.

In *Thomson-Houston Co. v. Black River Traction Co.*, 135 Fed. 759, 68 C. C. A. 461, this court decided that the two claims of the re-issue in suit were valid, the object of the reissue, which was to avoid the defense of double patenting, having been effectually accomplished. Although the tension device was not an element of claim 4 of the original it was held in the *Union Railway Case* that it must be read into the claim by implication and, as so construed, the claim was for the same invention as that covered by several of the claims of the earlier patent. In other words, in the *Black River Case* the court construed the claims of the reissue as containing four elements and those of the original patent as having more than four elements and, being so differentiated, the reissue was upheld. At page 764 of 135 Fed., page 466 of 68 C. C. A., the court says:

"Holding, as we do, that the tension device is not an element of the claims of the reissue, it is plain that the invention of those claims had not been patented, previously to the original patent, because in none of the claims of the patent of April 1st, 1890, was there one for a combination of the elements now claimed which did not also specify a tension device as an element."

We see no escape from the conclusion that, under the previous decisions of this court, the claims of the reissue are broader than those of the original. The reissue was saved from the fate of the original because its claims have but four elements whereas the claims of the original were construed to have five. We cannot now read into the claims the very element, the omission of which gave them vitality. If these claims are construed to include a tension device they are void for double patenting; if construed, as of course, they must be under the decision in the *Black River Case*, as containing but four elements, namely, the car, the overhead conductor, the swinging arm and the

contact device, it is obvious that they are broader than the claims of the original. It will thus be seen that the only questions left open for discussion are laches in applying for the reissue and the question of infringement.

The question of laches has not been decided by this court but this patent has been held invalid on this ground by the Circuit Court of Appeals of the Sixth Circuit in the Milloy Case, 148 Fed. 843, 78 C. C. A. 533, and by the Circuit Court for the District of New Jersey in the Sterling-Meaker Case, 150 Fed. 589. It will simplify the discussion if we assume, without deciding, that the complainant was justified in delaying the application for a reissue until the question of double patenting was disposed of by the highest court to which it could be carried—namely, a Circuit Court of Appeals. Such a decision, as we have seen, was rendered by this court 3 years, 2 months and 7 days before the application for the reissue in one case, and 2 years, 5 months and 20 days in the other. But it is argued not only that the complainant was entitled to have the question decided by an appellate court, but also to have the decision rendered at final hearing and on plenary proofs. We are not impressed by this contention. Of course, there are many questions arising on a motion for a preliminary injunction which cannot be satisfactorily determined until the proofs are taken, and this court has consistently refused to decide doubtful questions depending on disputed facts upon appeals from such orders. This is not such a case. The question here is not of fact but of law, to be disposed of by a comparison of the two patents. This was, in effect, decided by this court in the Hoosick Case. Although the Court of Appeals for the Sixth Circuit in the Ohio Brass Case, 80 Fed. 712, 26 C. C. A. 107, intimated that light might be thrown upon the question of double patenting by postponing the question until final hearing, yet, when the question was presented on appeal from final decree in the Jeffrey Case, 101 Fed. 121, 41 C. C. A. 247, it was decided, precisely, as in this court, by a comparison of the documents. Indeed, we fail to see how it could be decided in any other way and we do not find that the complainant has pointed out any testimony which might have been introduced in the Hoosick Case or which was introduced in the Jeffrey Case which presents the question there at issue in any more favorable light for the complainant. It may be conceded that this court might have refused to pass definitely upon the question of double patenting on the appeal from the order, but we are here concerned with what the court did do, not what it might have done. What it did do was to decide in an elaborate opinion that the patents were unambiguous, that no testimony was needed to explain their meaning and that the claims of the patent in issue were void. It seems incredible that the complainant's officers should have supposed, after a decision so positive and unqualified in its logic, that the court would reach a contrary conclusion at final hearing. When thus informed of the invalidity of its patent it was complainant's duty to file the application for a reissue at once.

Any delay after July 21, 1897, was at the complainant's peril. Two courses were open, it could apply for a reissue or continue the litiga-

tion, it could not do both. Apparently the former course offered the surest premise of speedy and widely extended relief; the latter depended for complete success upon the concurrence of three somewhat remote contingencies— (1) A contrary decision by another Circuit Court of Appeals, (2) a certiorari by the Supreme Court, (3) a decision by that court overruling the defense of double patenting. The complainant took the chance, remote though it was, of obtaining a reversal of the doctrine of the Hoosick Case and continued to litigate on these lines until the Circuit Court of Appeals of the Sixth Circuit, nearly three years afterwards, reached the same conclusion as this court, and the original patent No. 495,443 received its coup de grace. We think the complainant could not so experiment with the patent and, having failed, attempt to secure relief which is only available when promptly applied for. The complainant was in no way surprised or misled, it knew of the defense of double patenting as early as July, 1893, the defense had been urged in various litigations and finally the infirmities of the later patent were pointed out by a Circuit Court of Appeals, there being no higher court to which the controversy could ordinarily be carried. Surely, when this decision was announced the complainant should have acted promptly in an endeavor to secure a reissue, it had no time to spare. Rights had been, and in all probability would be acquired, based upon the invalidity of the original patent. A just regard for the rights of the public demanded, if the patent was to be resuscitated in the form of a reissue, that it should be done immediately; and especially so when the reissue claims were to sweep under the monopoly devices not covered by the claims of the original.

The complainant tacitly admits that if the application had been delayed, for a longer period than was reasonably required to prepare the papers for a reissue, after an adverse decision by a Circuit Court of Appeals from a decree taken at final hearing, laches could fairly be predicated of such delay. As before stated we think the decree in question was, in everything but name, a final decree. The complainant could not have received a more definite or final information regarding the invalidity of the claims. If such reasons for delay as are now advanced are to be sanctioned, the rights of the public will be seriously jeopardized and the door opened to excuses limited only by the ingenuity of counsel. Defects can be found in every record. Especially after a decision is rendered, additions and changes suggest themselves which might make the case of the defeated party stronger, but the contention that an application for a reissue may be delayed indefinitely to enable him to present the same question to other courts of co-ordinate jurisdiction is against public policy, subversive of intervening interests and runs counter to the reissue decisions of the Supreme Court.

We agree with the language of the court in the Milloy Case, *supra*. Judge Severens says:

"But the appellee chose to take its chances of prolonging its monopoly by continuing its effort to establish the later patent, which the court held to be invalid. We cannot think that a patentee may thus experiment with his patent. On the contrary, we think that when the grounds are disclosed for thinking there may be an error or mistake, he is bound in duty to the public to

correct it by obtaining a reissue or to adhere to his original patent; and if he declines to correct it, he should be deemed to be standing upon it as the measure of his right. A different doctrine would go far to defeat the object of the rule which requires the patentee to define his invention with such distinctness that other inventors, and the public as well, may know its scope and limitations."

We are of the opinion that no sufficient excuse for the delay in applying for the reissue after the decision of this court in the Hoosick Case has been shown and that for this reason the reissue is void.

The decree is affirmed, with costs.

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UNITED STATES HOG-HOISTING MACH. CO. v. NORTH PACKING & PROVISION CO.

(Circuit Court of Appeals, First Circuit. January 14, 1908.)

No. 728.

PATENTS—INFRINGEMENT—HOG-HOISTING MACHINE.

The Mahoney patent No. 441,311 for a hog-hoisting machine, if conceded valid, is for an invention of minor character relating to a combination of mechanical details, and is entitled to but a narrow range of equivalents; and, so construed, *held* not infringed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Benjamin Phillips (Alfred H. Hildreth and Michael F. Farrell, on the brief), for appellant.

William K. Richardson (J. Lewis Stackpole, on the brief), for appellee.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a bill alleging infringement of the first claim of a patent No. 441,311, for an invention of a hog-hoisting machine, issued to Dennis C. Mahoney on November 25, 1890, according to an application filed on November 25, 1889. The claim is as follows:

"1. In a hog-raising machine, in combination, a slanting rail held by suitable supports, a machine provided with bars which are raised and lowered as described, a double hook having one crook bent backward and arranged upon one of the bars of said machine, and the other crook bent forward and provided with a lip, whereby on being raised by said machine and being brought in contact with said slanting rail the said crook may slip upon said rail without jarring any weight attached to said hook, all substantially as described, and for the purpose set forth."

The Circuit Court dismissed the bill.

It will be noticed that the claim includes bars "raised and lowered as described." The description to which this refers, found in the specification, states that the bars are raised by parallel endless chains, and move on lines parallel to the slanting rail. The differences between this device and that in use by the respondent are sufficiently explained in the opinion of the learned judge of the Circuit Court who entered

the decree dismissing the bill. The case comes within a well-known class of inventions of a minor character, relating to the combination of mechanical details, as to which the demonstration whether or not there was any real invention of value depends largely on the practical commercial results. Notwithstanding the patent in suit was issued seven years ago, no machine for practical use has ever been built in accordance with it. We are not required to pass on the question of invention; but, assuming there was an invention at all, it was of that class, under the prior decisions in this circuit, as to which there is barely any room for equivalents. *Ford v. Bancroft*, 98 Fed. 309, 312, 313, 39 C. C. A. 91; *Bradford v. Belknap Motor Company* (C. C.) 105 Fed. 63, 64.

One of the elements of the claim in suit is, as we have said, the bars secured and moved in the manner which we have described. The learned judge of the Circuit Court pointed out the instrumentalities used by the respondent in lieu thereof; and he also pointed out that there is, as between the complainant and the respondent, a difference in the method of operation which, in view of the comparatively minor importance of the complainant's invention, if there is an invention, as to which we make no determination, must be regarded as substantial.

The complainant urges on us the rules as to equivalents applied by us in *Reece Company v. Globe Company*, 61 Fed. 958, 10 C. C. A. 194; but it overlooks our observations on pages 961, 962, and 965 of 61 Fed., pages 199, 198, 201 of 10 C. C. A., which clearly exclude a minor improvement of the kind before us here from the favorable aspect from which we viewed the fundamental and ingenious device in question in the case referred to. On the whole, we adopt the reasoning and the conclusion of the learned judge of the Circuit Court.

The decree of the Circuit Court is affirmed, and the appellee recovers its cost of appeal.

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NEW YORK BELTING & PACKING CO., Limited, et al. v. SIERER et al.

(Circuit Court of Appeals, Second Circuit. January 7, 1908.)

No. 54.

PATENTS—INVENTION—TILE FLOORS AND WALLS.

The Furness patent No. 527,961 for a tile floor or wall composed of tiles of yielding material with interlocking joints is void for lack of invention in view of the prior art which showed interlocking wall tiles of non-yielding material, and floor tiles of rubber not interlocking.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For opinion below, see 149 Fed. 756.

Hubert Howson (Charles Howson and J. C. Fraley, of counsel), for appellants.

R. H. Parkinson (J. Burnett Nash and Bayard Christy, of counsel), for appellees.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

NOYES, Circuit Judge. This is a suit in equity to restrain the alleged infringement of letters patent No. 527,961, issued October 23, 1894, to Frank Furness (assignor of one-third to David H. Watts) for "Improvements in Tile Floors, Walls, etc." The principal defense is want of invention in view of the prior art.

The patentee states that the object of the invention "is to prevent tile floors from cracking or opening at the joints because of tension or compression strains." This object is accomplished by the use of tiles of yielding material—preferably rubber—interlocked together. Various forms of tiles are described and illustrated in the patent. Some interlock directly; others, indirectly by means of key tiles. The preferable form of lock is the dovetail. While the specifications speak of properly cementing the tiles, the proof shows that this is only necessary when a water-tight floor is desired. The great advantage—according to the patent—of using a rubber tile instead of ordinary strip rubber is that ornamental designs may be obtained from different colored tiles, and the floor can be readily repaired in case a tile is injured. This is the claim of the patent:

"A tiled floor or wall composed of a series of tiles of yielding material, said tiles having interlocking tongues, and being removable, substantially as described."

The patent states that the tiling is especially adapted to cover the floors and decks of vessels, and the testimony shows that tiles manufactured under it have been extensively used for such purpose, particularly on ferryboats. The constant strain upon the floors of moving vessels causes coverings of nonyielding tiles—vitrified, earthen, and similar tiles—to crack and open at the joints. The complainants' tiles stand the strain without separating. They are also nonslippery, noiseless, waterproof, and sanitary when cemented, and attractive in appearance. These advantages have led to their use in many office buildings, hotels, and other indoor places where there is heavy travel. They are expensive, but their value is indisputable. A large part of the success of the complainants' tiles is undoubtedly due to their thickness, and the secret composition of which they are made. They are so thick that if laid upon floors not exposed to strain, they would probably remain in place without the interlocking device. Certainly they would do so if laid in cement. The noiseless, nonslippery, and waterproof qualities result from the material from which the tiles are made. Still, the interlocking device is unquestionably a useful improvement. It often serves to hold the tiles together without cement and prevents their "kicking up." More than all, it makes a practically homogeneous floor covering capable of standing strains without separating at the joints. But the fact that the Furness patent shows a new and useful improvement does not, in itself, disclose invention. As held by the Supreme Court in *Hollister v. Benedict Mfg. Co.*, 113 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901, novelty and increased utility in an improvement do not necessarily make it an invention. Whether, therefore, the patent shows invention, i. e., whether the improvement is the result of an original conception, is the important question. This question must be investigated in view of the state of the prior art. But in

considering the prior art, we need go no further back in the examination of alleged anticipating patents, than to the Harland English patent and the Watts design patent, which shortly preceded the Furness patent. If these do not anticipate, no earlier patent does. A very comprehensive examination of the earlier patents may, however, be found in the able opinion of the judge at circuit.

The Harland patent was granted in 1889 for elastic tiles of vulcanized india rubber. They were said in the specification to possess many of the advantages now found to exist in the complainants' tiling, being noiseless, impervious to water, and affording an excellent foothold when used upon the decks of ships. The tiles were to be laid in cement. The proof shows that Furness first obtained his idea of an elastic floor covering from tiles manufactured under this Harland patent and laid in the cabins of the White Star steamships. They were of various shapes, but were not interlocking, and were thinner than the tiles manufactured by the complainants. The thickness of the tiles is, however, not limited by the Harland patent, and floor coverings of the complainants' tiles and of the Harland tiles, properly cemented, of equal thickness, would be very similar. Probably the only difference would be that the complainants' covering would be of somewhat more homogeneous character, and better able to stand strains without separating. Moreover, the Harland tiles, regardless of thickness, would not hold their places so well as the complainants' tiles if laid without cement.

The Watts patent is a design patent. It illustrates and describes an interlocking tile of precisely the form of one of the figures in the Furness patent. The tiles manufactured under this patent were of pottery ware, and were used for wainscoting. Watts, the inventor, is the assignee of one-third of the present patent. Furness had seen this Watts pottery tile before he applied for his patent. It is apparent, therefore, that what Furness did—and all that he did—was to make the Harland yielding but not interlocking tile in the form of the Watts unyielding but interlocking tile. As the complainants' expert said of the proof of the prior art:

"All these things practically resolve themselves into two, viz.: (1) They show that yielding tiles having no interlocking means were old; and (2) that dovetailed interlocking projections and recesses were old with unyielding tiles."

Did it involve an original conception to bring these two forms of tiles together? This question—the vital one in the case—we may subdivide into reciprocal inquiries in order to obtain two points of view: (1) Was it invention to apply the old interlocking device to yielding tiles? (2) Was it invention to change the material of the old interlocking tile and make it yielding?

Tenons and mortises have been used since early times to hold firmly together sections of wood and other materials. The dovetailed lock is a common expedient. Any intelligent artisan having before him the mere problem of uniting hard rubber tiles would be likely to adopt it, especially if he knew that it was used to unite pottery tiles. In any such case there would simply be a selection of means and not invention.



In *Aron v. Manhattan R. Co.*, 132 U. S. 90, 10 Sup. Ct. 24, 33 L. Ed. 272, it appeared that the patentee had adapted well-known devices to a special purpose, with very considerable resultant advantage. But the Supreme Court held that this involved only the exercise of ordinary mechanical skill, and quoted, with approval, this language of Judge Wallace at circuit (Id., 26 Fed. 314):

"It seems impossible to doubt that any competent mechanic familiar with devices well known in the state of the art could have done this readily and successfully upon the mere suggestion of the purpose which it was desirable to effect."

In *Higgin Mfg. Co. v. Murdock*, 132 Fed. 810, 65 C. C. A. 466, the Circuit Court of Appeals of the Sixth Circuit said, in holding a patent void for want of invention:

"It may be conceded that the use of such a gripping rib as a means for attaching shell bands prior to Higgin is not shown. But it was an old and well-known means of attachment, and required no adaptation or special skill to use it for this particular purpose. The same principle is exhibited in the lead pencil with a rubber tip enclosed within a thin metal cylinder, the latter having several annular depressions which grip the rubber and hold it in place. The common iron ferrule for canes, umbrellas, and jointed fishing rods afford other examples of the holding effect of such an annular groove."

The complainants, however, seek to avoid the effect of these decisions and of the principles underlying them, by claiming that the present patent involves a new function for the interlocking device. The patentee testified:

"I was requiring of the interlocking joint an entirely new function and use, as far as my knowledge went of any joint in material before this time, and that is owing to the elasticity and flexibility of the rubber or other material which I proposed to interlock, I should require a joint that would more or less lend itself to the elasticity and flexibility of the material, so that after it was relieved of all strains it would resume the same position that it was in before the strains occurred, and remain a true and perfect joint."

Still, the real function of the interlocking device in the patented article is to prevent the tiles from pulling apart under strain and opening the joints between them. That was the stated object of the patent. The quality of elasticity arises not from the joint, but from the material the tiles are made of. This use by the patentee of the interlocking device to prevent tiles from opening at the joints was not a new use. The ordinary function of such joints is to prevent the improper separation of united parts. And this function is the same, regardless of the material. Some material may be too flimsy to interlock at all. Some may be too brittle to stand interlocking without breaking. Where, however, the interlock is used, its function is to keep the parts from separating. The use of the interlocking joints with yielding tiles seems clearly to be for the same purpose and to have the same effect as in the case of nonyielding tiles. Whatever difference there may be might be expected from the difference in material. The new use required by the patentee of the interlocking joint produced no novel or unexpected results. The testimony wholly fails to show a new function, within the rule stated by this court in *General Electric Co. v. Yost Electric Mfg. Co.*, 139 Fed. 568, 71 C. C. A. 552:

"But it is thought that the assertion of a new function or effect should only be sustained upon proof of novel or unexpected properties or uses capable of producing novel results."

Considering the case along these lines, therefore, we necessarily answer our first inquiry that there was no invention in applying the old interlocking device to yielding tiles. This disposes of the case. We may, however, test the correctness of our conclusions by taking the other view point, and examining our second and reciprocal inquiry—was it invention to change the materials of the old interlocking tiles?

Rigid tiles with the interlocking device had been in use before this patent was applied for. At that time, also, patentees in various patents had pointed out the advantages arising from substituting in tiles rubber and other elastic compounds in place of the nonyielding materials. The ordinary incident of elastic compounds is the capacity for expansion and compression. Employing this material in any known form of tile—interlocking or other form—involved no essentially novel use. The result was a marked improvement, but there was no original conception. "But the substitution of one material for another, which does not involve change of method nor develop novelty of use, even though it may result in a superior article, is not necessarily a patentable invention." *Florsheim v. Schilling*, 137 U. S. 64, 76, 11 Sup. Ct. 20, 24, 34 L. Ed. 574. The two Supreme Court cases following illustrate the application of the underlying principles in analogous cases:

In *Phillips v. Detroit*, 111 U. S. 604, 607, 4 Sup. Ct. 580, 28 L. Ed. 532, the patent was for a wooden pavement consisting of wooden blocks set with their fibers vertical in a bed of gravel or sand, the spaces between the blocks being filled with the same materials. The court held the patent void for want of patentable invention, saying:

"The improvement described in the appellant's patent consists, therefore, in simply taking a material well known and long used in the making of pavements, to wit, wooden blocks set vertically, and with them constructing a pavement in a method well known and long used. It is plain, therefore, that the improvement described in the patent was within the mental reach of any one skilled in the art to which the patent relates, and did not require invention to devise it, but only the use of ordinary judgment and mechanical skill. It involves merely the skill of the workman, and not the genius of the inventor."

*Brown v. District of Columbia*, 130 U. S. 87, 99, 9 Sup. Ct. 437, 32 L. Ed. 863, was another wooden pavement case. There the claim covered wooden blocks having a single plain surface and inclined sides, so that when laid on their larger ends, wedge spaced grooves would be formed to be filled with cement or similar material. A prior patent had shown stone blocks similarly cut. But it was claimed that the filling would adhere better to the wooden blocks than to the stone ones, because they were softer and would indent. They were also said to be superior in other ways. But the court, in holding that there was no invention, said:

"The blocks of the Lindsay patent are of the same shape as those of Cowing, but are of stone, while the latter are of wood, but this was nothing more than

the substitution of one material for another without involving a new mode of construction, or developing anything substantially new in the resulting pavement."

In considering the application of the principles stated in these decisions to the present case, the line of authorities holding that there may be invention in adapting an old device to a nonanalogous use must not be lost sight of. *Potts v. Creager*, 155 U. S. 605, 15 Sup. Ct. 194, 39 L. Ed. 275, is probably the leading case in this line. In that case the patent was for a cylinder for pulverizing clay, having upon its periphery longitudinal steel strips with sharp projecting edges called "scrapers." When the clay was forced into the machine between the cylinder and the abutment, it was pulverized by the "scrapers." The nearest anticipating device was a wood polishing machine having a cylinder similar to the clay machine except that the projecting strips were of glass instead of steel. The machine was designed to polish boards which were to be pressed against the cylinder by a roller. The Supreme Court held that this cylinder did not anticipate the patent. But it did so because the two machines were not to be used for analogous purposes. The court said (page 604 of 155 U. S., page 197 of 15 Sup. Ct. [39 L. Ed. 275]).

"Had this machine been used for an analogous purpose, it would evidently have been an anticipation of the *Potts* cylinder, since the substitution of steel for glass strips would not, in itself, have involved invention."

But this is not a case where the anticipating articles are in different industries. The Harland tiles were used for tiled floors. The Watts tiles were used for tiled walls. The patent in suit claims a tiled floor and a tiled wall.

It follows, therefore, that from whatever point of view we examine the present case no patentable invention is to be found. There was no original conception in applying the old interlocking device to yielding tiles. Conversely, there was no invention in changing the material of the old interlocking tiles.

The decree of the Circuit Court is affirmed, with costs.

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NATIONAL RECORDING SAFE CO. v. INTERNATIONAL SAFE CO. et al.

(Circuit Court, N. D. Illinois, E. D. January 24, 1908.)

No. 28,855.

**1. PATENTS—INFRINGEMENT BY PATENTEE—ESTOPPEL BY ASSIGNMENT.**

Where a patentee who has assigned his patent organizes and controls a corporation which is charged with infringement, it is estopped to the same extent that he would be to deny the validity of the patent, or to invoke the prior art to limit its claims, as made and allowed, and outside evidence is admissible only where the language is ambiguous to make clear what the applicant meant to claim and the government to allow.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, §§ 290-294.]

## 2. SAME—INFRINGEMENT—PORTABLE SAVINGS BANK.

The Fisher patent No. 793,779 for a portable savings bank, construed in the light of the contents of the file wrapper, *held* not so clearly infringed as to warrant the granting of a preliminary injunction.

In Equity. On motion for preliminary injunction.

Charles E. Pain and Walter H. Chamberlin, for complainant.

Dyrenforth, Lee, Chritton & Wiles, for defendants.

KOHLSAAT, Circuit Judge. Complainant moves the court for a preliminary injunction herein. The bill charges infringement of claims 1, 5, 6, and 8 of patent No. 793,779, dated July 4, 1905, for a portable savings bank. The application was filed by the defendant Fisher while in complainant's employ, who then assigned his invention, which, by various steps, became and is, together with the patent issued thereon, the property of complainant herein. This is seriously contested by defendants, but may be and is assumed from the record for the purposes of this suit. Fisher received for his patent one-third of the capital stock of the complainant, valued at \$5,000, upon which he has been paid in dividends 42½ per cent. and became a director of the company. Afterwards, and while retaining nominal connection with complainant, he organized the defendant company, taking \$12,000 of stock out of a capital of \$25,000, and assuming the position of secretary and treasurer. At first defendants manufactured certain noninfringing devices, and later, began the manufacture of the alleged infringing portable savings bank. The facts now produced bring defendants within the rule as to estoppel laid down in *Siemens-Halske Electric Company v. Duncan Electric Mfg. Company*, 142 Fed. 157, 73 C. C. A. 375. Fisher was the moving spirit. He induced the manufacture of the alleged infringing device, and the other stockholders, two in number, should be bound by the estoppel against him for whatever it is worth. In the *Siemens-Halske Case* aforesaid, where such estoppel was upheld, the court says that extraneous evidence is inadmissible in the absence of uncertainty in the language of the description and claims, and, in case of uncertainty, "outside evidence," says the court, "is admissible only to make clear what the applicant meant to claim and the government to allow, and not for the purpose of showing, even in the slightest degree, that the applicant had no right to claim, and that the government was improvident in allowing what was in fact claimed and allowed." In *Mellor v. Carroll* (C. C.) 141 Fed. 992, the court says:

"If the estopped assignor enters into business with others who derive from him their knowledge of the patented process or machine and, availing themselves of his knowledge or assistance, enter with him upon a manufacture infringing the patent, which he has assigned, they are bound by his estoppel."

Fisher cannot hide behind the corporation, which he is using to accomplish the thing complained of.

It is conceded by complainant that, for the purposes of this hearing, only claims 6 and 8 need be considered. These read as follows, viz.:

"6. In a savings-bank, the combination with a circular base, of a plurality of vertical flanges supported above the base and spaced apart to form compartments for the coins, walls uniting the inner edges of adjacent flanges, said

walls forming a central compartment, a cover comprising a surrounding side wall and top united thereto and adapted to inclose the base and flanges thereon, means for detachably securing said cover to the base, said cover having slots therethrough communicated with the compartments between the flanges and said central compartment.

8. In a savings-bank, the combination with a base, of a plurality of vertical flanges supported above the base and spaced apart to form compartments for the coins, a cover comprising a surrounding side wall and top wall united thereto, said cover adapted to inclose the base and the flanges thereon, and a lock secured to the under side of said top the bolt of which engages a slot in one of the walls between the inner edges of the two adjacent flanges."

There is a conflict between the experts of the two parties as to just what is meant by the phrase "spaced apart to form compartment for the coins," used in both claims 6 and 8. It is contended by defendants that the device of the patent in suit calls for a portable bank having compartments for different sized coins, from which the said coins can be removed laterally when the case is taken off—that is, as expressed in claim 2, and in different language in claims 3 and 4, "the distance between the outer edges of the radial flanges at each side of each compartment being greater than the diameter of the coins to be received by such compartment." In support of this contention defendant calls attention, first, to the language of claims 2, 3, and 4 aforesaid; second, to the drawings, every one of which shows such a construction (Walker on Patents [4th Ed.] pp. 172, 173, § 182); third, in construing the meaning of the phrase "the distance between the flanges of each compartment being greater than the diameter of the coins to be received by such compartment," found in amended claims 1 and 7 (present claims 1 and 5). Counsel for complainant, in their remarks accompanying their amended application of June 2, 1904, say:

"Claims 1, 2, 3, 4, and 7 have been amended to more clearly distinguish applicant's invention from the prior art by setting forth the fact that the distance between the outer edges of the adjacent flanges is greater than the diameters of the coins to be received in the compartment between such flanges. This feature facilitates the counting of the contents of the bank, inasmuch as the case may be removed, leaving the case with all of the coins contained in the bank, stacked within the compartments from which the coins may be readily removed by the teller in counting the same."

Fourth, the specifications, lines 64 and 75, p. 1, read the phrase, "The radial flanges are spaced apart to correspond with the diameters of the various denominations of coins," upon the compartments shown in the drawings to be formed by flanges wider at their outer edges than the coins to be inserted.

As above intimated, defendant is estopped from attacking the validity of the patent in suit. Nor is the court at liberty to hear extraneous evidence for any purpose other than to enable it to arrive at the scope of the claims, and then only when there is doubt as to the construction to be placed upon them. By reference to claims 6 and 8 in suit, it will appear that the flanges are "spaced apart to form compartments for the coins." It is insisted by complainant that these words are not modified by the drawings and specifications to the extent of reading into them the further provision that the compartments must have lateral openings larger than the coins they are expected to hold.

The language is certainly obscure in the light of the other claims, the specifications, and drawings. It can hardly be seriously contended that the patentee intended to say that the several compartments should be large enough to receive the several coins for which they are provided, and yet that would seem to be a fair paraphrase of complainant's construction of the language of the claims in suit.

There seems to exist a case coming within the exceptions in the cases above cited. Under the circumstances, it is within the rule of law above stated to consider the file wrapper and contents. From the foregoing consideration thereof, it may fairly be deduced that the device of the patent in suit covers only a savings bank in which the outer edges of the flanges are spaced apart to a distance greater than the width of the coin to be received between them. It would be proper also to declare the prior art, so far as introduced, for this purpose. A careful examination thereof, however, does not alter the opinion of the court upon the subject of the scope of claims 6 and 8 for the purposes of this hearing. Such being the case, the court cannot say from the evidence now before it that defendant's device, which is for a compartment, the lateral opening of which is less than the width of the coin, infringes. For the purpose of granting preliminary relief, the mind of the court should be free from doubt and uncertainty. Such is not here the case, and the prayer for preliminary relief must be, and is, denied.

McDUFFEE et al. v. HESTONVILLE, M. & F. PASSENGER RY. CO. et al.

(Circuit Court, E. D. Pennsylvania. January 28, 1908.)

No. 45.

1. SPECIFIC PERFORMANCE—UNAUTHORIZED CONTRACT BY TRUSTEE.

Where a patent was assigned to D. in trust, without power to sell or incumber the same, for the benefit of three persons named, and D. became the owner of a one-third interest therein, whereupon he contracted to sell all right, title, and interest in the patent, together with all claims for damages for past infringements—the purchaser having full knowledge of the condition of the title—such purchaser was entitled to enforce specific performance on its agreement to accept whatever title D. was able to convey.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Specific Performance, §§ 20-23.]

2. PATENTS—ASSIGNMENTS—EFFECT.

A patentee conveyed it with other interests to S., "his assignees and successors in trust," and directed that S. and his successors should have and hold the patent in trust, without power to sell, incumber, or otherwise dispose of the patents, etc., for the benefit of three persons, S. being one of them. S. thereafter assigned the same interest, so far as he had any right to do so, to D., trustee. *Held* that, by such transfer, D. acquired title in trust for himself, and for the two other persons, for whose benefit S. had held the title, so that D. was entitled to convey a one-third interest in the patent, of which he was the absolute owner.

3. SPECIFIC PERFORMANCE—PARTIAL FAILURE OF TITLE—ABATEMENT OF PRICE.

D. having agreed to convey the whole title to a patent for \$20,000, when he was unable to convey but a one-third interest therein, the purchaser, on electing to take specific performance of such title as D. was enabled to convey, was entitled to an abatement of two-thirds of the price.

### On Rehearing.

For former opinion, see 154 Fed. 201.

J. B. McPHERSON, District Judge. The facts in this case may be found in the court's opinion published in 154 Fed. 201. It was there assumed that the General Electric Company would not be content with anything less than the whole title to the patent, and, as McDuffee could not give such a title, the dismissal of the cross-bill asking for specific performance seemed to be inevitable. Before a decree was entered to that effect, however, the pending petition for a rehearing was presented and allowed, in which the General Electric Company declares its willingness to accept whatever title McDuffee is able to convey, and asks that a decree be entered requiring the conveyance of such interest as he may possess, and also making an adequate allowance to the General Electric Company for his breach of the agreement to convey the whole title. The rehearing has now been had, and, in order that a speedy opportunity for prosecuting an appeal may be afforded, I shall not take the time that would be necessary to discuss the numerous questions raised by counsel, but shall only say briefly that in my opinion the petition has put a different face upon the situation. Since the General Electric Company is willing to accept what McDuffee was, and still is, able to give—for his contract with the Allis-Chalmers Company is in no respect an obstacle to the decree now asked for, the latter company having had previous notice of the petitioner's conflicting claims—I think the court is bound to order the conveyance to be made.

As the facts are undisputed a reference to a master would be superfluous. The title which McDuffee is able to convey is derived from the assignment dated March 6, 1895, under which he acquired the undivided one-third equitable interest in the patent, and this interest he should now be obliged to transfer to the General Electric Company. At the time the assignment of March 6th was made Schlesinger was the owner, as trustee, of the whole legal title, and was also the owner, as an individual, of an undivided one-third equitable interest. Being thus interested in two characters, he transferred all his interest, legal and equitable—expressly selling and assigning, “so far as I have any right so to do, unto John I. McDuffee of Philadelphia, Pa., trustee, all my right, title and interest (both personal and as trustee) in and to the following letters patent and applications for letters patent, \* \* \* together with all choses in action thereunder”—and requested the Commissioner of Patents to issue “said applications to John I. McDuffee, trustee, as the assignee of the entire interest therein.” It is argued by the counsel for McDuffee and the Allis-Chalmers Company that this instrument had no effect upon Schlesinger's equitable interest. I quote from page 5 of their brief:

“The utmost, then, which was intended to be, or could be, attained by this instrument was to vest in McDuffee, as trustee, the same interest which Schlesinger had held, and without change of the *cestuis que trustent*. For any implication that Schlesinger intended to convey his beneficial interest to McDuffee as an individual is rebutted conclusively by the fact that the grant was expressly to him as trustee. Trustee for whom? Not for himself, but for

Schlesinger, who remained, as before, a cestui que trust of one-third. The expression 'both personal and as trustee' employed by Schlesinger does not in any way change the character of the assignee, and the word 'personal' is amply explained by the fact that Schlesinger was the applicant in all the applications and appropriately thus made the formal request to the Commissioner of Patents."

I am unable to assent to this argument. If nothing more was accomplished by the assignment of March 6th than is supposed in the foregoing quotation, that instrument was ineffective, so far as Schlesinger's equitable interest was concerned, although he declares in unmistakable language that he intends to convey it, and uses apt words so to do. As I interpret the assignment, it transfers the legal title from Schlesinger, trustee, to McDuffee, trustee, and if this were all, McDuffee would hold in trust for Schlesinger, Mrs. McDuffee, and Williams. But there is something else. Schlesinger also owned an equitable title, and this "personal" interest he also conveyed to McDuffee, trustee, thus making him the owner of the equitable title that had previously been Schlesinger's, and, so far as this equitable title is concerned, constituting him trustee for himself. It would certainly have been an extraordinary transaction if Schlesinger had conveyed his equitable title, and, by the same instrument, had retained it; and surely such a result could only be accomplished by the use of the clearest language. In my judgment, no such language appears here, but the court is asked to reach the result by inference, and by disregarding the declared and unambiguous intention of the assignor to convey all his interest, both legal and equitable. I therefore hold that McDuffee, by force of the conveyance made on March 6th, not only became the trustee holding the entire legal title in Schlesinger's place, but also became the equitable owner of one-third, that being the "personal" interest which Schlesinger was able to transfer, and in my opinion did transfer, by his assignment. Accordingly, McDuffee, owning the whole legal title, and owning also the equitable one-third interest, became trustee for himself so far as the equitable interest in one-third was concerned, and continued to hold this double relation to the patent until the rise of the controversy now before the court. If this is correct, he was then able to convey both the legal and the equitable title to an undivided one-third interest; for, so far as that interest was concerned, the two titles merged, and as the absolute owner he was able to make an effective transfer to any purchaser.

The price agreed upon for the whole title was \$20,000, and as the facts in proof do not debar the General Electric Company from claiming compensation in this proceeding, an abatement of two-thirds from that amount should be made, so that one-third only should be paid to McDuffee or paid into court, as may appear to be the proper course when the formal decree comes to be entered.

The order directing a decree to be entered in accordance with the opinion filed June 6, 1907, is therefore modified so as to direct a decree to be entered carrying out the views now expressed, and also dividing the costs equally between McDuffee and the Allis-Chalmers Company.



## AMERICAN WINE CO. v. KOHLMAN et al.

(Circuit Court, S. D. Alabama, Fifth Circuit. December 11, 1907.)

No. 256.

TRADE-MARKS AND TRADE-NAMES — WORDS SUBJECT TO APPROPRIATION —  
"AMERICAN."

The "American Wine Company" cannot be exclusively appropriated as a trade-mark or trade-name, the word "American" being broadly geographical, and its use as a name by a second corporation is not an infringement of trade-mark rights of a prior user, nor does it constitute unfair competition unless it is used fraudulently with the intent and the effect of deceiving the public to the injury of the first user.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trade-Marks and Trade-Names, §§ 13, 82.

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity. On motion to dismiss bill for want of equity, and on demurrers to bill.

Gregory L. & H. T. Smith, for complainant.  
Fitts, Leigh & Leigh, for defendants.

TOULMIN, District Judge. The substance of the bill of complaint is that the complainant is a corporation incorporated under the laws of the state of Missouri, in and by the name of "American Wine Company"; that, subsequently, it acquired by "letters patent" a trade-mark, the material and principal part of which is the name "American Wine Company"; that under said name complainant has for many years engaged in the business of manufacturing, dealing in, and selling wine, and is still so engaged; that under said name it has acquired an extensive and profitable business, and established a reputation as a reliable manufacturer and dealer in pure and superior wines, which has been of great value to it; that within the past year the defendants have, without any authority or permission from complainant, appropriated and used the said business and corporate name of complainant in its public advertisements, and in issuing and distributing letter heads and envelopes bearing the name "American Wine Company"; that defendants organized a corporation under the laws of the state of Alabama under the corporate name of complainant "American Wine Company"; that they are conducting their business under said corporate name; that the defendants, well knowing the high reputation of complainant, assumed and appropriated the name of complainant for the express purpose of deceiving the public and securing trade that would naturally come to complainant, and that persons were deceived into believing that they were dealing with complainant, when, in truth and in fact, they were dealing with defendants. The bill further alleges that complainant objects to and complains of the appropriation and assumption of its corporate name and the use of its trade-mark and name, and the deception of the public as aforesaid. The prayer of the bill is that defendants be enjoined from using the name of the complainant, or conducting any business or making any sales under the name of the "American Wine Com-

pany"; and also prays for such other or further relief as complainant may be entitled to, the premises considered. The case is submitted on motion to dismiss the bill for the want of equity, and on demurrers to the bill.

Geographical terms and words descriptive of the character, quality, or place of manufacture of an article are not capable of monopolization as a trade-mark. To entitle a person to the protection in the use of a name as a trade-mark his right to use it must be exclusive, and not a name which others may employ with as much truth as he who uses it. *Burton v. Stratton* (C. C.) 12 Fed. 700; *Continental Ins. Co. v. Continental Fire Ass'n*, 101 Fed. 257, 41 C. C. A. 326; *Canal Co. v. Clark*, 13 Wall. 311, 20 L. Ed. 581; *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, 37 L. Ed. 1144; *Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535; *Shaver v. Heller Merz Co.*, 108 Fed. 831, 48 C. C. A. 48; *Elgin Nat. Watch Co. v. Ill. Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365.

"It is one of the fundamental rules of the law of trade-mark that words or even symbols which are descriptive of the kind, quality, nature, properties, or place of manufacture of an article to which the words are applied cannot be appropriated as a trade-mark, as respects that article." *Brennan v. Emery-Bird-Thayer Dry Goods Co.*, 108 Fed. 627, 47 C. C. A. 532.

The word "American" is broadly geographic. *Draper v. Skerrett* (C. C.) 116 Fed. 206. I am clear on the proposition that the words "American Wine Company" are not in themselves a good trade-mark, and cannot be exclusively appropriated as a trade-mark or trade-name.

It appears from the allegations of the bill and the prayer for specific relief that this suit is based on an alleged infringement of a trade-mark. It, therefore, rests on the ownership of the trade-mark, the title to which is indispensable to a good cause of action. Being of opinion that the complainant has no exclusive proprietary interest in the words of the alleged trade-mark, it is not entitled to the specific relief prayed for.

There is, however, another class of suits based on what is called unfair competition in trade. The sale of the goods of one manufacturer or vendor as those of another is unfair competition; and constitutes a fraud which a court of equity may lawfully prevent by injunction.

In *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997, the court says:

"Undoubtedly an unfair and fraudulent competition against the business of plaintiff, conducted with the intent on the part of the defendant to avail itself of the reputation of the plaintiff to palm off its goods as plaintiff's, would, in a proper case, constitute ground for relief."

But, as said by the court in *Draper v. Skerrett*, *supra*:

"To justify a court of equity in interfering, there must be something more than the mere duplication by the one party of the other's trade-name. This is found in the deceptive use of imitative methods of display or other devices by which the public are led into buying the infringer's goods when they in-

tended to buy those of the original producer. The fraud which is thus perpetrated is a legitimate ground for equitable interference, and is the practicable basis of it."

In *Elgin Nat. Watch Co. v. Ill. Watch Co.*, 179 U. S. 665, 21 Sup. Ct. 270, 45 L. Ed. 365, Mr. Chief Justice Fuller said:

"The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another."

In *Canal Co. v. Clark*, *supra*, the court said:

"It is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another. Where a person has so dressed out his goods as to deceive the public into the belief that they are the goods of another person, and so put them upon the market to the manifest injury of that person and of the public, equity will restrain such unfair and fraudulent competition. The plaintiff's rights are to prevent anybody from passing off his goods as the goods of the plaintiff, which is indeed the very substance and kernel of the cases on the subject." *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 86 Fed. 608, 30 C. C. A. 386, 41 L. R. A. 162; *Proctor & Gamble Co. v. Globe Refining Co.*, 92 Fed. 361, 34 C. C. A. 405.

Unfair and fraudulent competition against the business of another with intent on the part of the offender to avail himself of the reputation of the other, in order to palm off his goods as the goods of the other, would, in a proper case, constitute ground for relief in equity; but false or deceitful representation must be made out. Fraud must be shown. *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396, 34 L. Ed. 997; *Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 604, 9 Sup. Ct. 166, 32 L. Ed. 535.

"The only basis for a private suit for an injunction against unfair competition is the injury to the property rights of the complainant. The fact that the defendant deceives the public as to his goods by fraudulent means, while an important factor in such a suit, does not give a right of action, unless it results in the sale of such goods as those of the complainant." *Am. Washboard Co. v. Saginaw Mfg. Co.*, 103 Fed. 281, 43 C. C. A. 233, 50 L. R. A. 609.

In the course of the opinion, the court said:

"There are numerous cases in the Reports upon the subject of unfair competition in trade. From the general principle running through them all it may be said that when one has established a trade or business in which he has used a particular device, symbol, or name, so that it has become known in trade as a designation of such person's goods, equity will protect him in the use thereof. Such person has a right to complain when another adopts this symbol or manner of marking his goods so as to mislead the public into purchasing the same as and for the goods of complainant. Plaintiff comes into a court of equity in such cases for the protection of his property rights. The private action is given, not for the benefit of the public, although that may be its incidental effect, but because of the invasion by defendant of that which is the exclusive property of complainant. \* \* \* It is true that in these cases it is an important factor that the public are deceived, but it is only where this deception induces the public to buy the goods as those of complainant that a private right of action arises."

The bill in the case at bar does not proceed upon the ground of unfair competition in trade. There are no facts alleged in the bill which show that any injury has resulted to the complainant, or is likely to result to it. It is not alleged that the defendants are engaged

in the business of manufacturing or selling wine. It is not alleged that they are in any business similar to that of complainant, or that they deal in or sell any goods or product of like kind with those of complainant. It is not alleged that the defendants are selling or palming off, or attempting to palm off, by any particular device, symbol, name, or manner of marking, their goods for those of complainant. There are no facts alleged in the bill showing ground of fraud on the public and on complainant perpetrated by the defendants by intentionally and fraudulently selling or attempting to sell their goods as those of complainant. It is only inferentially alleged that the defendants are selling or trying to sell any particular kind or character of goods. But the gravamen of the complaint is that the defendants have appropriated and assumed to use the corporate and business name of the complainant; and the court is specifically asked to enjoin and restrain them from doing so. I find no facts alleged in the bill that would, in my opinion, authorize the court to grant, under the general prayer of the bill, other or different relief.

In any aspect of the case, as presented by the allegations of the bill, my opinion is that the bill is without equity, and that the same must be dismissed on the motion of the defendant to that effect.

It is so ordered.

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UNITED STATES, to Use of HUDSON RIVER STONE SUPPLY CO., v.  
VENABLE CONST. CO.

(Circuit Court, N. D. Georgia. June 3, 1904.)

**1. COURTS—FEDERAL COURTS—WITNESS FEES—MILEAGE.**

A witness in attendance on a federal court may be allowed mileage for going to his home and back, not exceeding 100 miles, during an adjournment of the court, and the same taxed as costs, where it is less than his per diem fees would be if he had remained in attendance.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 938.]

**2. SAME—ATTORNEY'S FEES FOR TAKING DEPOSITIONS.**

Attorney's fees for taking depositions can be taxed in a federal court under Rev. St. § 824 [U. S. Comp. St. 1901, p. 632], only for such depositions as were "admitted in evidence" in the language of the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 938.]

**3. SAME—FEES FOR TAKING DEPOSITIONS.**

Fees taxable for taking depositions on interrogatories in a federal court when not taken by a United States commissioner are not governed by the state statute, but may properly be taxed at 20 cents per folio by analogy with those allowed the clerk, by Rev. St. § 828 [U. S. Comp. St. 1901, p. 635].

**4. SAME—ATTORNEY'S DOCKET FEES—CONSOLIDATION OF SUITS.**

Where two suits are brought in a federal court between the same parties which are consolidated for trial, but separate verdicts are returned, two attorney's docket fees of \$20 each are taxable against the losing party, under Rev. St. § 824 [U. S. Comp. St. 1901, p. 632].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 938.]

On Motion to Retax Costs.

For original opinion, see 124 Fed. 267.

Felder & Rountree and Staton & Campbell, for plaintiff.

Hoke Smith, H. C. Peeples, and B. H. & C. D. Hill, for defendant.

NEWMAN, District Judge. On the motion to retax costs in this case, the first question is as to the taxation of the mileage of two witnesses, viz., Brown, for two trips, and Kettle, for three trips. There is an agreement of facts by counsel as to this matter, as follows:

"There was an adjournment of the court for the holidays of two weeks, and in order that the court might be held at Columbus for one week, pending the trial of the cause. For this reason witness Brown has been allowed for two trips, and witness Kettle for three trips, each trip being taxed by the clerk at 100 miles each way. The trips were actually made by said witnesses during such adjournment. Each of said witnesses resides more than 100 miles from Atlanta, where the cause was tried. The attendance of neither was compulsory, but each had a subpoena handed him and each attended in good faith. The mileage allowed is less than the per diem would have been if either Brown or Kettle had remained in attendance during the entire trial."

It appearing that it was less expensive to allow the witnesses to go home and return, during the interval of the trial referred to, than it would have been to keep them in Atlanta and pay them their per diem allowance, and, the clerk only having allowed 100 miles, the taxation by the clerk as to this item is held to be correct, and is approved.

2. The next item is as to the allowance by the clerk of attorney's fees for depositions, \$2.50 each, under section 824, Rev. St. [U. S. Comp. St. 1901, p. 632], taken and not read in evidence in the case. The clerk taxed the defendant, the losing party in the cause, with attorney's fees for several sets of depositions or interrogatories which were not used on the trial, and for one set which was offered and rejected. The language on this subject (section 824) is as follows:

"For each deposition taken and admitted in evidence in a cause, two dollars and fifty cents."

The cases on this subject are collected in Gunckel, Costs in Federal Courts, p. 194 et seq. My opinion is that under this statute the losing party cannot be taxed with attorney's fees for depositions, unless they are "admitted in evidence" in a cause, in the language of the statute.

In Indianapolis Water Co. v. American Straw-Board Co. (C. C.) 65 Fed. 534, in the opinion by Judge Baker the question is disposed of in a way which seems to be correct, as follows:

"To entitle an attorney to this fee, there must be a concurrence of three things, viz.: (1) There must be a deposition; (2) it must have been taken in a cause; and (3) it must have been admitted in evidence therein."

In Barnardin v. Northall et al. (C. C.) 83 Fed. 241, the same judge said this:

"The contention of the defendant is that, when a deposition is 'taken,' it is 'admitted in evidence.' If such were the case, the words 'admitted in evidence' would be mere surplusage. It is a rule in the construction of statutes that effect shall, if possible, be given to every part of them. It is evident that Congress meant by the words 'admitted in evidence' something more than the mere taking of a deposition. An attorney's fee on depositions is not taxable until they are both taken and admitted in evidence. The ad-

mission of depositions in evidence involves an exercise of judicial functions which are not vested in an examiner or other ministerial officer. These depositions may or may not be legally entitled to be admitted in evidence. If a fee were taxable for the taking of a deposition, it might be contended that another fee would be taxable when the deposition is thereafter admitted in evidence."

The clerk in this case will only tax for interrogatories taken and admitted in evidence in the cause—that is, read in evidence.

3. Exceptions taken by defendant to the allowance by the clerk of "twenty cents for each folio of one hundred words" for taking depositions or interrogatories. The clerk taxes this by analogy with that allowed clerks under section 828 of the Revised Statutes [U. S. Comp. St. 1901, p. 635]. It is contended for the defendant that it should not be taxed as the expense of taking depositions with more than the fee allowed by the statute of Georgia (Civ. Code 1895, sec. 5321), which is, for examination of each witness, \$2; for certificate and returning testimony, 50 cents; and for issuing each subpoena, 20 cents; or at most, with the allowance to United States commissioners under the act of May 28th, 1896, c. 252, § 21, 29 Stat. 184 [U. S. Comp. St. 1901, p. 652], 10 cents a folio. Unless the statute of the state governs the matter in this court, the clerk had to adopt by analogy either the fee allowed clerks under section 828, or that allowed United States commissioners by the act of 1896; and, as I am inclined to think the state statute is not applicable here, I see no reason to find that the clerk erred in adopting, as governing in this matter, the rate allowed clerks for taking and filing depositions. Prior to the act of 1896 the fees of commissioners of the Circuit Court was the same as that allowed the clerk—20 cents a folio—but by that act it was reduced to 10 cents a folio. This reduction only applies to what are now known as "United States Commissioners"; formerly, and before the act of 1896, commissioners of the Circuit Court. It does not apply, of course, to persons other than such commissioners who are named to execute or take answers on written interrogatories filed by the parties in civil cases; and the clerk in taxing costs may as well adopt the rule as to the amount allowed clerks as the amount allowed United States commissioners; indeed, with more propriety, as this has heretofore been the rule for taxing costs in such cases. As a matter of fact, even the amount thus allowed would be much less than the amount necessarily expended in having, in this way, testimony properly taken. The clerk may tax against the defendant the expense of the plaintiff for taking depositions or interrogatories which were used in evidence, at the rate allowed clerks by the statute, and fixed by him, viz., 20 cents a folio.

4. The remaining question is as to the taxation by the clerk of two attorney's docket fees. There were two suits by the plaintiff against the defendant, and they were consolidated for convenience in the trial, with the proviso, in the order making such consolidation, that separate verdicts should be taken. The jury was instructed by the court to find separate verdicts, which was done. The statute is:

"On a trial before the jury in civil \* \* \* causes, \* \* \* a docket fee of twenty dollars."

I think the clerk was correct in allowing a docket fee of \$20 in each case. While there was but one hearing before the court and jury in this case, two cases were really tried and separately ended. In this sense, there were two trials, and I agree with the clerk that two attorney's docket fees should be charged. *Switzer v. Home Ins. Co.* (C. C.) 46 Fed. 50.

As the action of the court in this matter will probably serve somewhat as a precedent in taxing costs in this district, I have conferred with Circuit Judge Pardee regarding it, and he agrees with me in the conclusions stated above.

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### GULBENKIAN v. STRANAHAN.

(Circuit Court, S. D. New York. April 29, 1907.)

#### 1. CUSTOMS DUTIES—RELIQUIDATION—VOLUNTARY SATISFACTION OF PROTEST.

A collector of customs sustained an importer's protest against the assessment of duty, instead of transmitting the protest to the Board of General Appraisers for decision, under Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933]. *Held*, that the provisions of the act were as well complied with by this action as they would have been by transmission of the case to the Board.

#### 2. SAME—RELIQUIDATION BY ORDER OF SECRETARY OF TREASURY—ESTOPPEL.

The Secretary of the Treasury authorized a collector of customs to sustain an importer's protest relative to the value of the currency of the invoice; but, after reliquidation had taken place accordingly, he ordered a re-reliquidation, on the same basis as the original liquidation against which the protest had been made. This order was based on Tariff Act August 27, 1894, c. 349, § 25, 28 Stat. 552 [U. S. Comp. St. 1901, p. 2375], authorizing the Secretary to order reliquidation in certain currency cases. *Held*, that the rights of the Secretary, conferred by this section, were not impaired by his previous acquiescence in the importer's protest.

#### 3. SAME—RELIQUIDATION AFTER ONE YEAR—PRESENCE OF PROTEST.

Act June 22, 1874, c. 391, § 21, 18 Stat. 190 [U. S. Comp. St. 1901, p. 1986], provides that the liquidation and settlement of duties shall become final "after the expiration of one year from the time of entry, in the absence of \* \* \* protest." *Held*, that this prohibition does not apply where a protest has been filed, even though it has been sustained, and is no longer pending.

#### 4. SAME—COLLECTOR OF CUSTOMS—LIABILITY—ACTS OF PREDECESSOR.

A collector of customs is not liable to importers for the failure of his predecessor to send the importers' protests to the Board of General Appraisers, under Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933].

#### 5. SAME—LIABILITY FOR OBEYING SECRETARY OF TREASURY.

A collector of customs is not responsible for the action of the Secretary of the Treasury in ordering reliquidation under Tariff Act August 27, 1894, c. 349, § 25, 28 Stat. 552 [U. S. Comp. St. 1901, p. 2375], relating to currency fluctuations; and he is not liable to importers where he follows instructions issued by the Secretary under said section.

#### At Law.

This case involves the following provisions of law:

"Sec. 25. That the value of foreign coin as expressed in the money of account of the United States shall be that of the pure metal of such coin of standard value; and the values of the standard coins in circulation of the

various nations of the world shall be estimated quarterly by the director of the mint and be proclaimed by the Secretary of the Treasury. \* \* \* And the values so proclaimed shall be followed in estimating the value of all foreign merchandise exported to the United States during the quarter for which the value is proclaimed. \* \* \* Provided, that the Secretary of the Treasury may order the reliquidation of any entry at a different value, whenever satisfactory evidence shall be produced to him showing that the value in United States currency of the foreign money specified in the invoice was, at the date of certification, at least ten per centum more or less than the value proclaimed during the quarter in which the consular certification occurred." Tariff act of 1894 (Act August 27, 1894, c. 349, § 25, 28 Stat. 552 [U. S. Comp. St. 1901, p. 2375]).

"Sec. 14. That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise \* \* \* shall be final and conclusive, \* \* \* unless the owner, importer, consignee or agent of such merchandise \* \* \* shall within ten days after \* \* \* liquidation of duties, \* \* \* if dissatisfied with such decision, give notice in writing to the collector, setting forth therein distinctly and specifically \* \* \* the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties. \* \* \* Upon such notice and payment the collector shall transmit the invoice and all the papers and exhibits connected therewith to the board of three general appraisers, \* \* \* which board shall examine and decide the case thus submitted. \* \* \*"

Customs administrative act of 1890 (Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933]).

"Sec. 21. \* \* \* Whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, \* \* \* such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties." Act June 22, 1874, c. 391, 18 Stat. 190 [U. S. Comp. St. 1901, p. 1986].

The plaintiffs are the members of the firm of Gullabi Gulbenkian & Company, who have brought the action against Nevada N. Stranahan, collector of customs at the port of New York, for the recovery of damages alleged to be due by reason of the wrongful withholding of excessive duties paid by the importers under protest, also by reason of breach of official duty in not forwarding the importers' protest to the Board of United States General Appraisers, as provided in said section 14. The case relates to importations into said port between June 30, 1899, and October 30, 1900, which was before said Stranahan had become collector of customs, and while his predecessor, George R. Bidwell, was still in office. The merchandise in question was imported from India, the invoices being made out in rupees, the currency of that country. The entries for the merchandise were liquidated on the basis of the exchange value of the rupee, as shown by consular certificates attached to the invoices; and the importers paid the duties on this basis, but filed protests against the action of the collector as provided in said section 14, contending "that the collector erred in regarding or taking as the value of the rupee the exchange value thereof; and \* \* \* that instead he should have regarded and taken as the value of the rupee the proclaimed value as estimated by the director of the mint or the value of the pure metal of the coins in question." The collector did not forward these protests to the Board of General Appraisers in accordance with section 14, nor was he requested so to do by the importers; but he reliquidated the entries on the basis of the proclaimed value as contended in the protests. He, however, made no refund to the importers of the amounts accruing by virtue of the reliquidation, but again reliquidated the entries on the same basis as the original liquidation. Both this reliquidation and the re-reliquidation were made pursuant to specific instructions by the Secretary of the Treasury; the instructions as to the re-reliquidation being on the ground that there had been produced to the Secretary satisfactory evidence that the value in United States currency of the Indian rupee was 10 per cent. more than the value proclaimed during the quarter in which the consular certification of the invoice occurred, and that, therefore, under said section 25 of the tariff act of 1894, he was au-



thorized to direct the aforesaid re-liquidation on the exchange value. No protests were filed by the importers with respect to the re-liquidation.

The importers' complaint refers to three schedules. As to the first they subsequently disclaimed all right to recover damages. The second related to importations upon which the duties were liquidated, reliquidated, and re-liquidated before the defendant herein became collector. Schedule 3 related to importations upon which the duties were originally liquidated by said Bidwell, defendant's predecessor, but were reliquidated and re-liquidated by the defendant. As to the importations embraced in this last schedule, it appeared that all of the reliquidations and re-reliquidations were made after the expiration of one year from the time of entry. The importers contended that, the protests having been satisfied by the reliquidation, there was then an "absence of protest" within the meaning of said section 21. Consequently, more than a year having elapsed after entry, and there being no fraud, no further liquidations were legal, being contrary to the provisions of the section. Note *United States v. Leng* (D. C.) 18 Fed. 15; *Cassel v. United States* (C. C.) 146 Fed. 146; *United States v. Fox* (D. C.) 53 Fed. 531, 536; *Gandolfi v. United States*, 74 Fed. 549, 20 C. C. A. 652; and *In re Benziger*, G. A. 6224 (T. D. 26,898).

The plaintiffs asked the court to find as conclusions of law (1) that, upon the reliquidation of the entries by the collector, they became entitled to a refund of the amount of the duties paid on such entries in excess of the amount of such duties estimated in accordance with the pure metal value, as duly estimated by the director of the mint and proclaimed by the Secretary of the Treasury, of the currency in which the merchandise of such entries was invoiced; and (2) that any subsequent liquidation of said entries or any of them was contrary to law and void. The case was tried without a jury.

Hatch & Clute (Walter F. Welch, of counsel), for importers.  
Winfred T. Denison, Asst. U. S. Atty., for collector.

HOUGH, District Judge. In my opinion section 14 of the administrative act of 1890 (Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933]) is complied with by either (1) transmitting all the papers and exhibits to the Board of General Appraisers, or (2) complying with the terms of the protest. In this view the claims based upon the importations enumerated in schedule 2 are disposed of by *United States v. Whitridge*, 197 U. S. 135, 25 Sup. Ct. 406, 49 L. Ed. 696; for if the Secretary of the Treasury, after a hearing before the Board of General Appraisers, could exercise his rights under section 25 of the act of 1894 (Act August 27, 1894, c. 349, 28 Stat. 552 [U. S. Comp. St. 1901, p. 2375]), he could certainly exercise the same rights after having once acquiesced in the terms of the protest.

As to the claims enumerated in schedule 3, it appears to me that, a protest having been duly filed, section 21 of chapter 391 of Act 1874, 18 Stat. 190 [U. S. Comp. St. 1901, p. 1986], does not apply. This is the inference I draw from the remarks at the foot of page 442, 124 U. S., page 558, 8 Sup. Ct., 31 L. Ed. 492 (*Beard v. Porter*). That is, as shown by the case last cited, since there was a protest against a prior liquidation or settlement of duty, it follows that such liquidation or settlement did not become final and conclusive at the expiration of a year or at the expiration of any other period, so far, at least, as that statute is concerned.

I am unable to acquiesce, however, in plaintiffs' position that a cause of action accrued against this defendant because such defendant's

predecessor in office unreasonably refused, for the space of nearly two years prior to his resignation, to give the plaintiffs any redress whatever; that is, he neither yielded to their protest, nor transmitted the papers to the Board of General Appraisers. It may well be that these plaintiffs had a cause of action against Bidwell, but all that Stranahan did was to obey the direct orders of the Secretary of the Treasury to (1) yield to the protest, but (2) pay nothing by reason thereof, and (3) send the papers on to Washington, where (4) steps were promptly taken to render the protest a vain thing. If the collector had even, under the compulsion of his superior officer, refused either to send the papers to the Appraisers or to yield to the protest, a cause of action might exist against him; but he did yield, and I do not think he is responsible for the final action of the Secretary of the Treasury, concerning which it is not necessary to express any opinion.

Judgment for defendant.

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In re SHEARER.

(District Court, E. D. Pennsylvania. January 20, 1908.)

No. 382.

**ALIENS—NATURALIZATION—MINOR CHILDREN OF DECEASED ALIEN—"ALIEN WHO HAS DECLARED HIS INTENTION."**

The provision of the naturalization act of June 29, 1906, c. 3592, § 4, cl. 6, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 422], that "when any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention," is precisely the same in effect as Rev. St. § 2168 [U. S. Comp. St. 1901, p. 1332], which is repealed by the later act, and, being a re-enactment, the words "any alien who has declared his intention" must be construed to include persons who made their declarations under the old statute, and subsequently died, whose minor children may be naturalized under the new act without making any declaration of intention.

Petition for Naturalization.

William S. Gregg, Special Asst. U. S. Atty.

J. B. McPHERSON, District Judge. The petitioner, who is an alien subject of Great Britain, came to the United States in 1883, when he was less than two years old, and has resided here continuously since that time. His father declared his intention to become a citizen in 1889, but had not been naturalized when he died in 1893. At the death of his father the petitioner was still a minor, not quite 12 years of age, and, under section 2168 of the Revised Statutes [U. S. Comp. St. 1901, p. 1332], he succeeded to the benefit of his father's declaration. He did not become a citizen immediately, and ipso facto as he would have become, if the father had taken the final step to complete his own citizenship, but he was entitled to use the father's declaration with the same effect as if he himself had made it, and to become a full citizen, after his arrival at majority, by presenting the ordinary final petition

and taking the oaths prescribed by law. Section 2168 [1 U. S. Comp. St. 1901, p. 1332] is as follows:

"When any alien, who has complied with the first condition specified in section 2165" (that is, has declared his intention to become a citizen), "dies before he is actually naturalized, the widow and the children of such alien shall be considered as citizens of the United States, and shall be entitled to all rights and privileges as such, upon taking the oaths prescribed by law."

There is no dispute about the meaning of this section, so far at least as concerns the present controversy. It is agreed that its effect upon the petitioner's rights, as a minor alien, is correctly stated in the foregoing sentences of this opinion; and, therefore, when the minor reached his majority in December, 1902, he could have availed himself at once of the privilege offered by section 2168, and could have become a citizen by presenting a final petition; and taking the necessary oaths. He did not apply for citizenship, however, until May 2, 1907, when he filed a petition under the act of 1906, claiming the same right now under section 4, cl. 6, as could have been asserted in 1902 under section 2168. Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 422]. The government objects to the petition on the ground that the alien's right under section 2168 has been taken away by specific repeal (see section 26, Act 1906); and that no new right is given to the petitioner by clause 6 of section 4, because his father died before the passage of the act. It is said that this clause applies only to the case of an alien who shall die after the passage of the act, and that the petitioner must make his own declaration of intention, and wait two years before his final petition can be entertained. In my opinion this position is not sound. Clause 6 of section 4 [U. S. Comp. St. Supp. 1907, p. 422] is in these words:

"When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized, the widow and minor children of such alien may, by complying with the other provisions of this act, be naturalized without making any declaration of intention."

The phrase "who has declared" will bear either of three constructions. It may mean "who shall hereafter declare," or "who has already declared," or "who has already declared, or shall hereafter declare." Unless it refers exclusively to the future, the government's objection cannot be sustained, and, as I have already indicated, it seems to me that the phrase should bear the broadest of the three possible meanings. In support of this view, it is to be noted that the effect of the clause is precisely the same as the effect of section 2168. The language differs in some particulars, but there is no essential difference in the meaning. When, therefore, clause 6 provides that "when any alien who has declared his intention, etc., dies before he is actually naturalized," his widow and minor children may be naturalized without previously declaring their own intention, it merely repeats, in exactly equivalent terms, what had theretofore been the law under section 2168. The act of 1906 was intended to codify the statutes relating to naturalization, making some changes and adding certain provisions; and the effect of the repeal of section 2168 by section 26 of the later statute, while its provisions were at the same time re-enacted

in section 4, was simply to continue the earlier law on this subject without a break. Upon familiar principles of statutory construction, the plain meaning of the words used in section 2168 is to be carried over to the same words thus deliberately adopted by Congress in the act of 1906; the result being, in my opinion, that the words "any alien who has declared his intention," etc., in the later act must be construed to include the same persons that were included in the words "any alien who has complied with the first condition," etc., in section 2168 of the Revised Statutes. *Bear Lake Co. v. Garland*, 164 U. S. 11, 12, 17 Sup. Ct. 7, 41 L. Ed. 327.

If this construction is correct, it follows that the petitioner's right under section 2168 to avail himself of his father's declaration of intention was not taken away by the act of 1906, but was preserved and continued by clause 6 of section 4, and that the present application should be granted. (I am authorized to say that Judge Holland, to whom a similar petition has been presented by another applicant, agrees with this opinion.)

The clerk will enter an order in accordance therewith.

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FARMERS' BANK OF CUBA CITY, WIS., v. WRIGHT et al.

(Circuit Court, N. D. Iowa, C. D. January 25, 1908.)

No. 298.

1. COURTS—FEDERAL COURTS—SUIT TO ESTABLISH CLAIM AGAINST ESTATE—PARTIES.

In proceedings to establish claims against the estates of deceased persons, the federal court follows and administers the local law, and it is only necessary in such a proceeding in that court to serve those whom it would be necessary to serve if the proceeding were in the state court; and such parties only are indispensable parties defendant either in the state or federal court.

2. SAME—JURISDICTION—NONRESIDENT EXECUTOR.

Iowa Code 1897, § 3465, provides that "where two or more parties are bound by contract \* \* \* or statute whether jointly only, or jointly and severally, or severally only, \* \* \* the action thereon may at the plaintiff's option be brought against any or all of them." Section 3410 provides that "in an action against several executors or administrators they shall be considered one person, and judgment may be taken and execution issued against all as such although only a part were served with notice." Rev. St. § 737 [U. S. Comp. St. 1901, p. 587], relating to federal courts, provides that "the misjoinder of parties who are not found within the district shall constitute no matter of abatement or other objection to the suit," but that the judgment against the parties properly before the court shall be without prejudice to parties not served nor appearing. *Held* that, under such statutes, a federal court had jurisdiction of a suit against executors appointed in Iowa to establish a claim against the estate of their testator, and that its jurisdiction was not affected by the fact that one of the executors joined was a citizen and resident of another state and was not served, such executor not being an indispensable party under the Iowa statute.

[Ed. Note.—Jurisdiction as affected by state laws, see note to *Barling v. Bank of British America*, 1 C. C. A. 513.]

**3. SAME—PENDENCY OF CLAIM IN STATE COURT.**

Iowa Code 1897, § 3338 et seq., relating to claims against the estates of decedents, requires such claims to be filed with the clerk of the district court within the stated time to prevent the same from being barred by limitation and to fix their class, and unless approved by the executor or administrator they must thereafter be established by the court on notice in what is in effect an ordinary independent suit. *Held*, that the filing of a claim as so required by a nonresident creditor does not bar his right to maintain a suit to establish the same in a federal court where the jurisdictional facts exist, even if it be assumed that after such filing the matter is pending in the state court.

At Law. On demurrer to defendant's plea in abatement and to the jurisdiction of the court.

The plaintiff, a Wisconsin corporation, filed its petition against George Wright and W. H. Wasem as executors of the will of John Wasem, deceased, late of Wright county, this state, to establish a claim against said estate based upon two promissory notes, aggregating \$14,200, alleged to have been made by the deceased in his lifetime to A. H. Wasem or order, who then was, and still is, a citizen of Wisconsin. The petition alleges that the deceased, John Wasem, a resident of Wright county, this state, died testate in that county July 26, 1906; that his will was duly admitted to probate by the district court of Iowa in and for that county in October following; and that defendant George Wright, then and now a citizen of Iowa residing in said Wright county, and W. H. Wasem then and now a citizen of South Dakota residing in that state, were named in said will as executors thereof, and by said court duly appointed joint executors of said will and of the estate of the deceased on October 9th; and that they have duly qualified, and are now acting as such. It also alleges that pursuant to the provisions of the Iowa Code, relating to the settlement of the estates of deceased persons, the plaintiff made a written statement of its claim against said estate based upon said notes, setting forth copies thereof, duly verified the same, and filed it with the clerk of the district court of said Wright county February 7, 1907, within six months after the notice of the appointment and qualification of said executors was given. The prayer of the petition is that the said claim be allowed; that it be adjudged that the executors of said will and the estate of said deceased are indebted to the plaintiff in the amount of said two notes, with interest from their dates according to the terms thereof; and for such other order in the premises as may be authorized by law. The petition names both executors as defendants, but defendant Wright only is served with summons, and he alone appears and files pleas in abatement and to the jurisdiction of the court upon the grounds: (1) That his co-executor is an indispensable party to this proceeding; that he has not been served with summons; has not appeared; and is now, and was when this action was commenced, a citizen and resident of South Dakota, and cannot rightly be made a party defendant hereto. (2) That at the time of the commencement of this action there was, and still is, pending in the district court of Iowa in and for Wright county, an action by this plaintiff against the estate of John Wasem, deceased, upon the same causes of action set forth in the petition in this action, to prove and establish the same as a claim against said executors and said estate. The plaintiff demurs to each of these pleas.

McGrath & Archerd, Healy & Healy, and Thos. D. Healy, for plaintiff.

Eugene Schaffer, Nagle & Nagle, Birdsall & Birdsall, and Kelleher & O'Connor, for defendant Wright.

REED, District Judge (after stating the facts as above). Defendant's first plea challenges the right of the court to establish the claim against the estate of John Wasem, deceased, because one of the co-executors of his will, who has qualified and is acting as such with

defendant, is a citizen of South Dakota, has not appeared, and cannot be served with process within the jurisdiction of this court. It is not disputed that a nonresident creditor may establish his claim against the estate of his deceased debtor in the proper circuit court of the United States, the requisite amount and diversity of citizenship existing; but it is contended by the defendant Wright that his co-executor Wasem is jointly liable with him, and is therefore an indispensable party to this proceeding. In view of the limited jurisdiction of the federal courts the question lies at the threshold of this proceeding. It was the rule at common law that when one only of several joint obligors was sued, he could plead the nonjoinder of the others in abatement. And the rule applied to suits against joint executors to recover upon obligations of the testator. *Hensloe's Case*, 9 Coke, 36 (vol. V, p. 64); *Swallow v. Emberson*, 1 Levin, 161; 1 Chitty's Pl. 52 (14th Am. Ed.); *Gould's Pl. (Hamilton)* p. 197. Following that rule, it was early held in the federal courts, in the absence of statute changing it, that if those not served were citizens of the same state as the plaintiff, or of some other district so that they could not be served with process within the district where the suit was brought, the jurisdiction of the court was defeated. *Barney v. Baltimore City*, 6 Wall. 280-286, 18 L. Ed. 825. But this rule of the common law is abrogated in many of the states, Iowa among them. The Code of Iowa 1897 provides:

"Sec. 3465. Where two or more persons are bound by contract or by judgment, decree, or statute, whether jointly only, or jointly and severally, or severally only, including the parties to negotiable paper, common orders and checks, and sureties on the same or separate instruments, or by any liability growing out of the same, the action thereon may at the plaintiff's option, be brought against any or all of them. When any of those so bound are dead, the action may be brought against any or all of the survivors, with any or all of the representatives of the decedents, or against any or all of such representatives. An action or judgment against any one or more of several persons jointly bound shall not be a bar to proceedings against the others."

And to avoid the effect of the rule in the federal courts, the act of February 28, 1839, c. 36, § 321, was enacted. That statute, with some unimportant changes, is section 737 of the Revised Statutes of the United States [U. S. Comp. St. 1901, p. 587], which is as follows:

"Sec. 737. When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process not voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

A plaintiff prosecuting his action to judgment against one of his joint debtors, as authorized by these statutes, obtains only the relief to which he is entitled as against him; and no injustice is done to the others because their rights are not affected by such judgment. *Barney v. Baltimore*, 6 Wall. 287, 18 L. Ed. 825. But neither of these

statutes, nor the forty-seventh equity rule, authorizes the court to proceed to final judgment or decree in the absence of parties who are indispensable to a final determination of the question before it. Code of Iowa 1897, § 3466; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Minnesota v. Northern Security Co.*, 184 U. S. 199-237, 22 Sup. Ct. 308, 46 L. Ed. 499; *Decatur Co. v. Bright*, 57 Iowa, 724-729, 11 N. W. 653.

The question then is, are all of the executors, or administrators, when more than one is appointed of the estate of a deceased person under the Iowa statute, indispensable parties to a proceeding by a creditor in a circuit court of the United States in that state, to establish his claim against the estate of his debtor, who was domiciled in that state at the time of his death, and whose estate is being there administered? The federal courts, in proceedings to establish claims against the estates of deceased persons, follow and administer the local law for the allowance of claims against such estates. *Aspden v. Nixon*, 4 How. 467, 11 L. Ed. 1059; *Security Trust Co. v. Bank*, 187 U. S. 211-227, 23 Sup. Ct. 52, 47 L. Ed. 147; *Mining Co. v. Blanden*, (C. C.) 136 Fed. 252-254.

In Iowa, since 1886, the district court (which is the court of general jurisdiction) exercises jurisdiction in the probate of wills and the settlement of the estates of deceased persons; and the powers, duties, and obligations of executors or administrators, as the case may be, in that state with reference to the settlement of such estates are identical; and each is charged with the obligation to apply the estate of the deceased person liable for his debts to their payment. Code 1897, § 3270 et seq. Other sections are:

"Sec. 3338. Claims against the estate shall be clearly stated, and, if founded upon a written instrument, the same or a copy thereof and of all indorsements thereon shall be attached as a part of the statement, and if upon account, an itemized copy shall be attached, showing the balance; which statement must be sworn to and filed with the clerk of the district court and ten days' notice of the hearing thereof—which shall be at some regular term of the court—accompanied by a copy of the claim, shall be served on one of the executors or administrators in the manner required for commencing ordinary actions, unless the same has been approved by the executor or administrator, in which case it may be allowed by the clerk without notice, and so entered upon the probate calendar."

"Sec. 3341. If a claim filed against the estate is not fully admitted by the executor or administrator, the court may hear and allow the same, or may submit it to a jury, and on the hearing, unless otherwise provided, all provisions of law applicable to an ordinary action shall apply."

"Sec. 3410. In an action against several executors or administrators, they shall be considered one person, and judgment may be taken and execution issued against all as such, although only part were served with notice."

Administrators were unknown to the early common law. Their appointment for the estates of persons dying intestate was first required by the statute of 31 Edw. III, c. 11 (A. D. 1357), which is as follows:

"That in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods:

"(2) Which deputies shall have an action to demand and recover as executors, the debts due to the said person intestate, in the King's court. \* \* \*

"(3) And shall answer also in the King's court, to other to whom the said dead person was holden and bound, in the same manner, as executors shall answer.

"(4) And they shall be accountable to the ordinaries, as executors be in the case of testament, as well of the time past as the time to come."

This statute, and the later one of 21 Henry VIII, c. 5, are the foundation of the statutes of the American states upon the subject. 2 Blackstone's Com. 496; 3 Redfield, Wills, p. 78 and note (2d Ed.).

In the earlier decisions after the statute of 31 Edw. III, a distinction is made between the powers, duties, and obligations of administrators, and those of executors, who, it is said, derive theirs from the will. That statute does not seem to warrant the distinction thus made, at least as to their duties and obligations in the settlement of the estates; and no such distinction exists under modern statutes—especially like that of Iowa; and under such statutes the powers, duties, and obligations of each in the settlement of estates have been regarded in later decisions as the same. *Hudson v. Hudson*, 1 Atkyns, 460 (2 Eng. R. C. 135); *Dickerson v. Robinson*, 6 N. J. Law, 195, 10 Am. Dec. 396-399; 2 Black. Com. 496-507. Sec. 3465 of the Iowa Code, above, is comprehensive, and includes all joint obligations; and its plain purpose is to abolish the common-law rule requiring the joinder in one action of all parties jointly bound, no matter how the obligation arises. The obligations of co-executors arise either from the will, or, as in case of administrators, from the statute, and in either case they are within the very letter of this section. See *Moore v. McKinley et al.*, Executors, 60 Iowa, 367-370, 14 N. W. 768.

The Iowa statute would seem therefore to settle the question against the defendant. But it is earnestly contended in his behalf that the common-law rule still obtains, in the federal courts at least, as to actions against joint executors; and *Conolly v. Wells* (C. C.) 33 Fed. 205, and cases there cited, are mainly relied upon as sustaining that contention. It must be admitted that the contention has support in that decision. The case, however, may be distinguished upon its facts from this. It was a suit in equity to establish a claim against the estate of a deceased person, and for an accounting of certain bonds or securities intrusted by complainant to the deceased, who in his lifetime was a partner of complainant in certain transactions in which they together obtained such securities, the joint possession and legal title of which, it is held, passed to three executors of the will of the deceased partner, one of whom was a citizen of the same state as the complainant, and was not named as a party defendant, for to have done so would defeat, it was said, the jurisdiction of the court; and it was held that a final decree could not be made concerning these securities without affecting the interest of the absent executor therein. The decision, however, broadly holds that one joint executor, when sued alone for a debt or obligation of the testator, may plead in abatement, as at common law, the nonjoinder of a co-executor; and a statute of Wisconsin similar to section 3410 of the Iowa Code is held not to affect this rule of the common law. The opinion is carefully prepared, is concurred in by the circuit judge, and is entitled to much weight. A number of cases are cited, which the opinion concedes, hold to a dif-



ferent rule. One of them, *United States v. Backus*, 6 McLean, 443, Fed. Cas. No. 14,491, was an action to recover from the executors of a deceased postmaster, who died in Michigan, a balance due the United States upon their account against the postmaster. There were three executors named in the will, all of whom qualified and were acting as such, two of them being citizens and residents of Wisconsin, and one of Michigan, who alone was served. He appeared and pleaded in abatement the nonjoinder of his two co-executors. In holding the plea to be untenable the court said:

"The objection that two of the executors are citizens of Wisconsin, and, consequently, this action against the defendant is not sustainable, we think is obviated by the provisions of the act of February 28th, 1839, which declares, 'that the nonjoinder of parties, who are not found within the district shall constitute no matter of abatement, or other objection to the suit.' By the statute, the judgment against the party served with process shall not prejudice other parties. And we suppose that this provision applies as well to persons jointly liable as executors as to any other joint liability. It is a well-settled principle that an executor is not liable to be sued in any other jurisdiction than that under which the letters testamentary were granted. And if the suit must abate on the ground stated, the effect would be to defeat the demand of the government."

And it might have been added, of all other creditors who would sue to recover their demands. *Tappan v. Bruen*, 5 Mass. 193, *Parker v. Danforth*, 16 Mass. 299, *Williams & Ivey v. Sims*, 8 Port. (Ala.) 579, and some other cases cited, hold to the same effect, in the absence of any statute upon the subject. *Blake v. McKim*, 103 U. S. 336, 26 L. Ed. 563, also cited, was an action originally brought in one of the courts of Massachusetts, by a citizen of that state, against three executors of the will of George Blake, upon a bond of the testator. Two of the executors were citizens of Massachusetts, and one of New York, all of whom were sued. They appeared and filed a joint answer, presenting a defense common to all, and subsequently filed a joint petition to remove the suit to the Circuit Court of the United States. It was held that the suit was not removable, because it did not involve any separable controversy between the plaintiff and any of the defendants, and two of the defendants were citizens of the same state as the plaintiff. The statement by Mr. Justice Harlan that all of the executors were indispensable parties but states the common-law rule as to actions against joint obligors, as appears from the citation of Chitty, Gould, and Dicey. The Iowa statute abrogating that rule, permits the plaintiff, at his option, to sue all of his joint obligors, including executors or administrators, in one action, and to have judgment against all jointly; and if a creditor should pursue this course in that state it is plain that if some of those whom he would thus sue were citizens of the same state with himself, the suit would not be a removable one. Nothing in the case touches the question of the right of a creditor, under a statute like that of Iowa, to establish his claim against the estate of his deceased debtor, upon a service of one only of the joint executors of his will. *Barney v. Baltimore*, 6 Wall. 286, 18 L. Ed. 825, was a suit for the partition of lands. As no partition of lands can be final that would not affect and conclude all of the owners thereof, and as some of those

were not, and could not be made, parties to that suit, it necessarily failed. In *Inbusch v. Farwell*, 1 Black, 566, 17 L. Ed. 188, Farwell, a citizen of Illinois, commenced suit against James Buchanan, Henry Eastman, and Patten McMillan, doing business as partners under the firm name of Buchanan, Eastman & Co., upon a partnership debt, and attached the property of the partnership. All of the defendants appeared, and Buchanan for the copartners, and John G. Inbusch and another as sureties, executed a bond for the release of the attached property, conditioned for the payment of the judgment that might be recovered against the defendants, on the filing of which the attachment was released. Subsequently it appeared that Buchanan and Eastman were citizens of Illinois, and the action was dismissed as to them for want of jurisdiction. McMillan afterward died, and his administrator was substituted against whom judgment was rendered for the partnership debt. Suit was then brought against Inbusch and the other surety upon the bond given by them. The defense was that Farwell had not recovered judgment "against the defendants" in the attachment suit, and therefore that the condition of the bond was not broken. Mr. Justice Clifford speaking for the court said:

"Jurisdiction of the federal courts is not defeated by suggestions that other parties are jointly liable with the defendants, provided it appears that such other parties are out of the jurisdiction of the court (Act Feb. 28, 1839). \* \* \* Under that law, therefore, without more, it is clear that, if Buchanan and Eastman had not been made parties to the suit, it might have been regularly prosecuted against the other defendant in his lifetime, and after his decease might have been revived and prosecuted against his administrator; and it is equally clear that, by the law of the state and the rule of the court adopting the same, it was competent for the plaintiff under the circumstances to discontinue as to Buchanan and Eastman, and proceed against the administrator of the other partner. Beyond question, therefore, it was a valid judgment upon a partnership debt." And see *Hill v. Tucker*, 13 How. 458, 14 L. Ed. 223.

One of the English cases cited in *Conolly v. Wells* is *Rouse v. Etherington*, 1 Salkeld, 312 (A. D. 1702). While the quotation from the opinion in that case shows that a judgment against joint executors upon a debt of the testator is authorized by an appearance or service of one only, so as to bind the property of the estate, the quotation is inaccurate, and does not show the grounds upon which the decision rests. The action was against two executors upon a debt of the testator. The writ was returned not found as to one. The other appeared, and judgment was given against both.

Upon writ of error Holt, C. J., said:

"By the statute 9 E. III, if debt be brought against several executors, and one appear, and the other make default upon the grand distress, the court may proceed against him that appears, and if the plaintiff recover judgment shall be against all of the executors for the goods of the testator; and the 25 E. III, c. 17, which gives a *capias* in debt, has been always construed within the equity of the 9 E. III. So that if there be several executors defendants, the *cepi* is returned as to one, and a *non est inventus* as to the rest, the plaintiff shall proceed against him that appears, and shall have judgment against all; for the default upon the *capias* is the same as upon the great distress."

The decision rests therefore, upon the statute of 9 Edw. III, c. 3 (A. D. 1335), which is as follows:

"That in a writ of debt brought against divers executors, the same executors, nor any of them, shall have but one essoin before appearance, that is to say, at the summons, or attachment nor after the appearance they shall have but one essoin, as the testator should have had; so that all the executors do present the person of the testator as one person."

"(2) It is also enacted, that though the sheriff do answer at the summons, that some of them have nothing whereby he may be summoned, yet there shall an attachment be awarded upon them.

"(3) And if the sheriff answer, that he hath nothing whereby he may be attached, the great distress shall be awarded, so that at the great distress returned upon them, he or they that do first appear in the court shall answer to the plaintiff.

"(4) And although some of them have appeared in the court, and make default at the day that the great distress is returned upon the other, yet nevertheless he or they shall be put to answer, that first appear at the great distress returned.

"(5) And in case the judgment pass for the plaintiff he shall have his judgment and execution against them that have pleaded according to the law heretofore used, and against all others named in the writ, of the goods of the testator, as well as if they had all pleaded.

"(6) And it is to be understood, that if any in such case will sue according to the law that hath been used heretofore he may freely do it notwithstanding this statute."

It thus appears that at that early date the rule of the common law was modified, as to actions against joint executors, so far as to authorize a judgment against those that were served or appeared; and against all for a debt of the testator, upon service or appearance of one only, to bind the goods of the testator. And as the statute of 31 Edw. III, c. 11, provides that "administrators shall have action to recover debts due to, and shall account and be holden for the debts of, the testator, the same as executors," both executors and administrators were thereafter considered in law as one person. These venerable statutes are therefore the origin of the rule which declares "that several executors, or administrators as the case may be, shall be considered in law as one person, and shall represent the estate of the deceased, both in actions by and against them as such." *Dickerson v. Robinson*, 6 N. J. Law, 195, 10 Am. Dec. 396-399; *Murray v. Blatchford*, 1 Wend. (N. Y.) 583, 19 Am. Dec. 537; *Dean v. Duffield*, 8 Tex. 235, 58 Am. Dec. 108; *Barry v. Lambert*, 98 N. Y. 300, 50 Am. Rep. 677; *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34. Section 3410 of the Iowa Code, and similar statutes in some other states, are but re-enactments in modern terms of 9 Edw. III (*Dickerson v. Robinson*, 6 N. J. Law, 195, 10 Am. Dec. 396-399), and section 3338 expressly provides that notice of the hearing to establish the claim against the estate need be served on only one of the executors or administrators.

Some stress is laid in the opinion (*Conolly v. Wells*), upon the fact that the nonresident executor was not named in the pleadings as a party to the suit, and the fair inference from its reasoning is that had he been so named the suit might have been held to fall within the rule of *Rouse v. Etherington*, under the Wisconsin statute. But the fact alone that one is named as a party defendant in a suit, with-

out serving him with the subpoena or summons, does not make him such. Service of the process is necessary to accomplish this. Under the rule contended for, the nonresident executor would be equally an indispensable party to the proceeding if it was in the state court, and the claim could not be there established against the estate without his presence. But this cannot be true under the Iowa statute. If this proceeding was in the state court, there could be no hesitancy in holding that service only upon the executor residing in Iowa would authorize that court to establish the claim against the estate so as to bind the property of the deceased in Iowa. Whether or not it would bind property of the estate elsewhere, if any, need not now be considered. But see *Hill v. Tucker*, 13 How. 458, 14 L. Ed. 223.

As the federal court is governed by, and follows, the local laws in proceedings like this, it is only necessary in such a proceeding in that court to serve those whom it would be necessary to serve if the proceeding was in the state court; and such parties only are indispensable parties defendant either in the state or federal court. Of course, it is not to be understood from this that the property of the estate in the custody of the executor under authority of his appointment by the state court may be seized upon execution from this court in this proceeding. The judgment or order allowing the claim, if it shall be allowed, must take its place in its proper class with other established claims against the estate. *Yonley v. Lavender*, 21 Wall. 276, 22 L. Ed. 536; *Security Trust Co. v. Bank*, 187 U. S. 211-227, 228, 23 Sup. Ct. 52, 47 L. Ed. 147; *Mining Co. v. Blanden* (C. C.) 136 Fed. 252-254.

The second plea rests upon the ground that an action by the plaintiff against the defendant, upon the same causes of action alleged in the petition, was pending in the state court at the time this action was commenced. The filing of the claim with the clerk of the state court within the prescribed time may be necessary to save it from the bar of the statute of limitations, or to fix its class, or the order in which it is entitled to payment. If filed within six months following the notice by the executor or administrator of his appointment, it belongs to claims of the third class, though notice of the hearing be not given until after that time. Code, § 3348; *Phelps v. Greenbaum*, 87 Iowa, 347, 54 N. W. 76. It cannot, however, be established as a claim against the estate, unless it is admitted or approved by an executor or administrator, until after notice has been given to one of them as required by section 3338 of the Code. If not filed within the 6 months aforesaid, it is a claim of the fourth class; and then it must be filed, and the notice served upon the executor or administrator within 12 months, or it is forever barred, unless peculiar circumstances entitle the claimant to equitable relief. Code, § 3349. The filing of the claim in the state court within such six months is but a reasonable precaution to fix its status as one of the third class, if it shall be finally established, and to save it from the bar of the statute, and does not defeat the jurisdiction of the proper circuit court of the United States to determine its validity or the amount due thereon. The proceeding to establish or prove the claim against the ex-

ecutors is essentially an independent suit inter partes, and not a matter of "pure probate jurisdiction," as defined in *Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599, and again in *Farrell v. O'Brien*, 199 U. S. 89-110, 25 Sup. Ct. 727, 50 L. Ed. 101. And see *Cooley v. Smith*, 17 Iowa, 99; *McCrary v. Deming*, 38 Iowa, 527-531; *Clough v. Ide*, 107 Iowa, 669-671, 78 N. W. 697.

Conceding then, without deciding, that an action on the claim is pending in the state court from the time it is filed with the clerk, that is not sufficient ground for abating an action afterwards brought thereon in the Circuit Court of the United States. *Stanton v. Embrey*, Adm., 93 U. S. 548-554, 23 L. Ed. 983; *Barber Asphalt Paving Co. v. Morris*, 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761. *Radford, Assignee, v. Folsom (C. C.)* 14 Fed. 97, relied upon by defendant, must yield to the decision of the Court of Appeals, this circuit, in *Barber Asphalt Paving Co. v. Morris*, above.

It is also objected that this proceeding is but ancillary to the alleged action pending in the state court. From what has been said it will follow that this objection must be held to be not well taken.

The conclusion, therefore, is that the demurrer to each of the pleas should be sustained; and it is so ordered.

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#### CHESAPEAKE TRANSIT CO. v. WALKER & SON et al.

(Circuit Court, E. D. Pennsylvania. January 20, 1908.)

##### No. 34.

#### 1. PRINCIPAL AND SURETY—DISCHARGE OF SURETY—MAKING NEW AND DIFFERENT CONTRACT.

The surety on a contract for the construction of a railroad for a lump sum, which contract the principal wholly failed to perform, is discharged from liability by the making of a new contract by the railroad company with another contractor, which, as a whole, differed materially from that on which the surety was bound.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 162-165.]

#### 2. SAME.

Plaintiff, a railroad company, contracted for the construction of a line of road, and defendant became surety on the contractor's bond. The contract was for a lump sum, and the contractor failed wholly to perform, whereupon plaintiff entered into a contract with another for the construction of the road which differed from the first, inter alia, in that under the first the road was to be a steam road only, while under the second it was to be equipped for both steam and electricity; the specifications of the two contracts differed materially as well as the time given for completion of the work, and the method and means of payment differed so largely that they could not well be compared. *Held*, that such differences were material, and their effect was the same as though they had been introduced into the original contract without defendant's consent, and released him from liability.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 40, Principal and Surety, §§ 162-165.]

## 3. DAMAGES—CERTAINTY—EVIDENCE—SUFFICIENCY.

Evidence of the damages sustained by plaintiff from a breach of contract *held* too uncertain to sustain a recovery.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Damages, § 5.]

On Motion for New Trial.

Wm. A. Glasgow, Jr., for plaintiff.

V. Gilpin Robinson, for Abram C. Mott.

J. B. McPHERSON, District Judge. This is an action brought against Abram C. Mott (who alone was served with process), the surety upon a bond conditioned for the faithful performance by Walker & Son, his principals, of a contract to build and equip a railroad. The principals having failed to carry out the contract, and the road having thereupon been built and equipped by another contractor at a higher price, the surety is now called upon by the company to make good the loss that is said to have been sustained. Two defenses were set up at the trial: First, that a provision in the contract concerning the preliminary examination and approval of certain titles by the counsel for the surety and his principals had not been complied with, and, therefore, that the contract to build never took effect; and, second, that the agreement under which the road was afterwards constructed differed so materially from the first agreement that the surety was relieved from liability upon his bond. As will be observed, each of these defenses raises a question that is vital to the company's case, and defeat upon either, therefore, would be as fatal as defeat upon both. They were submitted to the jury as questions of fact, and I believed at the trial, as I believe now, that the evidence offered concerning the first question was of such a character as to compel submission to that tribunal, and forbid determination by the court. But I had serious doubt whether the evidence upon the second question was similarly effective; and, if I had been obliged to decide upon its sufficiency after counsel had finished their arguments, I should have sustained the second defense, and should have instructed the jury then to find in favor of the defendant. In the hope, however, that the jury might settle the controversy by their verdict, I submitted the second defense also, but retained control of the subject by an appropriate reservation. After a prolonged effort the jury could not agree, and, in order to avoid what I then thought would be the useless formality of a second trial, I followed my first impressions, and directed a verdict in favor of the defendant. I have now had an opportunity to consider the evidence at leisure, assisted by the able and exhaustive arguments and briefs of counsel, and I find that my opinion at the close of the trial has been fully confirmed. Laying the first defense aside, therefore, since it need not now be dwelt upon, I think that a brief statement of the undisputed facts relating to the second defense will show it to be sufficient of itself to prevent the plaintiff from recovery. For this conclusion two reasons will appear: First, because the first contract was so materially altered by the second that the obligation of the surety was discharged; and, second, because, even if the plaintiff had a valid claim to recover a part of the difference between the cost of construction under one,

and the other, contract, the evidence concerning this part was not sufficiently definite to justify its submission to the jury. The uncontroverted facts will, I think, show clearly that the surety cannot properly be called upon in this action to respond in damages.

It is to be borne in mind throughout that the suit is against the surety alone, and, therefore, that the established principles limiting a surety's liability must be applied. In many of the decisions to be found in the books, the surety has been relieved because, in the carrying out of the original contract, for whose fulfillment he was bound, the obligation of his principal had been materially changed by agreement with the other contracting party. Where such a change has been made, it is familiar law that the surety is discharged, and that the courts will not inquire whether the change hurt him or helped him. *Ziegler v. Hallahan* (C. C. A.) 131 Fed. 205, 66 C. C. A. 1; *Shelton v. American Surety Co.* (C. C. A.) 131 Fed. 210, 66 C. C. A. 94. The sole question is, was the alteration material? And, if the answer is in the affirmative, it is then for the surety to decide whether he is willing to be bound by a contract to which he did not agree. Of course, he may waive the defense if he chooses, but, if he declines to submit to the changed agreement, he is discharged from the original obligation. It is, perhaps, more exact to say that the original obligation does not become effective, so far as the surety is concerned, because a substantially new obligation has been substituted therefor, and that no recovery can now be had against the surety upon either; not upon the first, because the parties have, in effect, abandoned it; and not upon the second, because to this the surety did not agree. While the present suit does not arise in precisely this way, the situation is so closely analogous that the legal principles just referred to are still pertinent. The defendant here agreed as surety that a certain contract should be carried out as a whole by his principals; there was a complete failure to fulfill on the part of the principals, and, by their default, the surety became immediately bound to make good whatever damage the other contracting party might suffer in an effort to have this particular engagement carried out as a whole by other persons. But, concededly, the first agreement, to which alone the engagement of the surety referred, was neither undertaken nor actually fulfilled by the second contractor. A new agreement was entered into, differing in many particulars from the first; and manifestly, therefore, the surety cannot be affected by what was done under the second contract, to which he did not agree, unless the differences between the two agreements are differences in details merely, and do not go so far as to make material and substantial changes. In order to determine how much, and how importantly, the second contract differs from the first, it will be necessary to examine both, and then to decide whether the differences that undoubtedly exist may be neglected as immaterial, or whether they are so great that the defendant has thereby been relieved from his obligation. He did not bind himself separately to the performance of each item among the number that are comprised in the agreement, but he promised that the whole engagement of his principals—although it was made up of many items—should be carried out;

and therefore he cannot be affected by the execution and performance of another contract that is materially different as a whole from the agreement to which his obligation refers. Slight differences may not relieve him, but if, separately or in the aggregate, the changes are material, he cannot be bound by the action of other persons to which he did not consent.

The first contract is to be gathered from two writings, both signed by Walker & Son and the Chesapeake Transit Company. By the writing dated September 13, 1900, the contractors obligated themselves:

"1. To lay out and construct a standard gauge railroad, not exceeding 16 miles in length, from a point to be designated by the said company in or near the city of Norfolk, Virginia, by as straight a line as practicable, to Lynn Haven Inlet, and around Cape Henry, through and upon Atlantic avenue, and equip the same ready for operation, in accordance with the estimates and specifications compiled by J. Taylor Gleaves (a copy of which is hereto attached) but instead of laying 56 pound rails, it is understood and agreed that 65 pound relay rails shall be used, with an aggregate cost not to exceed the aggregate cost of 60 pound rails laid new for the same distance. Said work to be done within 5 months from the date said contractors shall commence work.

"2. If the said company shall increase the distance of said railroad from 16 to 20 miles, the cost of laying the extra 4 miles of track shall be on the same basis.

"3. If the said company shall desire to extend its line a greater distance, such extension shall be made upon the same basis of cost for laying the said track over like ground.

"4. If the said company shall desire to reduce its mileage to a distance not less than 16 miles, or to reduce its equipment or any other item or items in the contract, the contract price shall be correspondingly reduced.

"5. The said contractors are to furnish bond with security to be approved by the said company for the faithful performance of their contract, and to commence work as soon as security approved by the said contractors is furnished by the said company, that the cash portion of the contract price shall be paid within ten days after a complete fulfillment of said contract by the said contractors."

Upon its part, the company bound itself as follows:

"1. To pay to the said contractors the sum of \$277,878 for the construction and equipment of the said 16 miles of track as set forth in the before-mentioned paragraph 1, and at the same rate for the hereinbefore stipulated increased distance, as follows:

"(a) Two-thirds of said contract price in first mortgage 5% gold bonds of the said company, duly issued, payable 30 years after their date at 80 cents. The said issue of bonds not to exceed \$25,000 per mile, or \$450,000 if the mileage is reduced to 16 miles. Said mortgage to bind all the property and franchises of the said company acquired or to be acquired. This is to include a tract of 50 acres of land at Cape Henry, the title to which is to be clear and unincumbered, and which land is to be used as a railroad terminal. Said bonds to be duly issued and delivered to the said contractor, upon the approval of the bond stipulated to be furnished by them under paragraph 5 of this agreement.

"(b) The balance of the contract price to be paid in cash to the said contractors or their assigns within 10 days after the road is completed, and equipment furnished in accordance with the terms of this contract.

"(c) To pay and deliver to the said contractors or their assigns upon the acceptance of their bond 20% of the authorized capital stock (of \$100,000) of said company, fully paid and nonassessable.

"(d) In order to ensure at least 2 years' interest upon the hereinbefore recited bonded indebtedness, the said company shall, when the bond of the said contractors for the completion of the contract is approved, forthwith pay and



deliver at least \$55,000 (or as many as shall be necessary) of said first mortgage bonds, to some depository to be agreed upon, which bonds are to be sold by the said company at not less than 20% below their face value, and the proceeds to be deposited and held by the said depository, and applied to the payment of the interest on the said first mortgage bonded indebtedness as it shall accrue, said fund to be used for no other purpose.

"2. It is understood and agreed that this contract shall not be binding unless:

"(a) The said company has, or shall have before any work is commenced, all the franchises and rights from property owners, and the proper authorities, to construct and operate the road over the proposed route. The validity of all of which shall be determined and approved by the counsel for the said contractors.

"(b) The hereinbefore mentioned mortgage and bonds to be issued thereunder shall have been duly issued, and their validity approved by the said counsel. It being understood that the said mortgage so to be issued shall cover all the property and franchises of the said company, including 50 acres of land in Cape Henry, the title to which is to be clear, which land is to be used as a railroad terminal, and upon which is to be erected the necessary buildings for the company, stipulated for in the contract and specifications."

As will be observed, this paper recites that certain "estimates and specifications compiled by J. Taylor Gleaves" are attached, and that the road is to be built and equipped in accordance therewith; but only an estimate made by Mr. Gleaves was offered in evidence, and we do not know what the specifications contained, except as their contents may be inferred from the estimate, of which a summary is as follows:

Grading, 16 miles at \$954.....	\$ 15,264 00
Grading, 1 mile siding at.....	954 00
Drainage, 17 miles at \$50.....	850 00
Superstructure, 16-17 miles at \$5,659.....	96,203 00
2,000 ft. Bridge.....	7,700 00
350 ft. Bulkhead (lake).....	3,220 00
Stations and buildings.....	6,400 00
Terminal facilities.....	11,900 00
Coal shutes, water stations, etc.....	11,100 00
Equipment.....	81,900 00
	<hr/>
	\$235,491 00

Cost per mile for 16 miles, \$14,720.00.

These figures, and the detailed items that make them up, represent merely the engineer's opinion concerning the probable cost, and were in no sense binding upon Walker & Son. They did not undertake to do the work, and furnish the materials specified in the estimate, for the respective sums of money thus set down by the engineer; neither did they undertake the contract at the total cost for which Mr. Gleaves apparently thought that the road could be built and equipped. The parties did not agree in detail concerning the cost of the various items, but this subject was left entirely to the contractors' own judgment and calculation; and, so far as the total cost is concerned, it appears also that the engineer's estimate of \$235,491 was not accepted by the contractors, but that they would not agree to do the work for a less sum than \$277,-878—an increase of \$42,387 over the estimate of Mr. Gleaves. The contract price, as is usual in such cases, was evidently arrived at by the bidder in his own way, was not separated into items by his bid, but was stated as a lump sum, which cannot, therefore, be distributed with

accuracy among the several branches of the work, by assigning so much to each item. For example, it is impossible to discover how much the contractors expected to spend upon the grading, or at how much they were willing to undertake it; how much upon the bridges; how much upon the terminal facilities, equipment, etc. This writing of September 13th was modified on October 20th, by a second agreement, of which the material terms are as follows:

"Whereas, by an agreement made between the parties hereto on the 13th day of September, in the year 1900, which is hereby reaffirmed and is to be taken and read as part of this agreement, the said Isaac A. Walker & Son did agree to construct a standard gauge railroad for the said party of the second part, as in said agreement specified, and to accept, in payment of two-thirds of the approximate contract price of \$300,000, first mortgage bonds of the said company of an issue of \$500,000 at 80 cents on the dollar, the said company attempting to float the residue of the bonds on its own account, and to pay one-third of the contract price aforesaid in cash within 10 days after the completion and acceptance of the work: And whereas the said company has been unable to get the said bonds subscribed for in the city of Norfolk, and has applied to the said contractors to take the whole of the said bond issue: Now this agreement witnesseth that for and in consideration of the premises and other valuable consideration, the said contractors do hereby covenant and agree to take the whole bond issue amounting to \$500,000 at the price of 80 cents on the dollar, and the said contractors do further covenant and agree that, if they are able to dispose of said bonds at a larger price than that above named, they will pay over to the said company the amount of such increased price on \$125,000 worth of said bonds reckoned at their par value. And the said contractors further covenant and agree that they will give bond with security approved by the said company conditioned for the faithful performance and completion of their contract, and commence work upon the same as soon as the bonds of the said company shall have been made, signed, secured by mortgage, and duly registered ready for delivery. It is also further mutually understood and agreed between the parties hereto:

"First. That the specifications of J. Taylor Gleaves, attached to the said contract bearing date on September 13, 1900, which is made a part hereof, are to be followed as closely as possible in the construction of the railroad, and only to be departed from when the requirements of construction render a change necessary, and in case of dispute as to the necessity of such changes, and as to the interpretation of the specifications of the contract, such dispute shall be decided by arbitration of the question at issue.

"Second. Before the work of construction under this contract is begun, a careful relocation of the lines shall be made, and detailed plans and profiles prepared of said location, showing the alignment, gradients, trestles, bridges, and other requirements of construction as determined in the said specifications; and details shall be fully set forth, and, before the work is begun, formally approved and agreed to by the contractors.

"Third. The line of the Chesapeake Transit Co. from Norfolk to Cape Henry, and any extension and branches thereof, shall be located by the engineer of the Chesapeake Transit Co., and he shall establish the alignment and gradients; and shall design or approve the designs for the bridges, structures, and appliances of whatever description. His approval and acceptance of all the work done by the contractors under this agreement shall be necessary before the same is accepted by the company."

The bond in suit, which was given on March 16, 1901, refers to the agreements of September 13th and October 20th, and guarantees their faithful performance by the contractors. By the terms of the first contract, then, the contractors were: (a) To build and equip a standard gauge railroad to be operated by steam, the line to be at least 16 miles long; the company to have the option to extend the line to 20 miles,

and also to extend it over a still greater distance to a point not specified, the location of any extension to be made by the company's engineer. (b) To follow closely the specifications of Mr. Gleaves, who was to superintend and approve all work done under the contract. (c) To finish the work within five months. And for carrying out this contract they were to receive \$20,000 of the capital stock of the company—which was then \$100,000—full paid and nonassessable, and \$500,000 of the first-mortgage bonds of the company valued at 80 cents on the dollar; the contractors agreeing that, if they should sell the bonds at a higher price, they would pay over to the company "the amount of such increased price on \$125,000 worth of said bonds, reckoned at their par value."

This is the contract for which the defendant became surety, and for its breach the present suit is brought. After the bond was executed, various steps were taken by the company toward securing rights of way, and making other preliminary arrangements, and several months were spent in this work, and in correspondence and interviews. In the end, it appeared that the contractors could not carry out their engagement, and on October 28, 1901, before they had entered upon the task of construction, they were formally notified that the company would take other means to have the road built at once, and would hold them liable in damages. Negotiations between the company and other persons followed, the result being that a new contract was made with the National Construction Company, on January 20, 1902, under which the road was built. As the terms of this agreement differ from the terms of the foregoing contract with Walker & Son, it is necessary to determine whether the differences are so important that the surety has been relieved from liability. To take an extreme case, which was used as an illustration at the trial, if the company, after the breach of the first contract, had abandoned the land route between Norfolk and Cape Henry, and had decided to connect these terminal points by a line of steamers on Chesapeake Bay, clearly the surety would have had no concern with the second enterprise, and could not have been held liable if its cost had been greater than the cost of the railroad. At the other extreme, if a contractor had been found to sign a precise duplicate of the agreement with Walker & Son—with the single difference that the price was higher—the surety could have had no defense to a suit for the increased cost under the second contract. The present situation lies between these two extremes, and, as I have already said, requires an examination of the differences between the two contracts, and a determination whether the undeniable changes are material and substantial.

The second contract (which is a much more elaborate document than the first, and is too long to be quoted) requires the National Construction Company, *inter alia*: (a) To build and equip a railroad to be operated by both steam and electricity, from Norfolk to Cape Henry and thence to Virginia Beach, a distance of about 23 miles, the line to be run upon the right of way as then located. (b) To follow the specifications annexed to the contract, the work to be supervised and approved by the company's engineer. (c) To begin the work within 10

days, and to have the road in commercial operation within four months from January 20th.

In consideration of the construction company's engagements, the transit company agreed to pay \$495,000 in first-mortgage bonds, face value, of an issue of \$500,000, and to deliver \$100,000 of the capital stock of the company—which was now \$500,000—full paid and non-assessable.

There are many other provisions in the second contract that do not appear in the first, and some of them are much more than mere matters of detail, as a careful reading will disclose; but I do not think it necessary to lay stress upon any other differences than those already specified, for, in my opinion, these are so marked and so material that the two agreements cannot be properly said to be substantially identical. One road was to be built and equipped as a steam road, the other as a road to be operated by both steam and electricity; the specifications of the first contract (so far as they may be divined from the estimate of Mr. Gleaves) differed in many and important respects from the specifications of the second contract; the time allowed for completing the work differs by a month; and, finally, the method and means of payment differ so much in their terms as to be hard to compare with accuracy. Clearly, all these differences must have had their influence upon the respective bids of Walker & Son, and of the National Construction Company, and, in my opinion, the changes that appear in the second contract are so numerous and so vital as to forbid the conclusion that the two agreements differ only in unimportant particulars. I believe them to be distinct contracts, differing so much in scope and in terms that the second cannot be held to be an immaterial variation from the first; and I therefore hold that the liability of the surety upon the first agreement has been discharged, because it cannot be measured, either legally or equitably, by what was done under the second.

And the conclusion would be the same, if another test should be applied. Suppose Walker & Son had begun to build the road under the first contract, and during the progress of the work they had agreed with the transit company to the various changes that are embodied in the second contract. In such an event, it seems to me that the surety would inevitably have been discharged from liability, because the changes were material, and were made without his consent. If this be true, I cannot see how the application of the rule is to be avoided, by putting the changes into a new agreement, made with a stranger to the earlier contract.

But there is a further reason for denying the plaintiff's right to recover, namely, that the evidence offered in support of the right was not definite enough to enable the damage to be ascertained. The plaintiff was well aware that the two contracts, each taken as a whole, were not capable of comparison, and, accordingly, recovery was sought for the increased cost of one item only—an item that was necessarily common to both contracts, namely, the cost of the permanent way, including, in that phrase, grading, ties, rails, bridges, and the like. But no effort was made to prove the difference by the best and most direct method—that is, by proving for what price Walker & Son had agreed

to do this work, if such price could be satisfactorily discovered, and then by proving what the work actually cost, as it was done upon the ground by the National Construction Company. The method adopted was to take the contract price under the second agreement, attempt to reduce it to a cash basis, deduct therefrom the estimate of certain witnesses concerning the fair value (but not the actual cost, so far as appears) of the work and material that were peculiar to the second contract, and assume the remainder to be the actual cost of the permanent way. This remainder was then compared with the engineer's estimate of what the same cost would probably have been under the Walker contract, and the difference was put forward as the plaintiff's actual loss. Many complications and uncertainties of detail, which I shall not take time to specify, are involved in this method of calculation, but, even as just stated, I think it is manifest that the method is largely conjectural, and could not safely be relied upon to produce a result even approximately correct. And when, to the difficulties thus appearing, are added the difficulties arising from the numerous changes in detail between the two contracts, it becomes impossible, I think, to reach a conclusion that is even fairly satisfactory. If I may judge by my own experience, no one can read the evidence without being bewildered by the effort to make the frequent allowances and assumptions that must be made in order to follow the plaintiff's calculation, and without believing that this difficulty furnishes the probable reason why no agreement upon a verdict could be reached. If the case were now before me without a jury I should find it impossible to reach a conclusion that I could defend by specifying the particular pages of the testimony upon which I relied.

Being still of opinion, therefore, that the direction to find a verdict in favor of the defendant was right, the motion for a new trial is refused.

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#### PONTIAC BUGGY CO. v. SKINNER.

(District Court, N. D. New York. January 30, 1908.)

#### 1. SALES—CONDITIONAL SALES—RESERVATION OF LIEN—"COLLATERAL SECURITY."

A contract for the sale of buggies provided that all goods on hand and the proceeds of all sales of goods shipped under the contract, and on all subsequent orders, whether the proceeds are in notes, cash, or book accounts, should be held as "collateral security" by the buyer, in trust and for the benefit of and subject to the order of the seller, until all obligations of the buyer arising under the contract had been paid in cash. All goods on hand were to be kept insured by the buyer for the seller's benefit, so far as its interest might appear, and a failure to do so, in case of fire, obligated the buyer to assume all liability or loss, and that the title to all goods so shipped should remain in the seller until the price was paid, and until all notes given were paid in cash. The seller however contemplated that the buyer might make sales of the goods on its own terms, with power to give an absolute title in due course of business, and without any liability to account to the seller for the proceeds of such sales, except to hold such proceeds and the goods remaining as its own property in trust or as "collateral security" for the unpaid portion of the price due to the seller. *Held*, that such contract was not a valid conditional

sale, but an attempt to reserve a lien to secure payment of the price of the goods, the title to which vested at once in the buyer on delivery. Citing 2 Words & Phrases, 1252, 1253.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, §§ 1324–1326.]

2. SAME—VALIDITY OF CONTRACT—FRAUD.

If a seller parts with the possession to the buyer, and invests the latter with the right to sell as his own, and treat the proceeds as his own, the sale is absolute, and the title is in the buyer absolutely, as fraud is presumed even if there be an agreement that title to the property shall remain in the seller until the debt is paid; but if the agreement be that the buyer may sell, and if he does so shall pay over the proceeds to the seller to apply on the debt, then there is no fraud, and the seller retains the title.

3. BANKRUPTCY—LIENS—FILING.

Where an unfilled contract of sale reserves a lien on the property unsold in the hands of the buyer, and on the proceeds of the property sold as security for the unpaid portion of the price, such lien is void, as against the buyer's estate in bankruptcy, for nonfiling of the contract.

4. CHATTEL MORTGAGES—PROPERTY TO BE MANUFACTURED—FILING.

Where a contract for the sale of buggies to be manufactured attempted to reserve a lien on the buggies unsold in the hands of the buyer and on the proceeds of those sold, it was immaterial that the buggies were not in existence when the contract was made; the seller being required to file the contract when the buggies were delivered thereunder, if he desired to create a lien thereby.

5. BANKRUPTCY—LIENS—VALIDITY.

Under Bankr. Act, July 1, 1898, c. 541, § 67, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], providing that claims which, for want of record or for other reasons, would not have been valid liens against the claims of the creditors of the bankrupt shall not be liens against his estate, an alleged lien attempted to be reserved by a seller of personal property to the bankrupt to secure payment of the price was invalid, where the bankrupt was entitled to sell the property for its own benefit.

In Bankruptcy. Application by the Pontiac Buggy Company for an order directing the receiver of the Camden Wagon & Sleigh Company, bankrupt, to deliver certain buggies in his possession and which were in the possession of the bankrupt when the petition was filed, receiver appointed, etc.

Lewis, Watkins & Titus, for petitioner.

Coville & Moore, for respondent.

RAY, District Judge. The petitioner, Pontiac Buggy Company, is a corporation of the state of Michigan. The Camden Wagon & Sleigh Company, a New York company, did business at Camden in the state of New York and November 8, 1907, a petition in bankruptcy was filed against it, and it has been adjudicated a bankrupt accordingly. The petitioner was engaged in manufacturing and selling buggies, etc., and the bankrupt was engaged in selling buggies and other things. This was known to the Pontiac Company. Zenas E. Britton was the sales agent of the petitioner in the state of New York, and on the 8th day of July, 1907, he solicited and took from the now bankrupt company a written order, the material parts of which read as follows:

"Vehicle Contract and Order.

"Pontiac Buggy Company, Pontiac, Michigan.

"Dated at Camden, N. Y. 7-8, 1907.

"Gentlemen: Please enter for shipment to Camden Wagon and Sleigh Co. on or about Sept. 1, the following order, subject to the terms and conditions of this contract and at the prices named, and under your catalog warrantee. Terms, payable 3 months from date of sale until Dec. 1st or 5 per cent. for cash 30 days from date of sale until Dec. 1st for which we will give our notes upon receipt of invoice or when requested, in settlement, with privilege of discounting at time agreed upon, drawn with exchange on New York or Chicago, and interest at highest legal rate after maturity. All goods not sold Dec. 1st date bill April 1st, 1908."

Then follows description and quantity of goods with "List price per Job" in last column. Then—

"Less freight, same deducted from invoice.

"Agreed Conditions.

"The above prices and terms apply to all accepted orders whether by mail or otherwise during the season ending Sept. 1st next. All goods delivered f. o. b. cars at Pontiac, Mich. \* \* \* The title to and ownership of all goods shipped under this contract shall remain vested in the Pontiac Buggy Co. until the price thereof shall have been paid in cash and until all notes given under this contract are paid in cash, but nothing in this clause shall be considered a release from making settlements and payments as provided elsewhere in this contract. Notes taken by the Pontiac Buggy Co. in settlement are not accepted as payment, but only as evidence of indebtedness. All goods on hand and proceeds of all sales of goods shipped under this contract, on this order and on all subsequent orders, whether the proceeds are in notes, cash or book accounts, shall be held as collateral security, in trust and for the benefit of, and subject to the order of the Pontiac Buggy Co., until all obligations arising under this contract to the Pontiac Buggy Co. shall have been paid in cash. In case of death or financial embarrassment of the firm, or any member or individual making this contract, all accounts or notes for goods shipped under this contract shall become immediately due and payable. All goods on hand under this contract are to be kept insured by the maker of this contract for the protection and benefit of the Pontiac Buggy Co., so far as their interests may appear. Failing to keep insured in case of fire loss, he (maker) assumes all liability or loss. This order is accepted subject to unavoidable delays, such as fire, strikes, blockades or any other cause beyond control of the Pontiac Buggy Co., and they will not be held liable for any damages that may arise from such causes.

"Transportation companies shall be looked to for all losses occasioned by rubbing, chafing, or other damages which may occur to goods in transit, or the failure to deliver any goods shipped when receipted for in good condition. All claims for shortages must be made within five days from receipt of goods. No agreements, conditions or stipulations, verbal or otherwise, save those mentioned herein, shall be recognized. This order is not subject to cancellation except at the option of the Pontiac Buggy Co. and payment of 10% of amount of same as liquidated damages.

"This and all other orders during the term above mentioned accepted subject to the approval of the Pontiac Buggy Co."

Same was duly signed by the Camden Company and by Britton, the sales agent of the Pontiac Company, in duplicate, and one was delivered to such agent who forwarded same to the Pontiac Company, which company received it on the morning of July 10, 1907, and on the morning of July 11th the Pontiac Buggy Company wrote the Camden Wagon & Sleigh Company accepting and approving the order as follows:

"Camden Wagon & Sleigh Co., Camden, N. Y.

July 11/07.

"Gentlemen: We acknowledge your order sent in by our Mr. Britton for a car load of vehicles for shipment on or about Sept. 1st. Although it is a little irregular for us to accept an order at this season of the year that continues into next season, inasmuch as we have not heretofore done business with you we will accept the terms, and are mailing you under separate cover our catalogue and Eastern price list, and hope to merit your business in the future.

"Truly yours,

Pontiac Buggy Co."

The other order duly signed was retained by the Camden Company.

None of the buggies or runabouts described in the order were manufactured or on hand in stock at the time, but were manufactured thereafter by said Pontiac Company to fill the order, and were shipped August 30, 1907, and received a few days later by the now bankrupt company. The total number ordered, made, and delivered was 20, and the "List price per Job" amounted to \$762. Five of the vehicles were unpacked and sold, 6 were unpacked and exhibited for sale, and the remaining 9 were unpacked when the petition in bankruptcy was filed. Hence 15 are in the hands of the receiver. No payment was made on account of these vehicles or any of them. The Pontiac Company has duly demanded all the vehicles unsold, and delivery or surrender has been refused. As the facts are undisputed no question is raised as to the power and jurisdiction of this court to determine the title to the property unsold. This order was never filed as a chattel mortgage or otherwise. The question is where was the title to the property when the petition was filed? Was this a sale and delivery of the property with an attempt to create a lien thereon and on the proceeds, or was it a delivery thereof to the Camden Company to be sold by it for the Pontiac Company, and remit the proceeds less a commission or profit, or was it a conditional sale, title to revert on certain conditions? Was this a conditional sale or in law a sale absolute?

It is conceded that the sale to the Camden Wagon & Sleigh Company was to enable that company in turn to sell the property to its customers in due course of business, and give full and complete title thereto. No agency was created or attempted to be created. The Camden Company could sell at will at any price and on any terms it saw fit, and give absolute title. It was expected that it would. This applies to all the property mentioned in the order, not to the part sold by the Camden Company alone. It was not a sale of the property to the Camden Company with the understanding or agreement that it was to hold or use the same. But it is expressly stipulated, "All goods on hand and proceeds of all sales of goods shipped under this contract, on this order and on all subsequent orders, whether the proceeds are in notes, cash, or book accounts, shall be held as collateral security, in trust and for the benefit of and subject to the order of the Pontiac Buggy Company, until all obligations arising under this contract to the Pontiac Buggy Co. shall have been paid in cash." This was not an agreement that the proceeds of sales made by the Camden Company were to take the place of the property and be remitted to or handed over to the Pontiac Company, but rather, a recognition of the fact that the Camden Company was the owner thereof, and would hold them for the Pontiac Company as collateral security for the debt of the Camden Company to the Pon-



tiac Company. Then comes the provision that in case of death or financial embarrassment, etc., the whole account for the property shall become immediately due and payable. Also, the Camden Company is to keep the property insured in its own name for the benefit of the Pontiac Company as its interest may appear. These clauses are quite inconsistent with the claim that title remained in the Pontiac Company.

In *Re Garcewich*, 115 Fed. 87-89, 53 C. C. A. 510, 512, the Circuit Court of Appeals, Second Circuit, stated the law of conditional sales very clearly and forcibly as follows:

"It is the settled law of this state that personal property may be sold and delivered under an agreement for the payment of the price at a future day, and the title by express agreement remain in the vendor until the payment of the purchase price. In such a case the payment is strictly a condition precedent, and until the performance the title does not vest in the buyer. It is one of the exceptional cases in which the law tolerates the separation of the apparent from the real ownership of chattels when the honesty of the transaction is made to appear. But when the purpose for which the possession of the property is delivered is inconsistent with the continued ownership of the vendor, the transaction will be presumed fraudulent as against purchasers and creditors.

"The transaction will be deemed merely colorable, and the title to have been vested absolutely in the buyer. *Ludden v. Hazen*, 31 Barb. (N. Y.) 650; *Frank v. Batten*, 49 Hun, 91, 1 N. Y. Supp. 705; *Bonesteel v. Flack*, 41 Barb. (N. Y.) 435. When the property is delivered to the vendee for consumption or sale, or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale, and is a fraud upon the creditors of the vendee. Even in the case of a chattel mortgage, when it is understood between the mortgagor and the mortgagee that the mortgagor may sell the chattels in his business, and use the proceeds, the transaction is fraudulent in law as against the creditors of the mortgagor. Such an arrangement, if expressed in the instrument, defeats its essential nature and qualities as a mortgage, so that, in a legal sense, it is not a security, but merely the expression of a confidence by the mortgagee in the mortgagor; and, if made, but not expressed in the instrument, is equally vicious, if not more suggestive of a fraudulent purpose."

Is this the law as to conditional sales?

In *Re Carpenter* (D. C.) 125 Fed. 831, 833, this court followed *In re Garcewich*, supra, in a case where the order for goods was quite similar to the one under consideration here, and pointed out the distinction sharply drawn between that line of cases where the title to property sold is to pass when paid for only, and in the meantime the property is to be retained and used by the vendee, or, is sold, the proceeds are to take or stand in its place and be passed over to the vendor in payment or as his own, and that other line of cases where the sale is in terms conditional—that is, it is provided that the title shall remain in the vendor until the property is paid for, but, still, the vendee is given full power to use up, consume, or sell and give good title and take or hold the proceeds as his own. *Earle v. Robinson*, 91 Hun, 363, 36 N. Y. Supp. 178, affirmed 157 N. Y. 683, 51 N. E. 1090; *In re Kellogg* (D. C.) 112 Fed. 52, 7 Am. Bankr. Rep. 270; *Prentiss Tool & Supply Co. v. Schirmer*, 136 N. Y. 305, 32 N. E. 849, 32 Am. St. Rep. 737; and *Cole v. Mann*, 62 N. Y. 1; and *Ballard v. Burgett*, 40 N. Y. 314—are illustrations of the first class of cases, while *In re Garcewich*, supra; *In re Carpenter*, supra; *Lud-*

den v. Hazen, 31 Barb. (N. Y.) 650; Frank v. Batten, 49 Hun, 91, 1 N. Y. Supp. 705; Bonesteel v. Flock, 41 Barb. (N. Y.) 435—are illustrations of the latter. Brackett v. Harvey, 91 N. Y. 214, a mortgage case, illustrates both. If the vendor parts with the possession to the vendee and invests him with the right to sell as his own and treat the proceeds as his own then the sale is absolute, and the title is in the vendee absolutely, as fraud is presumed even if there be an agreement that title to the property shall remain in the vendor until the debt is paid. But if the agreement be that the vendee may sell, and that if he does he shall pay over the proceeds to the vendor to apply on the debt, then there is no fraud, and the vendor has the title. If a mortgage permits the mortgagor to sell and use the proceeds as his own the transaction is presumed fraudulent, and the mortgage is void. If the mortgage permits the mortgagor to sell and stipulates that the proceeds shall apply on the mortgage debt the mortgage is valid. The normal and proper purpose in both cases is that the proceeds shall be applied in extinguishment of the debt. See Brackett v. Harvey, 91 N. Y. 221.

The single question in this case is as to the proper construction of this order or contract. It was a sale in form and in effect to the Camden Company. It was agreed that the vendee might sell again, not as agent, thus treating the property as its own. Was it agreed in substance and effect that the proceeds of such sales should be the money or property of the Pontiac Buggy Company, and held and passed over to it in extinguishment of the debt? It is stipulated, simply, that the property unsold and the proceeds of that sold are to be held by the vendee as collateral security for the vendor. The vendor is not to have possession of the collateral, even. It is to be held by the vendee in trust for the benefit of and subject to the order of the vendor, but it is not expressed anywhere that it is to be turned over to the vendor as its property or held as its property. It is expressly contemplated that the vendee, in selling, may take notes from its vendees, or have the indebtedness from its vendees represented by book account merely. The parties do not agree that these are to take the place of the property sold, or that the Pontiac Company will accept them in payment for the property. In defining and designating the property unsold by the Camden Company, and the proceeds of that sold by it as "collateral security" to the Pontiac Company for the debt owing to it for the property and all other property subsequently ordered, the parties have inserted a provision inconsistent with the idea of retention of ownership of the property or proceeds by the Pontiac Company. It implies that the ownership is in the Camden Company and not in the Pontiac Company. See vol. 2, Words and Phrases Judicially Defined, 1252, 1253; *In re Wadell-Entz Co.*, 67 Conn. 324, 35 Atl. 257, 258; *Fisher v. Seligman*, 75 Mo. 13, 24; *Munn v. McDonald* (Pa.) 10 Watts, 270, 273; *McCormick v. Falls City Bank*, 57 Fed. 107, 110, 6 C. C. A. 683.

In *Re Wadell-Entz Co.*, supra, it is said:

"'Collateral security' necessarily implies the transfer to the creditor of an interest in some property, or lien on property, or obligation, which furnishes a security in addition to the responsibility of the debtor. The law regulating

this subject rests on the assumption of such transfer to the creditor of property in some form, on which property he relies for security, and which he is entitled to apply, instead of resorting to the debtor's own property, towards the satisfaction of his debt, by virtue of a contract, implied or express, as the case may be, but collateral to the contract of indebtedness. A debtor's additional promises to pay cannot, from the very nature of the case, be treated as collateral security for his debt, unless such additional promises are themselves secured by a lien on property, or by the obligations of third persons."

In *Fisher v. Seligman*, supra, it is held:

"No person will be regarded as holding stock as a trustee or by way of 'collateral security,' within the meaning of section 9, Wagner's St. p. 301, c. 37, art. 2, and therefore exempt from liability as a stockholder, unless it has come into his possession by original subscription as trustee for some person other than the corporation, or by derivative title as trustee, or by way of collateral security after it has already been issued by the corporation in the ordinary course of business."

In *Munn v. McDonald*, supra, it is said:

"The use of the term 'collateral security,' when a debtor transfers to his creditor an article of value or the evidence of a debt, is intended to express that it is not received in payment of the principal debt, and that it is not an additional right to which the creditor is absolutely entitled. It is merely a concurrent security for another debt, subsidiary to the principal debt, and, if the principal debt be paid off, the debtor is entitled to a restoration of the collateral security."

Turning out, putting up, pledging, or giving collateral security necessarily implies that the debtor has given to the creditor some property or promise, either that of the debtor or of some third person, as additional security to the main debt, obligation, or promise, and to which collateral the creditor may resort. *Moffatt v. Corning*, 14 Colo. 104, 24 Pac. 7, 13. It is there said:

"Collateral, 'in its common use, means additional, subsidiary security given to secure the principal obligation. It is a separate obligation. Such 'collateral security' stands by the side of the principal promise as an additional or cumulative means for securing the payment of the debt. The etymology of 'collateral' security indicates that it is something running along with, and, as it were, parallel to, something else of a similar character. It is collateral to the original indebtedness.'"

I cannot conceive that a debtor has given his creditor "collateral security" when the debtor agrees merely to hold the property and proceeds of the property of the creditor which belong to such creditor. It seems to me the fair interpretation and meaning of the contract in question is that the Pontiac Company sells the property to the Camden Company on credit, with the understanding that the Camden Company is to sell as owner and give absolute title in due course of business; that the Camden Company becomes indebted to the Pontiac Company for the amount of the purchase price fixed by the agreement and which is to be paid at a future day with a discount if paid sooner; that in a certain event the whole purchase price becomes immediately due and payable. Then, as security to the Pontiac Company, it is agreed that title shall remain as security—that is, a lien is given or attempted to be given by way of a conditional sale back to the Pontiac Company, the condition being that, if the Camden Company does not pay, the Pontiac Company may treat the unsold property as

its own, and take possession. This is but a chattel mortgage. Then, as further security to the Pontiac Company, the Camden Company gives its promise that it will hold the money, notes, etc., received by it for the property sold in trust for the benefit of the Pontiac Company as collateral security to that company for the debt—that is, it agrees to hold its own property, including that part purchased of the Pontiac Company and remaining unsold, for the benefit of the Pontiac Company and as a collateral security for its own debt to that company. It is a mere agreement to pledge its own property as security to the Pontiac Company for a debt it owes in præsentī, and may or may not owe in the future.

I think it was the design and purpose of the Pontiac Buggy Company to part with title; that it fully understood it was doing so; that it intended to create a debt from the Camden Wagon & Sleigh Company to it for the purchase price; that it intended to create or obtain a lien on the property unsold and on the proceeds of that sold by the Camden Company as collateral security for the unpaid purchase price. I do not think the Pontiac Company retained title to any part of the property. As a security or lien the agreement is void as to the bankrupt estate, because not filed. It is immaterial that the property was not in existence when the contract was made when the order was given and accepted. It was in existence September 1, 1907, and was then delivered. Then the agreement should have been filed, if it was intended to create a lien thereby. But if intended as a mortgage, etc., as it was evidently an agreement for a lien, it was void as to all creditors, and as to the trustee and receiver so far as the vehicles unsold are concerned, for the reason that the Camden Wagon & Sleigh Company had the right to sell the same as its own, and treat same and the proceeds as its own. In such case the inference of fraud is irresistible, and conclusively presumed in the absence of proof to the contrary. This is the common law. See, also, *Robinson v. Elliott*, 22 Wall. (U. S.) 523, 526, 22 L. Ed. 758, cited and approved, *Brackett v. Harvey*, 91 N. Y. 221; *In re Garcewich*, 115 Fed. 87-89, 53 C. C. A. 510. See, also, cases cited in 6 Am. Encyc. L. p. 483; *Barbour v. Perry*, 41 Ill. App. 613.

It is immaterial that the Camden Company agreed to pledge the proceeds as collateral security for the debt or hold them as such. The proceeds were to become and did become the property of that company, and it could have disposed of them giving good title. Had it done so it would have violated its agreement or contract; true, but in so doing it would not have misappropriated or misapplied any of the property of the Pontiac Buggy Company. This contract put these vehicles into the possession of the Camden Company with the right to sell in its own name and take notes, etc., payable to itself, in fact with every appearance of absolute ownership, and with an agreement that the company should hold the proceeds as its own, but as collateral to the debt owing by it to the Pontiac Company. Evidently the purpose was to vest the Camden Company with every evidence of title, to give it, in effect at least, a false and delusive credit, and, such being the facts, within the decisions of the Supreme Court of the United States, the Circuit Court

of Appeals in this Circuit, and the Court of Appeals of the state of New York, the title was in the Camden Company, the limitations and conditions were void as to all the creditors of that company and as to the receiver and trustee in bankruptcy. This is true whether we consider the contract one of conditional sale merely, or as a mortgage. I think the trend of the well-considered cases is to regard it as a mortgage merely. *Brown v. Dewey*, 2 Barb. (N. Y.) 28; *Matthews v. Sheehan*, 69 N. Y. 585; *Conway v. Alexander*, 7 Cranch (U. S.) 218, 3 L. Ed. 321; *Pioneer Gold M. Co. v. Baker* (C. C.) 23 Fed. 258; *Hughes v. Sheaff*, 19 Iowa, 335; *Wheeland v. Swartz*, 1 Yeates (Pa.) 579; 1 *Jones on Mortgages*, § 258. See 6 Am. & Eng. Encyc. Law, 443, where it is said:

"The inclination of the courts in doubtful cases is to construe the transaction as a mortgage rather than as a conditional sale, on the ground that an error which converts a conditional sale into a mortgage is less harmful than one which changes a mortgage into a conditional sale."

It is conceded that the decisions on the question of the validity of such a contract and its effect are not uniform. In New York, as in other states, statutes have been enacted, approved, and then repealed, requiring all contracts for conditional sales, when the vendee was given possession of the property, to be filed or recorded. But there is no statute that does away with the presumption of fraud when the conditional sale is accompanied by an absolute delivery of the property with the right in the vendee to sell all, treat the proceeds as his own, even if he does agree that the unsold property and proceeds of that sold shall stand as collateral security for the purchase price.

It is clear that the Camden Company under the contract could have sold these vehicles and given clear title, and that had any creditor of the Camden Wagon & Sleigh Company obtained a judgment against it, such creditor could have issued execution, caused a levy on and sale of these vehicles to be made, and that such sale would have carried the entire title, and such levy would have created a lien superior to any claim of the Pontiac Company. Section 70 of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], in most explicit terms declares that:

"The trustee, etc. \* \* \* shall \* \* \* be vested by operation of law with the title of the bankrupt \* \* \* to all \* \* \* property transferred by him in fraud of his creditors; (5) property which prior to the filing of the petition, he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

Hence, as the bankrupt company had a title which it could transfer, that title is in the receiver for him to protect, and it is the entire title. If it is subject to any lien, that will remain and will be protected, but clearly it does not exist under this contract, for the two reasons given. Section 67 of the bankruptcy act provides:

"Claims which for want of record, or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

This alleged lien, if one be claimed, is void for the reason the Camden Company had the right of sale for its own benefit as stated. This case is directly within and controlled by *In re Garcewich*, 115 Fed.

87, 89, 90, 53 C. C. A. 510. This case is also within and controlled by *Skilton v. Codrington*, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885. This case, reversing 105 App. Div. 617, 93 N. Y. Supp. 460, not only holds (affirming *Thompson v. Van Vechten*, 27 N. Y. 568) that a chattel mortgage and conditional contract of sale, intended as security, are void if not filed within a reasonable time after execution and delivery (see pages 86 and 89 of 185 N. Y., pages 791, 792 of 77 N. E. [113 Am. St. Rep. 885]), but also that an agreement whereby the mortgagor may sell the mortgaged property makes the mortgage void unless it provides that the proceeds of such sale be paid over to the mortgagee. The case also holds expressly, notwithstanding the decision of the Circuit Court of Appeals in *Re New York Economical Printing Co.*, 110 Fed. 514, 49 C. C. A. 133, that creditors of the bankrupt who have not obtained judgment are entitled to the benefit of nonfiling, and that the trustee in bankruptcy may take advantage of such nonfiling for their benefit, inasmuch as section 67 of the bankruptcy act provides that "claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate." The court points out that this provision was not in the prior act of 1868, under which *Stewart v. Platt*, 101 U. S. 731, 25 L. Ed. 816, was decided. The court also points out the error of the Circuit Court of Appeals in the *Economical Printing Co.* Case above referred to, and says:

"The case in the Circuit Court of Appeals is in point, and it was there held that a trustee in bankruptcy could not attack a chattel mortgage for default in filing. As appears by the opinion, the result was reached on the assumption that by the law of the state of New York a nonfiled chattel mortgage was void only as to judgment creditors obtaining a lien, not as to general creditors. We think the very eminent judge who wrote in the case misconceived the law of the state in this respect. If it were a federal question we would follow the decision regardless of our own opinion, but as the question is as to the law of this state, we must adhere to the prior decisions of this court."

On the subject of the invalidity of conditional contracts of sale and mortgages intended as security where permission is given the mortgagor to sell the mortgaged property, the Court of Appeals at page 90 of 185 N. Y., page 793 of 77 N. E. (113 Am. St. Rep. 885), says:

"A chattel mortgage otherwise valid is not rendered void because it professes to include property that may be subsequently acquired. *Gardner v. McEwen*, 19 N. Y. 123. Nor does permission given the mortgagor to sell the mortgaged chattels, the proceeds thereof to be applied in payment of the mortgage, render the mortgage void, because in such case the proceeds of the sales must be treated as reducing the amount due on the mortgage, even though the mortgagor should misapply them or refuse to pay them to the mortgagee. *Conkling v. Shelley*, 28 N. Y. 360, 84 Am. Dec. 348. But an agreement between the parties by which the mortgagor was to carry on a retail store, making purchases from time to time and selling off in the ordinary manner, the mortgagee all the time retaining a lien on the whole stock by way of mortgage under which he could, upon default, take possession of the remaining goods and sell them for the payment of his debt, was held void as against creditors. *Edgell v. Hart*, 9 N. Y. 213, 59 Am. Dec. 532. This last case may be somewhat limited by the subsequent decision in *Brackett v. Harvey*, 91 N. Y. 214, but nevertheless it is unquestionably the law that where there is an agreement that the mortgagor may sell for his own benefit the mortgage is fraudulent as a matter of law. *Southard v. Benner*, 72 N. Y. 424; *Potts v. Hart*, 99 N. Y. 168,

1 N. E. 605; *Hangen v. Hachemeister*, 114 N. Y. 566, 21 N. E. 1046, 5 L. R. A. 137, 11 Am. St. Rep. 691; *Mandeville v. Avery*, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678."

The conclusion is inevitable that these vehicles in question here belong to the estate in bankruptcy—of the Camden Wagon & Sleigh Company—and there will be an order to that effect reciting findings of fact and conclusions of law in accordance with this opinion. Application denied.

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ELLIOTT v. E. C. MILLER & CO.

(Circuit Court, E. D. Pennsylvania. January 27, 1908.)

No. 74.

1. TRIAL—VERDICT—GENERAL OR SPECIAL VERDICT.

Under the Pennsylvania practice, a special verdict must place on record all the essential facts of the case, disputed or undisputed, upon which facts alone without inferences of further facts the judgment is to be rendered, and where a case is submitted generally the fact that certain disputed questions of fact were also submitted for findings thereon does not render the verdict a special one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, § 822.

Jury trial in federal court, see notes to *O'Connell v. Reed*, 5 C. C. A. 603; *Vany v. Peirce*, 26 C. C. A. 528; *Nederland Life Ins. Co. v. Hall*, 27 C. C. A. 393.]

2. CORPORATIONS—TRANSFER OF SHARES—INDORSEMENT OF CERTIFICATE IN BLANK—BONA FIDE PURCHASERS.

The owner of a certificate of stock in a corporation who delivers it to brokers for sale, indorsing it in blank, thereby makes it transferable by delivery, and an innocent purchaser of the same for value from the brokers acquires an indefeasible title as against the true owner.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 539-546.]

3. SAME—PURCHASER FOR VALUE.

Plaintiff delivered a certificate of stock in his name to a firm of brokers for sale, indorsing the same in blank. The brokers having an open account with defendants, who were their correspondents, sent such certificate to defendants to be credited generally to their account, and to take the place of certain other stock previously sent to defendants, which at their request defendants transferred to a third person. Defendants had no knowledge that the brokers were not the actual owners of plaintiff's stock. *Held*, that they were innocent purchasers for value, having surrendered other stock of value in exchange therefor, and that plaintiff was not entitled to recover its value from them in conversion.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 12, Corporations, §§ 539-546.]

At Law. On motion by defendants for judgment notwithstanding the verdict.

Ruby R. Vale and Whiteman & Woolley, for plaintiff.

G. W. Hart and E. D. McLoughlin, for defendants.

J. B. McPHERSON, District Judge. The plaintiff's counsel is mistaken in supposing that the verdict is what is well known as a special verdict. Such a finding should place on record all the essential facts of the case, disputed or undisputed, and upon these facts alone the judg-

ment of the court is to be rendered. The established rule in Pennsylvania on this subject is thus stated by Mr. Justice Mestrezat in *Sewing Machine Co. v. Insurance Co.*, 201 Pa., on page 647, 51 Atl., at page 354:

"It is the province of a special verdict to find and place on record all the essential facts in the case. This includes the disputed as well as the undisputed facts. What is not found by the verdict is presumed not to exist, and no inferences as to matters of fact are permitted to supply the facts themselves which the verdict should have found. In entering judgment, the court is confined to the facts found by the special verdict, and unless they are sufficiently found no judgment can be entered. The jury must find the facts, and the court declare the law on the facts so found. Such are the requisites of a special verdict as held in all our cases. In *Wallingford v. Dunlap*, 14 Pa. 33, it is said: 'It is of the very essence of a special verdict that the jury should find the facts on which the court is to pronounce judgment according to law. And the court will not intend anything, especially any fact not found by the jury. \* \* \* The undisputed facts ought to have been incorporated in the special verdict. \* \* \* The court is confined to the facts found by the special verdict. And when a special verdict is given, the court ought to confine its judgment to that verdict. \* \* \* But this special verdict is so defective and erroneous, and the judgment so anomalous in being entered partly on the verdict and partly on what was called undisputed facts, that we must do what has often been done before, reverse the judgment, and send the case back for a new trial.' Mr. Justice Mercur, delivering the opinion of the court in *Vansyckel v. Stewart*, 77 Pa. 126, says: 'It (special verdict) must include both disputed and undisputed facts. The court will not infer a fact not found by the jury. It must declare the law on these facts alone. As all the essential facts must be found in the verdict, it follows that it cannot be aided by intendment or by extrinsic facts appearing upon the record.' In *Trigg v. Treacy*, 104 Pa. 498, Clark, J., speaking for the court, says: 'We cannot resort to the testimony, or to such extrinsic matters as were undisputed at the trial, or avail ourselves of such even as appear upon the record. It is of the very essence of a special verdict that the facts found are those upon which the court is to pronounce judgment according to law. What is not thus found is presumed not to exist, the verdict being conclusively the complete result of the jury's deliberation upon the whole case presented.'"

To the same effect is *Kelchner v. Nanticoke Borough*, 209 Pa. 412, 58 Atl. 851.

In the case now before the court, the jury was not asked to find a special verdict, but simply to answer certain questions, and thus to settle the dispute between the parties concerning the particular facts covered thereby. The method adopted is fully described in *Clementson on Special Verdicts*, chs. 4 and 5, pp. 44, 57, 68. The verdict is so far from being special that it embraces a general finding in favor of the plaintiff for a definite sum; and, moreover, if the court is now to be confined, as the counsel for the plaintiff apparently insists, to the answers made by the jury to the questions put by the court, no judgment whatever can be entered, because the questions and answers taken by themselves are not intelligible, and, thus taken, do not form a sufficient basis for judgment. This will appear at once by reading at this stage of the discussion the questions and answers that are now part of the verdict:

"(1) Was the certificate pledged by Evans & Co. on November 10 or 11, 1905, in order to protect their general account with Miller & Co.? In other words, was it deposited as collateral security for that purpose? Answer: No.

"(1½) Did Evans & Co. intend to pledge this stock as collateral security for a debt to Miller & Co. existing on November 10th or 11th, or did they intend



it to be credited generally to their account? Answer: To be credited generally to their account.

"(2) Was the certificate in question intended to take the place, and did it take the place, of the 30 shares of U. G. Imp. Co. referred to in the letter of November 10th? Answer: Yes.

"(3) On November 10th or 11th, or at any time afterward, before the stock in question was sold, did Evans & Co. direct Miller & Co. to hold this stock, and not to sell it until it should reach either 51½ or 52½? Answer: No."

It is, I think, perfectly plain that these questions and answers do not constitute, and were never intended to constitute, a special verdict, but were simply intended to resolve certain disputes of fact which the jury was asked by the court to settle specifically by this method. An examination of the charge will show distinctly what was done. Nearly all the facts were undisputed, but some were controverted, and there was a controversy also concerning the propriety of drawing certain inferences of fact. It was these controversies only that were covered by the questions that the jury were asked to answer, and the result of the verdict (taken as a whole) is, therefore, to decide all the disputes of fact, and thus to leave the court to consider the reserved questions of law, upon the facts about which there was no contention at the trial, and also upon the facts that were then in contest, but have now been conclusively found by the jury's answers to the questions put by the court.

The undisputed facts were as follows: The plaintiff, on November 10, 1905, was the owner of 50 shares of preferred stock in the Philadelphia Company, and on that day he delivered the certificate to H. L. Evans & Co., a firm of brokers then doing business in Wilmington, Del. He directed them to sell at not less than 51½, and, at the time when the certificate was delivered, he indorsed it in blank, according to the usual course of business. The effect of this indorsement was to make the certificate transferable by mere delivery, and therefore to enable the brokers to deal with the plaintiff's stock precisely as if it were their own. Among other acts, they had the power to sell or pledge the certificate for their own benefit to any other person and at any price whatever. They were the apparent owners, having been clothed with all the indicia of title by the real owner, and beyond question were able to make a formal transfer of the stock that was *prima facie* valid; and if their vendee or pledgee acted in good faith without notice of the facts, and gave a valuable consideration for the stock, the transfer would give him an indefeasible title, even against the plaintiff, who continued of course to be the true owner. This well-known rule rests upon the principle that, of two innocent persons, namely, the owner and his agent's vendee or pledgee, one of whom must suffer by the agent's wrongdoing, the owner must bear the loss, because by his own incautious act—the delivery of the certificate indorsed in blank—he has enabled his agent to do the wrong, and to get money or valuable property from an innocent third person by the use of this apparently perfect title.

The defendants, who were brokers in Philadelphia and the correspondents of Evans & Co., claim to be innocent holders for value, and the defense must stand or fall by the truth or falsity of this claim. Upon this point, it appeared that Evans & Co. had a running account with

the defendants, and on October 10, 1905, sent the stock in question with the following letter:

"Gentlemen: For the credit of our account, we hand you herewith inclosed certificate No. L 2260 for 50 shares Philadelphia Company preferred, in the name of Isaac C. Elliott. Kindly have put in name of Eugene DuPont, of this city, 30 shares United Gas Improvement, and forward certificate to us when ready."

The account kept by Evans & Co. with the defendants was a general account, into which was put all purchases and sales of stock and other securities. The account was credited with whatever cash was sent by Evans & Co. or was advanced by the defendants, and was credited also with the securities sent by Evans & Co., although these securities would only be sold upon their order; and the account was charged with the purchase price of such securities as were bought in accordance with their direction. The defendants had no notice from any source that the stock in question was in reality the plaintiff's property. In February, 1906, Evans & Co. failed, being then indebted to the defendants, on account of their mutual dealings, and the stock (with other securities) was sold under the rules of the Philadelphia Stock Exchange, bringing  $49\frac{5}{8}$  in the open market. The proceeds of the sale went in part to the credit of the general account of Evans & Co., and the remainder was paid to their trustee in bankruptcy. This sale and credit constitute the wrongful conversion charged by the plaintiff, and the suit is brought to recover the money thus realized by the defendants.

All the foregoing facts were undisputed. The disputed questions were these: (a) Did Evans & Co. direct the defendants to hold the stock in question, and not to sell it until it should reach at least  $51\frac{1}{2}$ ? The jury has found that no such direction was given. (b) For what purpose was the stock sent to the defendants? Was it pledged as collateral security to protect the general account of Evans & Co.? Was it pledged for a debt due to the defendants on November 10th or 11th? Or was it sent to be credited generally to Evans & Co.'s account? These questions the jury have answered by finding that the stock was not pledged to protect the general account, or as collateral security for a debt existing on November 10th or 11th; but that it was sent to the defendants to be credited generally to the account of Evans & Co.—that is, that the shares were to be credited as if they had been so much cash paid in on account, although the precise sum could not be ascertained until the stock should be sold. (c) But there was a further important fact in dispute that needed decision. The defendants alleged that the shares in question were sent to take the place of certain shares of United Gas Improvement Co.'s stock, which the defendants had previously received from Evans & Co., and had already credited upon the general account. These shares were now to be turned over to another person, Eugene DuPont, and the Philadelphia Company shares were to be substituted therefor. This allegation the jury has also found to be true, as indeed there could be little question in view of the instruction contained in the letter of November 10th—"Kindly have put in the name of Eugene DuPont of this city, 30 shares of United Gas Improvement Co. stock, and forward certificate to us when ready."

It will thus be seen, I think, that the legal question is very narrow. It is not denied that, if the facts before the court show the defendants to be innocent holders for value of the certificate in dispute, the plaintiff cannot recover. It is also not denied that they are innocent holders, since they had no actual notice, and were not put upon inquiry, concerning the validity of the apparently perfect title with which the plaintiff had clothed Evans & Co. on November 10th. If they were also "holders for value," their title was indefeasible, and this, then, is the narrow point to be determined. As I regard it, there is not much room for discussion. The jury has found distinctly that the stock was not pledged as collateral, either to protect generally the account of Evans & Co., or as security for the particular balance that they may have owed on November 10th or 11th; but that it was sent to the defendants to be credited generally, taking the place for this purpose of 30 shares in another corporation, these shares being thereupon surrendered by the defendants and delivered to Evans & Co. in accordance with the letter of November 10th for the benefit of a third person. Upon these facts, I think the defendants were clearly holders for value. They gave a valuable consideration for the shares in question, because they had in their hands on November 11th a piece of valuable property to the benefit of which they were entitled, and at the request of Evans & Co. they exchanged this property for shares in another company to which Evans & Co. had an apparently perfect title. Having thus parted with a thing of value, in consideration of receiving another thing of value in its place, the transaction is an executed contract upon lawful and sufficient consideration, and in my opinion, therefore, the defendants are "holders for value" of the stock in dispute. It seems hardly necessary to support this conclusion by reference to authorities, but citation may be made in the cases appearing in 6 Amer. & Eng. Ency. Law (2d Ed.) 738, note 5; 23 Amer. & Eng. Ency. Law (2d Ed.) 489, par. (7), notes 2 and 3; and 1 Page, Contracts, § 274. The defendants changed their position and gave up something of value to them on the strength of the shares they received in exchange—to use the language of *Shufeldt v. Pease*, 16 Wis. 660—and the transaction therefore discloses both a benefit to the promisor, and a detriment to the promisee; either of these elements being sufficient to constitute a valuable consideration.

Judgment will be entered in favor of the defendants notwithstanding the verdict.

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COLLINS et al. v. SMITH et al.

(Circuit Court, E. D. Pennsylvania. January 23, 1908.)

No. 24.

**1. JUDGMENT—MOTION FOR JUDGMENT NOTWITHSTANDING VERDICT—GROUNDS.**

Under the Pennsylvania practice, where a verdict for plaintiff is directed by the court and no question of law is reserved, the court cannot enter judgment for the defendant notwithstanding the verdict.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. POWERS—INSTRUMENT CREATING POWER—VALIDITY OF EXECUTION—LIMITATION AS TO TIME.

Where a bondholder of a corporation signed an instrument agreeing to deposit his bonds with a committee on demand, and authorizing such committee to sell the same, but added after his signature the words "till 1906," the limitation applied to the entire instrument, and a sale of the bonds by the committee after January 1, 1906, was unauthorized and conveyed no title, where the purchaser knew that the committee was acting under delegated power, and was therefore bound to inquire as to its scope.

3. SAME—EXECUTION BY AGENT AFTER EXPIRATION—ESTOPPEL.

The bondholder in such case had the right to leave the bonds in the hands of the committee for a reasonable time after the authority to sell them expired, and was not estopped by such fact nor by receiving notice from the committee of the sale from asserting his ownership by selling and transferring them to another, especially where the bonds were in foreclosure and not salable in the open market, and the purchasers from the committee were notified of such transfer before paying the consideration, and thereupon deposited the same in trust.

4. TROVER AND CONVERSION—DAMAGES—CONVERSION OF BONDS.

Defendants purchased from a reorganization committee bonds of an insolvent corporation in process of foreclosure at a large discount. Certain of the bonds the committee had no authority to sell, of which fact defendants had notice, but nevertheless took the same, depositing the price in trust, and used them at par in payment for the corporation's property bought at the foreclosure sale. *Held* that, in an action for conversion by the real owner, defendants were liable for such par value.

At Law. On motions by defendants for new trial and for judgment notwithstanding the verdict.

Burr, Brown & Lloyd, for plaintiffs.

Henry C. Boyer and Wm. A. Glasgow, Jr., for defendants.

J. B. McPHERSON, District Judge. In the present state of the record, the motion by the defendants for judgment notwithstanding the verdict is not appropriate. No question of law was reserved at the trial; the jury was simply directed by the court to render a verdict in favor of the plaintiff, and, according to the established practice in Pennsylvania, it would therefore be impossible to enter judgment in favor of the defendants, even if they were otherwise entitled thereto. This motion must be refused.

In order to understand the question raised by the motion for a new trial, a brief recital of the facts is necessary. The Bay Shore Terminal Company was a Virginia corporation, organized to build a short line of railroad from the city of Norfolk. In 1902 it executed a mortgage for \$500,000, under which about \$178,000 of bonds were outstanding in September, 1905. By this time the company had gone into the hands of receivers, and about the 12th of that month most of the bondholders—some of them being stockholders, also—signed a power of attorney, of which the following is a copy:

"Know all men by these presents, that we, the undersigned bond and stock holders of the Bay Shore Terminal Company, in order to facilitate a sale or reorganization of said company, do hereby agree to place, upon call, all of our bonds and stock of said company, in the hands of Messrs. S. L. Foster, W. C. Cobb, and W. T. Simcoe, as a committee, with full power as our attorneys in fact to sell, dispose of, exchange, and contract concerning said bonds and stock, and upon our behalf in respect thereto; hereby ratifying and confirming all said committee may do in the premises. And we agree to accept the considera-

tion received for said bonds and stock, whether in cash or securities; provided only that such consideration shall be of equal benefit to all the signers hereof without preference."

Among the bondholders that signed were the legal plaintiffs—S. Q. Collins (\$8,000) and George L. Arps (\$1,000). Shortly afterwards the bonds and stock of the signers were deposited with the committee, and receipts were duly issued in the following form:

"Committee's Receipt.

"Received of \_\_\_\_\_ Bond No. \_\_\_\_\_ of the Bay Shore Terminal Company, and certificate of \_\_\_\_\_ capital stock No. \_\_\_\_\_ for \_\_\_\_\_ shares. Said certificate being indorsed in blank, to be held and disposed of in accordance with agreement and power of attorney to the undersigned.

"\$ \_\_\_\_\_  
"\_\_\_\_\_  
"\_\_\_\_\_  
"Committee."

On January 25 or 27, 1906, the committee agreed to sell all the bonds and stock in their possession to Messrs. Groner and Taylor, two members of the Norfolk bar, who were acting as agents for Edward B. Smith & Co., the defendants. The price agreed to be paid to the committee for the bonds was 40 cents on the dollar—the stock to be transferred as a bonus—but the defendants used the bonds afterwards at par and interest in partial payment of their successful bid for the property of the terminal company, which was sold at foreclosure sale under the mortgage. They are now sued on behalf of the use plaintiff, to whom the legal title of Collins and Arps has been assigned, and it is asserted as the ground for recovery that (for reasons to be stated in a moment) the title to the Collins and Arps bonds did not pass to the defendants by the committee's agreement of sale, but that the whole equitable interest therein was transferred by Collins and Arps to Zell, the predecessor in title and assignor of Vandyke, who is the present use plaintiff. The action would formerly have been called trover, but is now labeled trespass by the Pennsylvania statute; the foundation of the suit being the conversion of the bonds to the defendants' own use. Recovery is sought of the full amount at which the bonds were valued in paying for the property bought at the foreclosure sale.

The committee's authority to sell the bonds in question is denied, because it was expressly limited (so the plaintiff contends) by both Collins and Arps at the time when they signed the power of attorney. Collins added to his signature, "Till January 1st, 1906," and Arps added, "Till 1906," both limitations being identical in meaning. Precisely what is the true meaning of either phrase is the first question in dispute. The defendants' position is that Collins and Arps intended merely to limit the time within which the committee might call for the deposit of their bonds and stock, and that they did not intend, if such call was made before 1906, to limit the power of the committee to sell thereafter—except, of course, as each signer retained the implied power to limit it, whenever he chose, before a sale took place, by giving the committee notice that he revoked the agency, and

elected to withdraw his securities. The plaintiff's position, with which I fully agree, is that the ordinary and natural meaning of the words should prevail, and that the proper interpretation is that Collins and Arps (and some other signers who also added limitations to their names) were putting a limit of time upon the whole agreement, and giving notice that they, at least, would not be bound by any one of its terms after the date selected by themselves. I think the defendants' interpretation is strained and untenable. It requires the court to assume that Collins and Arps meant what they did not say, and the argument in support of the assumption seems to be that, in the defendants' opinion, it would have been more to the bondholders' advantage to limit the time within which the bonds might be called than to limit the time within which they might be called and sold. But an unambiguous writing cannot be construed according to suppositions or assumptions, however plausible. If the words bear a single plain meaning, this meaning must be followed, even although it may seem to other persons that the parties might have made a better bargain. It is not for the court to indulge in conjecture concerning the reasons that might have moved, or in the opinion of the court that ought to have moved, Collins and Arps to say what they have not chosen to express. Dealing with their own property, as they had a right to deal, they could impose such limitation on the committee's agency as they saw fit, and their contract cannot be altered in order to make it accord with the court's opinion that, under all the circumstances, something else would have been more to their advantage. Certainly, as it seems to me, when Collins and Arps signed this power of attorney, saying, "Till 1906," they meant to limit in some manner the obligation that was attested by their signatures. This obligation, if it had not been qualified, would unquestionably have extended to all the terms of the instrument. If they had simply put their names to the paper, without more, it cannot be doubted that they would have been bound by every one of its provisions; and therefore, when they qualified their obligation by the words they added, I think they clearly qualified the whole instrument, and succeeded in saying (what I believe they intended) that they would not be bound at all after the end of the year 1905. If this construction is correct, it follows that Collins and Arps had impressed upon the face of the power of attorney a distinct notice that their bonds and stock could not be sold by the committee after the beginning of 1906. Of course, the committee was bound to take notice of its own limited agency, and intending purchasers who knew, as the defendants knew, that they were dealing with agents and not with principals, were bound to inquire concerning the source and scope of the delegated power. Such inquiry the defendants made, but unfortunately they did not demand the exhibition of the original power of attorney by the committee, but were content to accept an imperfect copy, which did contain "till 1906" opposite the name of Arps, but omitted altogether the limitation after the name of Collins. It is therefore evident that, since the defendants chose to accept the committee's mistaken statement (appearing upon the copy) concerning the absence of limitation by Collins, and apparently chose to interpret in the wrong sense the Arps limitation, of which they concededly had

notice, they are bound by the risk they were thus willing to take, and could certainly acquire no better title than the committee was able to give. And, as the committee could give them no title at all, it follows that they took none by the attempted sale of January 25th or 27th, unless the conduct of Collins and Arps, or of their successors in title, was such as to estop the use plaintiff from setting up in this suit the true ownership of the bonds.

This is the second defense, and needs some further consideration. Undoubtedly, as it seems to me, Collins and Arps were at liberty to leave their securities in the hands of the committee, at least for a reasonable time after January 1st. The agency of the committee having been expressly limited by a restriction on the very face of the instrument that gave them power to act, Collins and Arps ran little risk in leaving their property in the hands of their former agents. The bonds of the terminal company were not bought and sold on the market generally, they had then no attraction for the ordinary purchaser, and the committee could be trusted to dispose of those in their hands to such persons only as might be interested in the impending effort to reorganize the company. In the usual course of events, only such persons would deal with the committee at all, and during the negotiations the limitation imposed by Collins and Arps would almost certainly be disclosed. Moreover, Collins and Arps held the committee's receipts for their bonds and stock, and for all practical purposes these were as good as the securities themselves. Receipts of this kind are well known in proceedings to reorganize a corporation, and they are transferred almost as freely as the bonds or stock they represent. Therefore it was neither careless nor unreasonable to permit the bonds to remain in the custody of the committee until February 10th—this date being named because by that time Collins and Arps had sold their receipts to a representative of Zell, the assignor of the use plaintiff. I assume, as should be assumed on this motion, that both Collins and Arps received the notice that was sent out by the committee on the evening of January 27th, after the agreement of sale with the defendants had been concluded. The notice, which will speak for itself, is as follows:

"January 27th, 1906.

"Dear Sir: We, the undersigned, having heretofore been appointed a committee and attorneys in fact for certain of the bond and stock holders of the Bay Shore Terminal Company, to sell, dispose of, exchange or contract concerning said bonds and stock, beg to advise you that, pursuant to such authority, we have sold all of the securities of the subscribers to said agreement at the rate of forty cents on the dollar for each bond, the stock going with the same as a bonus, with the right to the holder of the committee's receipt, should he so elect, to exchange his bonds for new bonds of the company proposed to be reorganized by the purchasers. A copy of the agreement and terms under which this sale was made is on file in the office of the secretary, and can be seen upon application.

"Yours truly,

S. L. Foster,  
"W. T. Simcoe,  
"W. C. Cobb,  
"Committee."

Certainly, the mere receipt of this notice would not be sufficient to estop Collins and Arps from asserting their title, and, in my opinion,

no further evidence of ratification is to be found in this record that ought to have carried the question to the jury. It is undisputed that Collins and Arps knew nothing of the agreement to sell to the defendants before January 27th or 29th at the earliest; and it is also undisputed that their bonds had either then been sold, or were shortly afterwards sold, to Zell, the assignor of the use plaintiff, and that the committee's receipts were delivered to the purchaser on February 3d and February 10th, at the latest. It appears also without contradiction, that Zell knew on February 4th of the agreement to sell to the defendants, and that he acted promptly on this knowledge by notifying Groner and Taylor, the defendants' agents in this transaction, on February 5th or 6th that he was entitled to this \$8,000 of bonds. At the time he gave this notice, the defendants had neither received the bonds from the committee nor paid the contract price, and they were therefore abundantly able to protect themselves against a claim, of which they had thus received timely notice. How they have been injured does not appear, for the evidence shows that they did protect themselves effectively; and, as a result of their solicitude, the money paid by them for the bonds in controversy is now in the hands of trustees, awaiting the result of this litigation. Nevertheless, and without waiting until it should be finally determined whether they had acquired a valid title, they converted the bonds to their own use by turning them in at par and accrued interest upon the purchase price at the foreclosure sale; and, as I think, they have thereby made themselves liable to the use plaintiff for the price which they were thus able to get. To require the plaintiff to accept 40 cents on the dollar would, in effect, compel him to sell his property to the defendants at a price to which the owners did not agree since it was fixed by a contract to which they were not parties either as principals or by an agent.

A third question raised by the motion for a new trial concerns the rulings of the court upon certain testimony concerning a contract that was said to have been made on January 17, 1906, by the agent of Collins for the sale of his bonds. It is not necessary to pass upon the correctness of these rulings, for, in deciding to give the jury a binding instruction, I did not consider at all the testimony to which they refer, and the instruction was therefore not influenced thereby in the slightest degree.

The motion for a new trial is refused.

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SUNDERLAND BROS. et al. v. CHICAGO, R. I. & P. RY. CO. et al.  
(Circuit Court, D. Nebraska, Omaha Division. January 30, 1908.)

No. 53.

COURTS—FEDERAL COURTS—JURISDICTION—DISTRICT.

Interstate Commerce Act, Act Feb. 4, 1887, c. 104, § 1, par. 3, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3155], provides that all charges made for any service rendered or to be rendered in the transportation of passengers or property shall be reasonable and just, and any unreasonable charge is prohibited and declared to be unlawful. *Held*, that an action by certain ship-



pers to restrain an interstate carrier from enforcing a reconsignment charge of \$5 per car, as unreasonable, though maintainable at common law, was nevertheless a suit within the interstate commerce act, so that federal jurisdiction was not alone dependent on diverse citizenship, and hence could be brought only in the district of which the defendant was an inhabitant, as provided by Judiciary Act March 3, 1887, c. 373, § 1, 24 Stat. 552, as amended by Act Aug. 13, 1888, c. 866, 25 Stat. 434 [U. S. Comp. St. 1901, p. 508].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, §§ 806–815.

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 298.]

Francis A. Brogan, for complainants.

James E. Kelby, Edson Rich, W. D. McHugh, James W. Orr, C. C. Wright, and B. T. White, for respondents.

Before W. H. MUNGER and T. C. MUNGER, District Judges.

W. H. MUNGER, District Judge. The amended bill of complaint filed in this case alleges that the several complainants are engaged at Omaha and Lincoln, in the business of transporting into the state of Nebraska coal, lumber, shingles, lime, and cement, and that they sell and dispose of the same as wholesalers and jobbers to various retail dealers and consumers throughout the commercial territory tributary to the cities of Omaha and Lincoln, principally within the state of Nebraska, but also in the adjoining states of Iowa, South Dakota, Wyoming, Colorado, Kansas, and Missouri.

It is further shown by the amended bill that it is impracticable, for certain reasons, for complainants to store at Omaha and Lincoln sufficient quantities of the material to supply the demand of the trade; that they have been in the habit of shipping said commodities into the state by having the same billed to them at their respective places of business at Omaha or Lincoln, and then, upon their arrival at said places, having the cars rebilled or reconsigned to their customers; that this has heretofore been done by the defendant railroad companies without what is termed a reconsignment charge; that the respondents have amended their tariff schedule, which they are about to put into force, in which it is proposed to charge \$5 per car upon all cars reconsigned as before stated. This reconsignment charge, it is alleged, is unjust and excessive, and if permitted to be enforced would practically drive complainants out of business.

It is alleged that the said respondents are each and all engaged in interstate commerce, governed by the provisions of the act of Congress entitled "An act to regulate commerce," approved February 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154], and all acts amendatory thereof and supplemental thereto, and that some of the respondents have filed their schedules with the Interstate Commerce Commission, setting forth the reconsignment charges mentioned. It is further alleged that the complainants have prepared and filed with the Interstate Commerce Commission a complaint complaining of the said charges, and praying that the said Commission inquire into the same and cause an order to be made directing the respondents to refrain from making the said charge.

The bill seeks to have the respondents enjoined and restrained from putting the said reconsignment rules and charges into effect, and from demanding, exacting, or collecting from complainants, or any other firms or corporations similarly situated, who may hereafter intervene, the said proposed reconsignment charges, and that upon the final hearing it be decreed that said reconsignment charges are excessive and unjust, and that the respondents be perpetually enjoined from enforcing the same. It is further alleged that the several complainants are citizens and residents of the state of Nebraska; the several respondents are railroad corporations organized and existing under and by virtue of the laws of states named, none of them being organized under the laws of the state of Nebraska; and that the respondents are each citizens of the states named in the bill, none of them being citizens of the state of Nebraska.

Respondents have appeared specially and objected to the jurisdiction of the court, on the ground that, as jurisdiction of the court is based not alone upon diverse citizenship, but upon the several acts of Congress relating to interstate commerce, that suit should only be brought against the respective respondents in the district of which they are citizens. It is contended, upon the part of complainants, that while the reconsignment charges relate to interstate commerce said charges being made on commodities shipped from out of the state of Nebraska into the state of Nebraska, and the reconsignment being made to points in the state of Nebraska and other states, their right of action is not based upon the acts of Congress referred to, but upon a common-law right that charges must be reasonable and just, and therefore no federal question is involved, and that the jurisdiction of this court is based solely and alone upon diverse citizenship.

The third paragraph of section 1 of the interstate commerce act provides:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid or in connection therewith or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just: and any unjust and unreasonable charge for such service is prohibited and declared to be unlawful." 24 Stat. 379, vol. 3, Comp. St. 1901, p. 3155.

In *Toledo, A. A. & N. N. Ry. Co. v. Pa. Co. et al.* (C. C.) 54 Fed. 730, 19 L. R. A. 387, Judge Taft, then Circuit Judge, said:

"The jurisdiction of this court to hear and decide the case made by the bill cannot be maintained on the ground of the diverse citizenship of the parties, for the complainant and at least one of the defendants are citizens of the same state. If it exists, it must arise from the subject-matter of the suit. The bill invokes the chancery powers of this court to protect the complainant in rights which it claims under the act of Congress passed February 4, 1887, known as the 'Interstate Commerce Act.' Counsel for complainant contend that the interstate commerce law and its amendments are only declaratory of the common law, which gave the same rights to complainant, and that therefore this is not a case of federal jurisdiction. \* \* \* It is immaterial what rights the complainant would have had before the passage of the interstate commerce law. It is sufficient that Congress, in the constitutional exercise of power, has given the positive sanction of federal law to the rights secured in the statute, and any case involving the enforcement of those rights is a case arising under the laws of the United States."

*Voelker v. Chicago, M. & St. P. Ry. Co.* (C. C.) 116 Fed. 867, was an action resulting from the death of an employé of the company by reason of one of the cars in the train having a defective brake. Upon the trial of the case it developed that the car was loaded with coal, being shipped from the state of Illinois into the state of Iowa. Judge Shiras, in charging the jury, instructed them that the act of March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], relating to safety appliances, governed the consideration of the case. In passing upon a motion for a new trial, Judge Shiras said:

"It is said, however, that the defendant was taken unduly by surprise in that the court, in the charge to the jury, cited the provisions of the act of Congress of March 2, 1893, as applicable to the case, it being claimed that neither in the pleadings nor in the argument of counsel for plaintiff was any reference made to the act of Congress. As matter of pleading, it certainly cannot be said that, in order to base a right of recovery on the provisions of the statute, it was necessary to cite the statute or its provisions in the petition. \* \* \* No matter what the views of counsel are upon the law of the case, as expressed in their arguments, it is the duty of the court to give to the jury the law applicable to the facts as the court understands it. If the law as given to the jury is applicable to the facts before them, no error is committed. If the law as given is not applicable, that is error. \* \* \* It is next contended that it was error on the part of the court to call the attention of the jury to the provisions of the act of Congress because it was not averred in the petition that the defendant had hauled, or permitted to be used on its lines, the car in question, nor that it was hauled or used in connection with interstate traffic. When it became the duty of the court to instruct the jury upon the law, it clearly appeared in the evidence that the car in question being loaded with coal had been brought from Illinois into Iowa. It was left to the jury to find the fact under the evidence whether the car was brought by the defendant company from one state into the other. The jury being instructed that if they so found then the defendant in so transporting the car was engaged in interstate commerce, and in such case the act of Congress would be applicable to the case. Would it not have been error, under these circumstances, if the court had instructed the jury that the act of Congress had no relation to the case before them?"

The case was reversed upon another point by the Court of Appeals (129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264), yet that court, speaking upon this branch of the case, said:

"We are of opinion that no error was committed in instructing the jury that the branch of the case resting upon the condition of the car was controlled by the act of Congress."

The cases of *Tift v. Southern Ry. Co.* (C. C.) 123 Fed. 789, and *Jewett Bros. & Jewett v. C., M. & St. P. Ry. Co.* (C. C.) 156 Fed. 160, were actions similar to this, and in each it was held that the jurisdiction of the court was sustainable on the ground of a federal question being involved.

The act of Congress, in respect to the matters herein referred to, though it may be simply declaratory of the common law, yet is a valid enactment, and the parties complainant as well as respondent are not only bound by its provisions, but entitled to its benefits.

In section 1 of the judiciary act of March 3, 1887, 24 Stat. 552, c. 373, as amended in 1888 (Act Aug. 13, 1888, 25 Stat. p. 434, c. 866 [U. S. Comp. St. 1901, p. 508]), it is provided:

"No civil suit shall be brought before either of said courts against any person by any original process or proceeding, in any other district than that

whereof he is an inhabitant, but where jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

We think that the jurisdiction of this court is not based alone upon diverse citizenship, but also upon the before cited act of Congress and acts amendatory thereof.

It therefore follows that this court has no jurisdiction, and that the restraining order heretofore granted must be vacated, and the bill dismissed.

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HILL et al. v. EMPIRE STATE-IDAHO MINING & DEVELOPING CO.

(Circuit Court, D. Idaho, N. D. January 24, 1908.)

1. LIMITATION OF ACTIONS—ACCRUAL OF RIGHT OF ACTION—ACTION FOR FLOWAGE OF LANDS.

A complaint alleging that defendant built and operated ore reduction works from which large quantities of waste material were discharged into a stream which in times of high water was carried down, obstructed the stream, and caused it to overflow plaintiff's lands lying on the stream below, and that poisonous matter contained in such material poisoned the soil and destroyed trees and vegetation on such lands, states a cause of action for recurrent flowage which did not accrue on the construction of defendant's works, but as to any particular injury at the time such injury was sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 33, Limitation of Actions, § 305.]

2. SAME—STATUTE GOVERNING—IDAHO STATUTE.

Such an action is not one of trespass but on the case, to recover incidental and consequential damages resulting from the unlawful or negligent operation of defendant's works, and is not governed as to limitation by Rev. St. Idaho 1887, § 4054, subd. 2, which limits the time for bringing an action for trespass to three years.

At Law. On demurrer to amended complaint.  
See 156 Fed. 797.

A. G. Kerns, for plaintiffs.  
Albert Allen and C. W. Beale, for defendant.

DIETRICH, District Judge. By its demurrer, the defendant challenges the amended complaint upon three grounds: its sufficiency, its certainty, and the application of the statute of limitations. That a cause of action is stated I have no doubt; and the plaintiffs having, by amendment, substantially complied with the views expressed in the decision on the demurrer to the original complaint, wherein it was suggested that certain features be pleaded with more directness and detail, there remains for consideration only the plea of the statute of limitations.

It is contended by the defendant that the entire claim of plaintiffs is barred by subdivision 2, § 4054, Rev. St. Idaho 1887; or, if not the entire claim, all damages accruing more than three years prior to the commencement of the action are barred by the subdivision referred to, which provides that an action for trespass upon real property must be commenced within three years.

The action was commenced on the 27th day of August, 1906. The material facts exhibited by the amended complaint are that the plaintiffs have for a great many years been in the possession, as owners or otherwise, of a tract of agricultural land riparian to the South Fork of the Coeur d'Alene River in Shoshone county, Idaho; and that in June, 1898, the defendant erected and commenced the operation of reduction works, consisting of an ore crusher and a concentrator, near Canyon creek, a tributary of the South Fork of the Coeur d'Alene River, some distance above the lands referred to as belonging to the plaintiffs. These reduction works were operated continuously during the period from June, 1898, to September 1, 1903; and it is alleged that while the same were being so operated the defendant daily discharged therefrom into the channel of Canyon creek from 500 to 1,000 tons of tailings and waste material, the same being permeated with noxious slimes and other poisonous substances; that, as a consequence, the channel of the stream became partially filled up with refuse, and during periods of high water this refuse, including the poisonous substances, was carried down the stream, and, obstructing the channel, caused the water to overflow, and to deposit the débris upon plaintiffs' land, poisoning the soil, and destroying the trees, grasses, and other vegetation growing thereon. It is further averred that these overflows and deposits continued up to the time suit was commenced, and that they would continue from time to time during seasons of high water, so long as any of the waste material remained in the channel of Canyon creek.

Two general questions have been discussed: First, when did the period of limitations commence to run; and, second, by what section or subdivision of the statute is the period prescribed. Counsel for defendant contends that the statute commenced to run immediately upon the construction of the reduction works in June, 1898, and counsel for the plaintiffs maintains the view that the entire claim for damages is a unit, and that the cause of action "accrued" only upon the filing of the complaint. Defendant's theory is based upon a general allegation in the complaint, to the effect that, by reason of the defendant's wrongful acts, the plaintiffs "have been deprived of the free use and enjoyment and possession" of their lands from the time of the commencement of defendant's mining operations in June, 1898. It is insisted that this language should be construed to mean that the wrong was fully consummated, and the ensuing damage was complete, and the plaintiffs were dispossessed, immediately upon the commencement of the defendant's mining operations. But, even if this general allegation stood alone, such construction would be unnecessary, if not unnatural, and, in the light of other portions of the complaint, it must be rejected. A court will look beyond the form for the substance, and in construing a pleading, where the facts are explicitly averred, epithets and inferences not in harmony therewith will be disregarded. Applying this principle, the complaint must be regarded as exhibiting a case of recurring injury to plaintiff's lands, due to the operation by the defendant of a lawful enterprise in an unlawful or careless manner. There is no allegation of the absolute destruction of the entire tract of land, or of any part of it at any time, but, upon the other

hand, it is charged that from day to day, for more than four years, defendant continued to cast into Canyon creek large quantities of poisonous waste, and that, up to the commencement of the action, from time to time, by reason of spring and other freshets, this was carried down and discharged upon plaintiffs' land, and that "ever increasing quantities of the land" were thereby overflowed.

Moreover, the damage for which recovery is sought is not the direct, but only the consequential, result of the defendant's acts. So far as appears, it had the right to erect and operate its reduction works, and, in casting into Canyon creek its waste material, it infringed upon no right of the plaintiffs. It was only by reason of the intervening agency of high water, the effect of which was uncertain and contingent, that the defendant's acts indirectly resulted in the injury to plaintiffs' land. Nor can I adopt the plaintiffs' view that no right of action accrued until the complaint was filed. Primarily, the action is one to recover damages for the wrongful flooding of land, and, on principle, there is no essential difference between this case and one where lands are flooded by reason of the careless construction or maintenance of a railroad embankment or bridge, with insufficient provision for taking care of the water of a natural waterway. The fact that the waters which were thrown upon the plaintiffs' land carried thereon poisonous substances, only aggravates the injury, and does not, in law, essentially differentiate the cause of action from the ordinary case of flowage.

The rule is that in case of a nuisance of a permanent character, by the maintenance of which the property of another will be directly and necessarily damaged, a right of action in favor of the person injured accrues at once upon the erection of the objectionable structure, and in one action recovery may be had for the entire damage, both past and prospective, and the statute of limitations begins to run at once. But, upon the other hand, if the structure be a permanent one, and it may or may not be injurious, and the damage in question does not necessarily and directly flow from its creation or maintenance, no cause of action accrues in favor of any person until such person has received actual injury, and the statute of limitations begins to run only when, and immediately when, actual damage has been inflicted. Successive actions may be brought, in each of which recovery may be had for all damages actually suffered within the period of limitations, regardless of the date of the erection of the structure, to the maintenance of which the damage is indirectly due. The rule is well stated in a note to section 180 of Wood on Limitations (3d Ed.), where it is said:

"In actions for flooding land, limitation begins only when actual damage is sustained therefrom, and not when defendant's dam or other cause of injury is created; and the fact that the first flowage is already barred does not defeat a suit for such continuance of the wrong as occurs within the time limited by the statute."

See, also, Angell on Limitations, 300; Gould on Water Rights (3d Ed.) §§ 210, 343; *Brewing Company v. Compton*, 142 Ill. 511, 32 N. E. 693, 18 L. R. A. 390, 34 Am. St. Rep. 92; *Prentiss v. Wood*, 132 Mass. 486; *Consolidated Home Supply Co. v. Hamlin*, 6 Colo. App. 341, 40 Pac. 582; *St. Louis R. R. Co. v. Biggs*, 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804, 20 Am. St. Rep. 174; *Power v. Munger*, 52

Fed. 705, 3 C. C. A. 253; *Wilcox v. Plummer*, 4 Pet. 172, 7 L. Ed. 821; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. Ed. 784; *Sterrett v. Smelting Co.*, 30 Wash. 164, 70 Pac. 266.

Applying the rule thus stated (and there seems to be little diversity of opinion), it must be held that no right of action accrued to the plaintiffs until their lands were actually injured, and that, as to any particular damage, the statute of limitations commenced to run immediately when such damage was actually suffered.

Assuming that the defendant was negligent in casting into Canyon creek poisonous substances, and in filling the channel of the stream therewith, and in not taking proper precautions to impound such waste material and prevent it from being discharged upon plaintiffs' land, such negligence of itself did not constitute a right of action in favor of plaintiffs. Negligence alone does not create a right of action. There must be negligence and resulting damage, and until the waters overflowed the plaintiffs' land they could not have recovered even nominal damages.

There is no merit in plaintiffs' contention that the adoption of the view that, as to any stated damage, the statute begins to run from the time the injury is actually inflicted would impose upon the plaintiffs great hardship and render it difficult, if not impossible, to make proof of the damages suffered within the period of limitation. Under such view, it is not necessary, as claimed, to prove upon what day each particular foot of soil or each particular tree or other species of vegetation was injured or destroyed. Even if it were assumed that the period of limitations is three years (and neither party contends that it is less than that), the plaintiffs would be under the necessity of proving only the condition of the land and vegetation at the beginning and the condition at the end of the three-year period; and this would involve no great difficulty.

It is further contended by counsel for plaintiffs that this court is bound by an expression found in the majority opinion in the case of *Hill v. Standard Mining Company et al.*, 12 Idaho, 223, 85 Pac. 907, upon the theory, I assume, although it is not expressly stated, that the federal courts, in applying a state statute, will adopt the construction placed thereon by the state courts. It is true that in that case a cause of action similar to that alleged herein was relied upon, the plaintiffs there being the plaintiffs here. Chief Justice Stockslager, in the course of the opinion, says, that "plaintiffs could have commenced their action when the damage first developed, or they may wait until their property is entirely destroyed and rendered valueless for any purpose, and then sue to recover the value of the property in damage." To that extent, and that only, is the question discussed. It would be a sufficient reply to the contention now made, that in using this language, the Idaho Supreme Court was not construing, or professing to construe, any statute of the state of Idaho. No section or subdivision of the statutes was referred to, and the expression purports to be a statement only of a general principle of law, and is not based upon the construction of any statute of the state. Moreover, it is not apparent how such question could, upon the record in that case, have been presented to the

court for decision. The lower court had sustained a demurrer to the plaintiffs' amended complaint, and, the plaintiffs declining to plead further, a judgment had been entered dismissing the action, from which judgment an appeal was taken to the Supreme Court. The only action of the trial court assigned as error was the order sustaining the demurrer. Both the complaint and the demurrer are set forth in the opinion, and it appears therefrom that all of the wrongful acts of the defendants, by which plaintiffs claimed to have been damaged, were committed within three years prior to the commencement of the action, and the statute of limitations is not pleaded in the demurrer. The question is not referred to in a concurring opinion filed by Justice Ailshie, nor is it mentioned in the syllabus which was prepared by the court. It is obvious that the expression is a mere dictum, and was so regarded by the court itself.

As has already been stated, the defendant maintains that if the entire claim is not barred, all that portion of the claim which relates to damages actually suffered prior to August 27, 1903, is barred by the provision of the statute I have referred to; and, if this provision is applicable, this view should prevail. Plaintiffs, however, insist that this provision is not applicable, but that the case comes within section 4060, which provides that "an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." Whether the case is governed by section 4060 or by some other provision of the statutes not pleaded, should perhaps be left open for future consideration; but I am of the opinion that the subdivision pleaded is not applicable. As has been already stated, in erecting and operating its reduction works, the defendant did not dispossess the plaintiffs or invade or infringe upon any of their property rights. The damages complained of did not flow directly from the erection and operation of the reduction works, but they were the indirect and consequential results thereof. This must therefore be considered not an action in trespass, but upon the case. See *Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189; *Daneri v. Railroad Co.*, 122 Cal. 507, 55 Pac. 243. I have not overlooked the earlier case of *Atkinson v. Canal Co.*, 53 Cal. 102, where the provision of the California Code, corresponding to the subdivision relied upon by defendant, was held applicable. But in that case the tailings appear to have been discharged by the defendant directly upon the plaintiff's lands.

It follows that the demurrer must be overruled. The defendant is given 30 days from this date in which to serve and file its answer.

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#### MISHAWAKA WOOLEN MFG. CO. V. SMITH.

(District Court, W. D. Wisconsin. February 8, 1908.)

##### 1. BANKRUPTCY—CONDITIONAL SALES—TRANSFERS TO DEBTOR—STATUTES.

Sanborn's Supp. St. Wis. 1906, § 1693c, provides that a voluntary assignee shall represent the rights and interests of creditors as against all transfers and conveyances of property, and all liens and charges thereon, which would be fraudulent or void as to creditors. Bankr. Act July 1, 1898, c. 541, §§ 70, 70e, 30 Stat. 565, 566 [U. S. Comp. St. 1901, pp. 3451, 3452],



vests title in the trustee to all property transferred in fraud of creditors, and gives the trustee the right to avoid such transfers; and sections 67a, 67b, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449], apply to liens created by the debtor. *Held*, that neither the state statute nor such sections of the bankrupt act relates to property transferred to the debtor by a conditional sale reserving title until the property is paid for.

2. SAME—CONDITIONAL SALE CONTRACT—VALIDITY—FILING.

Rev. St. Wis. 1878, § 2317, provides that no contract for the sale of personal property, by the terms of which the title is to remain in the vendor and the possession thereof in the vendee until the purchase price is paid, shall be valid as against any other person than the parties thereto or those having notice thereof, unless the contract shall be in writing, subscribed by the parties, and the same or a copy thereof filed in the office of the clerk of the town, city, or village where the vendee resides; etc. *Held*, that such section did not invalidate an unfilled conditional contract of sale, as between the parties, so as to entitle the vendee's trustee in bankruptcy to any greater rights than those possessed by the vendee.

3. SALES—CONDITIONAL SALE—STATUTES—"PERSONAL PROPERTY."

The words "personal property" as used in Rev. St. Wis. 1878, § 2317, providing that no contract for the sale of personal property by the terms of which the title is to remain in the vendor and possession in the vendee until the purchase price is paid shall be valid against any other person than the parties, without filing, is not limited to property sold to be used and not resold.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 43, Sales, § 1353.

For other definitions, see Words and Phrases, vol. 6, pp. 5346-5358; vol. 8, p. 7753.]

4. SAME—RESERVATION OF TITLE.

A contract for the sale of certain merchandise provided that the title should remain in the seller until the price was fully paid in cash, and if payment was not made when due, or if at any time before payment the buyer should become insolvent, or in the opinion of the seller be in danger of insolvency, or the seller in its judgment, for any reason, should deem itself in danger of losing the price of the goods, then the seller at its option might reclaim and take possession of so much of the goods as then remained in the hands of the buyer unsold, provided that such provision should not affect the liability of the buyer for the payment at the prices agreed for such goods as were not recovered, etc. *Held*, that such contract was a valid contract of conditional sale, so that the title did not pass to the buyer until payment of the price, as between the parties.

Buell & Lucas, for petitioner.

Emerson Ela and E. D. McGowan, for trustee.

SANBORN, District Judge. On the 3d day of February, 1906, petitioner sold to the bankrupt, by two contracts in writing, certain rubbers, socks, boots, etc. The contracts contained the following provision:

"The title and property in all the goods herein mentioned shall remain in the vendor until fully paid for in cash, and if payment for the same shall not be properly made when due or if, at any time before the same shall be fully paid for, the purchaser shall become insolvent, or shall in the opinion of the vendor be in danger of insolvency or the vendor in its judgment, shall for any reason, whatsoever, deem itself in danger of losing the price of the said goods, then the vendor may, at its option, reclaim and take possession of so much of the said goods as shall then remain in the hands of the purchaser unsold; provided, however, that this provision shall not in any wise affect the liability of the purchaser for the payment at the prices agreed upon for such goods as are not recovered by the vendor in the manner aforesaid. This provision shall be understood to apply also to all orders hereafter received by the vendor from the purchaser, whether expressed in such orders or not."

On December 24, 1906, petitioner commenced an action of replevin in the state court to recover from the bankrupt the possession of the goods covered by the two contracts, and recovered possession of the first lot of goods, the sheriff not having succeeded in finding the other lot. Afterwards the vendee was adjudged a bankrupt, and thereupon a petition was filed with the referee, praying for an order directing the trustee to deliver to the petitioner the goods described in lot No. 2, so sold and delivered on the conditional contract aforesaid. The matter came on to be heard before the referee, who decided that the title to the goods in question vested in the bankrupt as against his creditors represented by the trustee, and overruled a demurrer to the answer to the trustee to the petition. Thereupon the matter was brought up by a petition to review the order of the referee.

Under the rule of *S. L. Sheldon Co. v. Mayers*, 81 Wis. 627, 51 N. W. 1082, the conditioned sale in question here would be held as vesting title in a voluntary assignee of the debtor, such assignee being there held to represent all creditors. In that case, however, the court overlooked the fact that the statute enabling the assignee to sell vested no title in him, but only a right of action as to transfers and conveyances made by the debtor. In that case *Zehnter*, the debtor, as in this case, made no conveyance, but simply bought property by a conditional sale. It may also be noticed that the act of 1882 referred to by Judge Pinney in the *Sheldon Case* was repealed in 1898, and the reenacting statute of 1901 (section 1693c, *Sanborn's Supp. St. Wis.* 1906), provides only that the voluntary assignee shall represent the rights and interests of creditors as against all transfers and conveyances of property and all liens and charges thereon which would be held fraudulent or void as to creditors. The language is limited to transfers made by the debtor, and liens created by him, and does not apply to transfers made to him, such as conditional sales where the title never reaches him, as in this case. This distinction is fully explained in *Kloeckner v. Bergstrom*, 67 Wis. 197, 30 N. W. 118, and *Charles Baumbach Co. v. Miller*, 67 Wis. 449, 30 N. W. 850, holding that the assignee takes no title to property fraudulently transferred, but merely the right to avoid such transfers.

The bankrupt act goes further than the state law, and vests title in the trustee to all property transferred in fraud of creditors, and gives him the right to avoid the transfer. Act July 1, 1898, c. 541, §§ 70, 70e, 30 Stat. 565, 566 [*U. S. Comp. St.* 1901, pp. 3451, 3452]. And sections 67a, 67b, apply only to liens created by the debtor. The provisions referred to, both of the state law and the bankruptcy act, relate only to property transferred by the debtor, or liens made by him. They have no application to property transferred to the debtor by a conditional sale reserving title until the property is paid for, as in this case.

I am entirely unable to distinguish this case from *York Mfg. Co. v. Cassell*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782, 16 Am. Bankr. Rep. 633. That was the case of a conditional sale of a machine, under a contract that the title should not vest in the vendee until it was paid for. The contract was subject to the law of Ohio. In

that state a statute existed similar to that in Wisconsin, the two acts being as follows:

Ohio law:

"In all cases where personal property shall be sold to any person to be paid for in whole or in part in installments \* \* \* on condition that the same shall belong to the person purchasing \* \* \* the same whenever the amount paid shall be a certain sum \* \* \* the title to the same to remain in the vendor \* \* \* until such sum \* \* \* shall have been paid, such condition, in regard to the title so remaining until such payment, shall be void as to all subsequent purchasers, and mortgagees in good faith, and creditors, unless such conditions shall be evidenced by writing, signed by the purchaser \* \* \* and also a statement thereon under oath, made by the person so selling \* \* \* and property \* \* \* of the amount of the claim, or a true copy thereof, with an affidavit that the same is a copy, deposited with the clerk of the township where the person signing the instrument resided," etc.

Wisconsin law:

"No contract for the sale of personal property, by the terms of which the title is to remain in the vendor and the possession thereof in the vendee until the purchase price is paid or other conditions of sale are complied with, shall be valid as against any other person than the parties thereto and those having notice thereof unless such contract shall be in writing, subscribed by the parties, and the same or a copy thereof shall be filed in the office of the clerk of the town, city or village where the vendee resides."

The Supreme Court held that inasmuch as the contract was entirely valid as between the parties, without being filed as provided by the Ohio statute, and as the property had not, at the time of the adjudication, been seized on process by any creditor (as the facts are in this case), the trustee took the property with the same title possessed by the bankrupt, and that the vendor was entitled to an order directing the trustee to turn over the property.

I do not regard the decision in the Sheldon Case as so clearly settling the construction of section 2317, Rev. St. 1878, that this court is bound to follow it, in view of the clear terms of the statute itself, and the other Wisconsin cases holding that section 2317 vests no title to transferred property, but gives only a right of action.

The learned referee also expressed the view that a distinction exists between conditional sales of property intended to be consumed or sold, like that here in question, and property designed only for use. But the statute makes no such distinction. It provides that "no contract for the sale of personal property, by the terms of which the title is to remain in the vendor, and the possession thereof in the vendee until the purchase price is paid, shall be valid against any other person than the parties," without filing. The words "personal property" are of perfectly clear meaning, and cannot properly be construed to mean only property sold to be used and not resold.

The exception to the order of the referee is sustained. An order will be entered directing the trustee to turn over the property described in the petition.

REED v. SMITH.

(Circuit Court, D. New Jersey. February 3, 1908.)

1. JUDGMENT—PAYMENT—SET-OFF OF JUDGMENT.

The power to set off one judgment against another is purely equitable, within the discretion of the court to which application is made, and should only be exercised when the court is satisfied that substantial justice will be done thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1669-1688.]

2. SAME—NATURE OF JUDGMENT.

The power to set off one judgment against another is not confined to judgments in the same court, but may be exercised with reference to judgments in different courts and in different states, it being also immaterial that one of the judgments is in tort and the other in contract, provided the set-off should be allowed in equity and good conscience.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1669-1688.]

3. SAME.

Plaintiff recovered judgment against defendant for \$750 and costs, for libel and slander, in May, 1907. In November, 1905, defendant and L. recovered judgment against plaintiff for \$3,728, on a bond secured by a mortgage assigned to defendant and L., as collateral security. It did not appear that the mortgage securing the bond had been foreclosed, or that the property embraced in the mortgage was inadequate to secure payment of the bond, but in April, 1907, prior to the recovery of plaintiff's judgment, L. assigned to defendant all his right, title, and interest in the judgment recovered by them against plaintiff, defendant having procured the same to use as a shield against any judgment plaintiff might recover. *Held*, that defendant was not entitled in equity to set off such judgment against plaintiff's judgment in the action for libel and slander.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 30, Judgment, §§ 1669-1688.]

In Tort. On rule to show cause.

Thomas B. Hall, for plaintiff.

Louis Starr, for defendant.

CROSS, District Judge. On or about May 7, 1907, the plaintiff in the above cause recovered a judgment against the defendant in this court for \$750, besides costs. On November 28, 1905, the defendant and one Alfred Lowrey recovered a judgment against the plaintiff in the court of common pleas, No. 1, for the county of Philadelphia and state of Pennsylvania, for \$3,728. Subsequently, and on April 27, 1907, Lowrey assigned to Smith, his coplaintiff, all his right, title, and interest in said judgment, whereby Smith on that day became its sole owner, and as such, shortly after the rendition of the judgment against him in this court, applied to have his said judgment set off against the judgment herein. Pursuant to the application, a rule to show cause why the set-off should not be made was allowed. Testimony under the rule was taken, and the question is now before the court.

The action upon which the judgment in this court was recovered was based solely upon allegations of libel and slander, and that in the Pennsylvania court upon a money bond secured by a mortgage given by Reed to the plaintiffs in that action. The power to set

off one judgment against another is purely equitable, and should be exercised upon equitable principles, and only when the court is satisfied that substantial justice is being done. There is no legal compulsion resting upon the court to exercise the power. An application of this character is addressed to the sound discretion of the court. "The doctrine is a purely equitable one, and will be administered in all cases upon such equitable terms as will promote substantial justice. These applications being founded on no positive statute, or any fixed rule which compels the court to grant them, are addressed to the discretion of the court, and in the exercise of that discretion, even where the set-off might legally be made, if the court sees that injustice will be done by granting the order of set-off, it should be refused." *Hendrickson v. Brown*, 39 N. J. Law, 239. To the same effect are *McAdams v. Randolph*, 42 N. J. Law, 332; *Terney v. Wilson*, 45 N. J. Law, 282; *Schautz v. Kearney*, 47 N. J. Law, 56.

The above doctrines are neither novel nor peculiar, but, on the contrary, have been enunciated generally by the courts of other states, as well as in England. Moreover, the power does not rest on the statute authorizing set-offs, but rather upon the control which courts exercise over their own suitors, and over the process, the aid of which those suitors invoke. *Hendrickson v. Brown*, *supra*; *Schautz v. Kearney*, *supra*. Nor, again, is the power to offset one judgment against another by any means confined to judgments in the same court; on the contrary, a judgment in one court can be offset by a judgment in another in the same state, or by a judgment in a different state, or a judgment in a state court by one in a federal court. So, too, the fact that one judgment is in tort and another in contract does not of necessity bar their set-off if such a course be equitable. The real and only test in any case is whether or not in equity and good conscience the set-off should be allowed.

Several objections to the allowance of a set-off in this case have been urged; it will be necessary, however, to consider but one of them. As already stated, the judgment in the Pennsylvania court was recovered upon a bond, secured by a mortgage, both of which were assigned to the plaintiffs in that action as collateral security. It does not appear that the mortgage securing the bond has been foreclosed, or that the property embraced in the mortgage is inadequate to secure the payment of the bond. Such being the case, no special equities exist in favor of the defendant; but were it otherwise, in view of the character of the judgment obtained against him in this court, there is no obvious reason why the court's prerogatives should be strained to save him from the consequences resulting from the unlawful use of his tongue and pen. The words spoken and written of the plaintiff were such as imported damage in and of themselves, and a jury found that the plaintiff was actually damaged thereby to the extent of \$750. With that verdict the court was entirely satisfied, and as a matter of fact the defendant never applied to have it set aside or its amount reduced. It has been held in quite a recent case, which will presently be more specifically referred to, that it is not in the interest "of good order or public peace" to allow a judg-

ment founded upon a contract to be used as a set-off against one founded upon a tort of the character here presented, and especially should this be so when no special countervailing circumstances are shown which appeal to the conscience of the court, and demand that the set-off be allowed. The case just adverted to is *Leitz v. Hohman*, 207 Pa. 289, 56 Atl. 868, 99 Am. St. Rep. 791. The facts there presented are as nearly like the present as they well can be. In its opinion the court, speaking by Chief Justice Mitchell, said:

"Some few rules, or at least presumptions, may be gathered from the incidental discussions and applications in the cases. Thus, if the judgments are both founded on contract, *prima facie* the set-off should be allowed, and probably the same presumption should prevail where one or both judgments may be in tort, but of a kind, such as damages from negligence, which does not involve the element of willful injury. But if one judgment is in contract and the other in tort, which implies intent to injure, though there is no fixed rule which prevents a set-off, yet the presumption is against it, and the party asking for it, especially if the tort-feasor, should show some equity in its favor. \* \* \*

"And all these rules and presumptions are subservient to the fundamental principle that each case is to be determined on its own circumstances and merits, viewed with the eyes of a chancellor in equity.

\* \* \* \* \*

"If he could do this in slander (that is, set off the judgment), he might do it in assault and battery or other tort. It is not in the interest of good order or the public peace to allow satisfaction for even a judgment debt to be obtained in this way. If the tort had been first in time, or the circumstances different, the rule might have been different; but on the merits of the case as presented, we concur with the learned judge of the common pleas, and 'do not think that, because one man holds a judgment against another, he is entitled \* \* \* to slander his character to the amount of his judgment, with immunity from other punishment, and we see no equity that can sustain such a proposition.'"

With what was there said and with all that was said, this court is in full accord. It may properly be inferred from the fact that the defendant herein procured an assignment of the foreign judgment but a very few days prior to the trial which resulted in the judgment against him, that he intended at that time to use it as a shield against the consequences of his own evil conduct; but, whether that be so or not, I see no reason to interpose the discretionary and equitable power of the court for his protection. The rule to show cause will therefore be discharged, with costs, and an order entered vacating the stay now in force against the execution of the plaintiff's judgment.

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Ex parte REED.

(District Court, U. S. New Jersey. January 20, 1908.)

HABEAS CORPUS—EXTRADITION—MEXICAN TREATY—DETENTION OF PRISONER TO AWAIT DOCUMENTS.

Under the treaty of February 22, 1899, 31 Stat. p. 1825, between Mexico and the United States, providing that on proper notification through the diplomatic channel either country shall cause the arrest of any alleged fugitive criminal from the other, and "keep him in safe custody for such time as may be practicable, not exceeding forty days, to await the production of the documents upon which the claim for extradition is founded," the prescribed 40 days is the limit of time during which a prisoner so arrested may be detained, unless the documents have been produced.

Habeas Corpus.

John C. Coleman, for petitioner.

John B. Vreeland, U. S. Dist. Atty., for the United States of America.

S. Mallet-Prevost, for the United States of Mexico.

LANNING, District Judge. Upon the return of the writ of habeas corpus allowed in this matter, it appears that on April 16, 1906, United States Commissioner Rowe issued his warrant for the provisional arrest of George Deering Reed, upon a complaint that Reed had embezzled certain moneys of his employer in the state of Oaxaca, Mexico. On November 30, 1907, Reed was arrested and taken into the custody of the United States Marshal; and on December 2, 1907, he was committed to the jail of Hudson county for safe custody until a hearing should be had. He is still there, and now applies to be discharged on the ground that his detention beyond the period of 40 days from the time of his arrest is contrary to the provisions of the tenth article of the treaty of February 22, 1899, 31 Stat. p. 1825, between the United States of America and the United States of Mexico. That article is as follows:

"On being informed by telegraph or otherwise, through the diplomatic channel, that a warrant has been issued by competent authority for the arrest of a fugitive criminal charged with any of the crimes enumerated in the foregoing articles of this treaty, and on being assured from the same source that a requisition for the surrender of such criminal is about to be made accompanied by such warrant and duly authenticated depositions or copies thereof in support of the charge, each government shall endeavor to procure the provisional arrest of such criminal and to keep him in safe custody for such time as may be practicable, not exceeding forty days, to await the production of the documents upon which the claim for extradition is founded."

In extradition cases, one of the rules of practice observed in this country is that, in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and deliver him to a foreign power. 1 Moore on Extradition, § 16; 4 Moore's Internat. Law Dig. pp. 251, 252, 253. In 1901, the Department of State held that the extradition of a fugitive, on a charge of "robbery without violence," cannot be granted under our present treaty with Mexico, for the reason that no such offense is included in the treaty. 4 Moore's Internat. Law Dig. 275. Where no time for holding an alleged fugitive under provisional arrest is prescribed by treaty, the Commissioner may exercise a reasonable discretion in the matter of adjourning the hearing and requiring the prisoner to be held in custody. *In re MacDonnell*, 11 Blatchf. 79, Fed. Cas. No. 8,771; *In re Ludwig* (C. C.) 32 Fed. 774. Some of our treaties with foreign governments contain express provisions that a fugitive shall not be held under provisional arrest longer than a designated time, and that after that time has expired, if proper proofs to support the complaint have not been produced, the prisoner shall be released. Such provisions are found in our treaties with Argentine Republic (1896), Bolivia (1900), Chile (1900), and Denmark (1902).

The petitioner in the present case was arrested on November 30,

1907. His petition for a writ of habeas corpus was sworn to on January 11, 1908, being 42 days after his provisional arrest. It is admitted that the documents upon which the claim for extradition is founded have not yet been produced before the Commissioner. Counsel for the United States of Mexico contends that the effect of the 40-day limitation, in the last clause of the tenth article of the treaty, is simply to relieve the authorities of our government from the obligation to aid the Mexican authorities after the expiration of 40 days from the date of the provisional arrest. So reading the article, the argument is that the treaty does not belong to that class of treaties which give to a prisoner a right to his discharge if certain documents or proofs are not produced against him within a prescribed period, but to that class in which no time for the detention of a prisoner under provisional arrest is prescribed, and in which the Commissioner has a discretionary power to prolong the detention for a reasonable period. But it does not seem to me that the construction thus contended for is a reasonable one. The fugitive is to be kept in safe custody "to await the production of the documents upon which the claim for extradition is founded." There is no intimation that he may be held "to await" their production after the 40 days are expired. Indeed, the language used excludes such an idea. The reasonable construction is that if the documents on which the claim for extradition in a given case is founded are produced within 40 days after the provisional arrest, and the proofs are in proper form, the fugitive may be committed for extradition; and that if they are not produced within that period the case shall no longer be regarded as one within the provisions of the treaty. If the documents are not produced within the 40 days, there is no authority for detaining the fugitive longer "to await" their production. I think the principle to be applied in this case is the same one that was applied by Judge Lacombe in the Dawson Case (C. C.) 101 Fed. 253. In that case, Dawson was placed under provisional arrest, waived examination, and consented to be sent back to South Africa to meet the charges there pending against him. He was accordingly committed for extradition. Having remained in jail for more than two months without demand for his delivery on any requisition, he was discharged under the authority of section 5273, Rev. St. [U. S. Comp. St. 1901, p. 3596], which provides for such discharge if there be no delivery upon a requisition within two calendar months after commitment for extradition.

In the present case, no satisfactory reason is given for the delay in securing the necessary documents from Mexico. The warrant on which Reed was arrested was issued more than 18 months before the arrest. The necessary documents should have been here long before the arrest, and ready for production before the Commissioner immediately after the arrest. Assuming, for the purpose of the argument, that the construction given to the treaty by the counsel for the Mexican government is the true one, the question arises whether, in the circumstances of this case, a delay in producing the necessary documents for more than 40 days after the date of the provisional arrest is not so unreasonable as of itself to entitle Reed to his discharge. That question, however, it is not necessary to decide. Construing the treaty as I do, I find that the Commissioner, by reason of the 40-day limitation



in the treaty, is now without authority to proceed further in the case. His jurisdiction is ended by lapse of time.

The petitioner must therefore be discharged.

NOTE.—Between the date of filing the above opinion and the date of signing an order discharging the prisoner, the documents upon which the claim for extradition was founded arrived from Mexico. Immediately upon signing the order of discharge a new complaint was presented to the United States district judge, upon which a new warrant of arrest was issued returnable before the judge. Under this warrant the prisoner was rearrested, a hearing had, a motion to dismiss the proceedings refused, and the prisoner committed for extradition. Thereafter the proceedings were certified to the Secretary of State, pursuant to the provisions of section 5270 of the Revised Statutes, and the prisoner was surrendered to the Mexican authorities.

### In re PICKENS MFG. CO.

(District Court, N. D. Georgia. January 30, 1908.)

#### 1. BANKRUPTCY—ACTS OF BANKRUPT—RECEIVERSHIP UNDER STATE LAWS—“ACT OF BANKRUPTCY.”

Georgia Code 1895, § 2716, provides that in case any corporation, not municipal, shall fail to pay at maturity any one or more matured debts, payment of which has been properly demanded of such debtor and by him refused, and shall be insolvent, a court of equity shall have power under a creditor's petition to appoint a receiver, etc. *Held*, that where, in proceedings in a state court for the appointment of a receiver for an alleged insolvent corporation, receivers were appointed by consent of both parties, such proceedings constituted an “act of bankruptcy” within Bankrupt Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1024], declaring that acts of bankruptcy by a person shall consist of having a receiver or trustee put in charge of his property under the laws of the state because of insolvency.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, p. 118; vol. 8, p. 7562.]

#### 2. SAME—INSOLVENCY LAWS—SUSPENSION.

Georgia Insolvent Traders Act 1880–81 (Ga. Code 1895, § 2716 et seq.), providing for the administration of the assets of an insolvent corporation or trader, etc., was superseded by National Bankruptcy Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418].

[Ed. Note.—For cases in point, see Cent. Dig. vol. 6, Bankruptcy, § 8.

Effect of national bankruptcy act on state insolvency laws and on assignments for benefit of creditors, see note to *Carling v. Seymour Lumber Co.*, 51 C. C. A. 11.]

#### 3. SAME—INSOLVENCY—HEARING IN BANKRUPTCY PROCEEDINGS.

Bankrupt Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], as amended by Act Feb. 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1024], provides that acts of bankruptcy by a person shall consist of his being insolvent and applying for a receiver or trustee for his property, or, because of insolvency, a receiver or trustee has been put in charge of his property under the laws of the state, etc. *Held*, that since, in order to obtain a bankruptcy adjudication on an issue of insolvency, insolvency must be shown at the time the petition was filed, an alleged bankrupt corporation was not concluded by proceedings in a state court in which a receiver was appointed for its property, which was claimed to constitute an act of bankruptcy, but was entitled to a hearing in the bankruptcy proceedings on the question of its solvency at the time the bankruptcy petition was filed.

### In Bankruptcy.

Geo. L. Bell & Son and Slaton & Phillips, for petitioning creditors.  
A. S. J. Hall and C. W. Smith, for respondent.

NEWMAN, District Judge. This is a petition for involuntary bankruptcy against the Pickens Manufacturing Company, and a denial of insolvency, or that it has committed an act of bankruptcy, on the part of the alleged bankrupt company.

The facts are that a petition was filed in the superior court of Pickens county on December 4, 1907, asking for the appointment of a receiver for the Pickens Manufacturing Company, and that on that day Hon. George F. Gober, judge of the superior court, appointed temporary receivers, and set the case for hearing on December 21st. On December 21st the hearing was continued until December 27th, and on that date permanent receivers were appointed. These receivers are now in charge of the property of the company. As the parties filing the petition in the state court were simply contract creditors, without any lien, so far as appears from the record brought here, the proceeding was necessarily under the Insolvent Traders Act of Georgia of 1880-81, Code Ga. 1895, § 2716 et seq. That act, so far as material here, is as follows:

"In case any corporation, not municipal, or any trader, or firm of traders, shall fail to pay, at maturity, any one or more matured debts, payment of which has been properly demanded of such debtor, and by him refused, and shall be insolvent, it shall be in the power of a court of equity, under a creditor's petition," etc.

It will be seen that there must be a failure to pay debts at maturity, and the trader must be insolvent, to justify the appointment of receivers under this act. In the petition for receiver in the state court, insolvency was expressly alleged, and the order of the court appointing permanent receivers on December 27th, as recited therein, was made "by consent of plaintiffs and defendant." It is difficult to see how, under the amendment to the Bankruptcy Act of February 5, 1903, c. 487, 32 Stat. 797 [U. S. Comp. St. Supp. 1907, p. 1024], the conclusion can be escaped that what was done in the state court constituted an act of bankruptcy on the part of the Pickens Manufacturing Company. The act as amended in 1903, so far as material here, reads in this way:

"Acts of bankruptcy by a person shall consist of his \* \* \* being insolvent applied for a receiver or trustee for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States."

Very little question has been raised, by counsel representing the defendant company here, that an act of bankruptcy in this respect has been committed. They claim, however, that under the provisions of the bankruptcy act they are entitled to be heard here on the question of solvency or insolvency, notwithstanding the fact that receivers were appointed on the ground of insolvency, or that insolvency was a necessary ingredient in making the appointment of receivers in the state court.

Counsel for the petitioning creditors claim that insolvency stands adjudicated against the company by the action of the state court and by the company's action in connection with those proceedings, and that it is precluded thereby from a further hearing here. The language of this amendment of 1903 is peculiar in that it provides that "being insolvent, applied for a receiver," etc., and then in the disjunctive "or because of insolvency a receiver or trustee has been put in charge," etc. This lends some point to the argument that where insolvency is found as a fact by the state court, and a receiver appointed on that ground, insolvency is adjudicated and will be assumed here. The practice, however, in the courts, so far as there has been a practice established, seems to allow a hearing here on the question of insolvency, notwithstanding the fact of the commission of an act of bankruptcy, under this amendment.

In Collier on Bankruptcy, p. 57, it is said as to the practice under this amendment:

"Here, perhaps, because the existence of a receivership usually implies insolvency, or, perhaps, because the papers on which it is granted were thought the equivalent of the books and examination called for by section 3d, the usual rule, putting the burden on him who asserts insolvency, was not changed. This new act of bankruptcy being in the fourth subdivision of section 5a, subsections 'c' and 'd' do not apply. Thus, it would seem necessary for petitioning creditors relying on this act of bankruptcy to allege and prove insolvency both at the time of filing and at the time of the commission of the act relied on."

In *Blue Mountain Iron & Steel Co. v. Portner*, 131 Fed. 57, 65 C. C. A. 295, where the act of bankruptcy was based on the amendment of 1903 referred to, it appears from the report of the case that the bankrupt on demand was allowed a jury trial on the question of insolvency, and also on the question of the commission of the act of bankruptcy. Also, in *Re Belfast Mesh Underwear Co.* (D. C.) 153 Fed. 224, the case was referred to a special master to find whether the respondent corporation in that case was insolvent at the time of the filing of the petition, and at the time it was alleged to have committed the act of bankruptcy, and also whether it committed the act of bankruptcy.

It is certainly necessary that insolvency should exist at the time of the filing of the petition in bankruptcy. It might well happen, not often perhaps, but sometimes, that a person insolvent at the time the act of bankruptcy was committed might be by a rise in the value of assets, or for other reasons, solvent at the time the petition in bankruptcy is filed, so that even if the action of the state court should conclude the *Pickens Manufacturing Company* as to its condition at the time the receivers were appointed, it certainly could have no further effect, and prevent them from denying insolvency at the time the petition was filed, and having a hearing on the issue so made.

I have not overlooked the fact that the Georgia insolvent traders act has been held to be suspended by the enactment of the national bankruptcy act of 1898. Judge Speer in the Southern District of Georgia so held in *Re Macon Sash Door & Lumber Co.* (D. C.) 112 Fed. 323, and his decision on this point was affirmed by the Circuit Court of Appeals on a petition for review, reported as *Carling v. Sey-*

mour Lumber Co., 113 Fed. 483, 51 C. C. A. 1. The first headnote of the latter case is as follows:

"The Georgia insolvency laws (Code Ga. 1895, c. 4, §§ 2716-2722), providing for the distribution of the assets of insolvents, and authorizing the chancellor to recommend to the creditors of the defendant that they release him from further liability, being in effect a state bankruptcy act, its operation was suspended by the passage of the bankruptcy act of 1898, and proceedings under the former act are void."

This is in line with many decisions to the same effect, indeed, with the uniform ruling on this subject, that is that state insolvency laws are suspended by the passage by Congress of a uniform bankruptcy law. The proceedings, therefore, under this act in the state court would be void; but I do not think this would materially affect the question at issue here, or take from the Pickens Manufacturing Company the right to be heard as to its solvency at the time of the commencement of the bankruptcy proceeding.

My conclusion is that the safer plan, and the proper plan, is to refer the questions made by the answer to the petition in bankruptcy, to a special master, to hear the same, and report his conclusions thereon to the court, and an order may be taken accordingly.

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ORR v. TRIBBLE et al.

(District Court, S. D. Georgia, W. D. December 20, 1907.)

1. BANKRUPTCY—CONTEMPT OF COURT—REFUSAL OF OFFICER OF STATE COURT TO SURRENDER PROPERTY.

A sheriff having actual possession of property under a valid levy of a writ from a state court at the time the owner is adjudged a bankrupt is not guilty of a contempt of the bankruptcy court, because of his refusal to surrender the property to a receiver in bankruptcy on summary demand made under general authority to take charge of the bankrupt's property, when he acted in good faith and on advice of counsel.

2. SAME—PROPERTY IN POSSESSION OF STATE COURT—DISCRETION OF BANKRUPTCY COURT.

Where property of a bankrupt at the time of the bankruptcy is in the lawful custody of a state court under seizure in a pending suit begun within four months, the court of bankruptcy has power to stay such suit and to direct the property to be turned over for administration in bankruptcy; but such power will not usually be exercised where it will be of no benefit to the estate, as where the suit in the state court is to enforce a valid lien which the property is insufficient to satisfy.

On Petition of Trustee in Bankruptcy for Restoration of Property and for Rule for Contempt.

The trustee of W. E. Thurmond filed a petition for the recovery of certain personal assets of the bankrupt, alleged to be unlawfully in the possession of W. I. Shi, deputy sheriff of the city court of Forsyth, Ga. It was alleged that this property had been taken by the officer of the state court while in custodia legis under the authority of the receiver of the bankruptcy court. On the petition, a rule nisi was issued against the plaintiff in *fi. fa.* in the state court, who directed the levies, and against the deputy sheriff. All questions raised by the answers, by agreement of counsel were referred to Arthur H. Codington, Esq., as special master, with direction by the court "to take evidence, and report his findings and conclusions upon the facts and the law re-

lating, for such action of the court as shall seem to it proper." The special master, after elaborate findings of fact, reported his conclusions upon the law, as follows:

"The issues here presented are whether the respondents have been guilty of contempt of the order and process of the bankruptcy court, and whether the disputed property, now in the actual possession of Shi, as deputy sheriff of the city court of Forsyth, under process of that court, shall be restored to the possession of Oliver Orr, the petitioner, who is the trustee elected by the creditors of the bankrupt. The order of the referee, under which the receiver acted, was no more than a general direction to seize and take possession of the bankrupt's assets. Its natural purport did not contemplate that property already in the possession of another court or of third parties should be surrendered upon summary demand. The general practice is to require the receiver or trustee to bring plenary suit, when title is claimed by a third party, having possession before the filing of the petition, in order that he may have the benefit of a full hearing. *Loveland on Bankruptcy*, 100; *Jaquith v. Rowley*, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620; *Louisville Trust Co. v. Comminge*, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. With conscientious endeavor to properly execute the general terms of his order, Mr. Orr made an attempted seizure of the property, and delegated the bankrupt to act as its custodian. But as it consisted of cotton seed and other agricultural products, as well as live stock, it was impracticable for the receiver to assume actual personal possession. His holding, then, could have constituted no more than a constructive possession. That it was effective against them was denied by the defendants and their counsel. They insist that the property was held under a valid levy by the deputy sheriff at the time Mr. Orr attempted to seize it, and being in custodia legis that its status was unchanged. The respective rights of the receiver, and of the deputy sheriff, was therefore a mooted question. The defendants acted under the advice of their counsel. There is no evidence that their conduct and that advice were not in good faith. The property has been held in statu quo under the order of this court, and it does not appear that there has ever been any intentional violation by either of the defendants of any order or process from officers of this court. Considering, then, the merits of the controversy, it is clear that the disposition of the property rests entirely in the discretion of the court. In *re Knight* (D. C.) 125 Fed. 35. The power to stay a suit against the bankrupt, based upon a claim from which a discharge would relieve him, is expressly granted by the bankruptcy act. Section 11, subd. 'a,' Act July 1, 1898, c. 541, 30 Stat. 549 [U. S. Comp. St. 1901, p. 3426]. This court has therefore ample jurisdiction to stay all proceedings in the city court of Forsyth, and to order the deputy sheriff to turn over the property to the trustee. Such power has been uniformly exercised in all cases where the possession of the state court would manifestly defeat the remedial purposes of the law. In *re Hornstein* (D. C.) 122 Fed. 266; In *re Knight*, supra. But where, at the time of the filing of the petition, the property is in the actual and lawful possession of a state court, and the rights of creditors and of the bankrupt are not prejudiced thereby, the United States courts will not ordinarily disturb that possession. *Pickens v. Roy*, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128; *Compton v. Jesup*, 68 Fed. 263, 15 C. C. A. 397; *Metcalf v. Barker*, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122. From an examination of all the testimony, it is clear that a valid and effective levy was made by the officer, Shi, several days prior to the bankruptcy proceedings. It was not necessary that he should have taken the property into his actual custody. The test which the authorities recognize for determining the validity of a levy is whether or not the acts of the officer were such as to render him liable as a trespasser, but for the protection afforded by the writ. 7 Am. & Eng. Enc. Law (2d Ed.) 148, 149. If the officer asserts a dominion over the property, it is sufficient. The principles by which the courts are guided are found in *Freeman on Executions*, vol. 2, § 260, as follows: 'In all cases, there must be something more than a mere pen and ink levy. It is not sufficient that the officer merely makes an inventory of the property and indorses the levy upon his writ. He must go where the property is. He must have it within his view. It must be where he can exercise control over it; and he must exercise or assume to exercise dominion by virtue of his writ. He must

do some act by reason of which he could be successfully prosecuted as a trespasser, if it were not for the protection afforded him by the writ. But, in order to make him responsible as a trespasser, it is not essential that he should remove the property, nor that he should touch it. It is enough that, having the property within his view, and where he can control it, he does profess to levy and to assume control of the property by virtue of the execution, and with the avowed purpose of holding the property to answer the exigencies of the writ.' In the case of *Corniff v. Cook*, 95 Ga. 61, 22 S. E. 47, 51 Am. St. Rep. 55, facts very similar to those here were held by the Supreme Court of Georgia sufficient to make a valid levy. While in their discretion, and with due regard to the spirit of comity which prevails between the national and state courts, courts of bankruptcy have stayed proceedings where property is in the possession of an officer of a state court under effective levy, yet such stays have been granted only when some benefit to the bankrupt's estate will be derived thereby. *Loveland on Bankruptcy*, 110. It has been accordingly held that a suit to foreclose a mortgage or other lien will not be stayed when the property is insufficient to pay the amount of the lien debt. *Heath v. Shaffer* (D. C.) 93 Fed. 647; *In re Holloway* (D. C.) 93 Fed. 638; *In re Porter* (D. C.) 109 Fed. 111. The value at which the trustee estimated the property is not more than \$300. Indeed, the lien creditor testified that it would not bring more than \$225. The estimate of the trustee will no more than satisfy the lien debt. It will be manifestly then of no advantage to the general creditors to have the property administered in this court, but it will be better for all parties that it should be sold under the processes of the city court. The trustee may keep in touch with the proceedings there, and, if necessary, intervene to secure for the general creditors any surplus which may remain after the satisfaction of the various liens.

"From the foregoing findings, the master therefore respectfully submits to the court that it will prove more advantageous to the parties directly interested to allow the property to remain in the possession of the deputy sheriff, to be sold under the processes of the city court of Forsyth, rather than to secure its administration by the trustee under the bankruptcy machinery of this court."

Akerman & Akerman, for petitioner.

Persons & Persons, for respondents.

SPEER, District Judge. (after stating the facts as above). The report of the special master, Arthur H. Codington, Esq., is a clear and accurate statement of the law on this topic. The attorneys for the plaintiff state that they have no exception to his findings. It will therefore be ordered that the finding of the master be made the judgment of this court, that the property be remanded to the officer of the city court of Forsyth, and that the rule against the defendants be discharged.

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#### UNITED STATES v. ONE PURPLE CLOTH COSTUME, etc.

(District Court, S. D. New York. December 6, 1907.)

#### CUSTOMS DUTIES—FORFEITURE—WAIVER—ESTOPPEL—ENTRY AFTER ACCRUAL OF FORFEITURE.

Dutiable articles in the baggage of a person arriving in the United States from abroad became forfeitable under section 2802, Rev. St. [U. S. Comp. St. 1901, p. 1873], because not mentioned to the Collector of Customs at the time of entry; but before they were seized their owner was permitted to make a lawful entry and pay the proper duty. *Held*, that such occurrences subsequent to the accrual of the right of forfeiture could not waive such right, nor estop the United States from asserting it.

On Information for Forfeiture of Imported Goods. Motion to set aside verdict and for new trial.

On June 30, 1907, the claimant in this case, a dressmaker, entered the United States after a trip abroad. Before leaving the steamer she made the usual baggage declaration and entry, omitting, however, any mention of certain model gowns of foreign origin which she had in her possession, and which were valued at more than \$100; and, in addition, she denied the possession of such goods, both orally and in the declaration. After they had been discovered in her baggage, they were found to have domestic labels, and she alleged that they were domestic goods which she had herself taken abroad. Subsequently she admitted that they had been bought in Paris, and that she had caused the false labels to be attached. The goods were sent to the public stores for examination and appraisal, and the claimant was permitted to make a lawful entry and to pay the proper duty. They were afterwards seized, and an information for forfeiture was filed. Soon after they were released under bond, pursuant to section 938, Rev. St. [U. S. Comp. St. 1901, p. 690], the pertinent portion of which is as follows:

"Sec. 938. Upon the prayer of any claimant to the court, that any \* \* \* merchandise, seized and prosecuted under any law respecting the revenue from imports \* \* \* should be delivered to him, the court shall appoint three proper persons to appraise such property. \* \* \* If on the return of the appraisement, the claimant shall execute a bond to the United States for the payment of a sum equal to the sum at which the property prayed to be delivered is appraised, and produce a certificate \* \* \* that the duties \* \* \* have been paid, \* \* \* the court shall, by rule, order such \* \* \* merchandise to be delivered to such claimant."

The seizure and information were based on Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895], and section 2802, Rev. St. [U. S. Comp. St. 1901, p. 1873]. The pertinent portions of these laws read as follows:

"Sec. 9. That if any \* \* \* person shall make or attempt to make any entry of imported merchandise \* \* \* by means of any false statement, written or verbal, or by means of any false or fraudulent practice or omission whatsoever, such merchandise shall be forfeited."

"Sec. 2802. Whenever any article subject to duty is found in the baggage of any person arriving within the United States, which was not, at the time of making entry of such baggage, mentioned to the collector before whom such entry was made, by the person making entry, such article shall be forfeited."

On trial of the case before a judge and jury October 4, 1907, the court directed a verdict in favor of the government, whereupon counsel for the claimant moved for a new trial. The grounds for this motion were (1) that the declaration made on shipboard was an irregular and improper means of entering merchandise, and was superseded by the formal entry made later, and (2) that the government, by permitting the claimant to make such entry and to pay the duties, waived every right to a subsequent seizure. The following decisions, which were rendered by the Circuit Court of Appeals, Second Circuit, were cited in support of the first point: *United States v. One Pearl Necklace*, 111 Fed. 164, 49 C. C. A. 287, 56 L. R. A. 130, and *One Pearl Chain v. United States*, 123 Fed. 371, 374, 59 C. C. A. 499. The government argued that the claimant's contentions were opposed to the provisions of section 938, quoted above, and cited *United States v. Six Packages*, 6 Wheat. 520, 5 L. Ed. 321; *United States v. One Pearl Necklace*, 111 Fed. 164, 169, 49 C. C. A. 287, 56 L. R. A. 130; *Wood v. United States*, 16 Pet. 342, 10 L. Ed. 987; *United States v. Boyd* (C. C.) 24 Fed. 690; *United States v. Gray* (D. C.) 107 Fed. 104; *United States v. Cargo of Sugar*, 3 Sawy. 46, 25 Fed. Cas. 238; *United States v. Segars*, 3 Phil. 517, 522, 27 Fed. Cas. 1015; and *Hoyt v. United States*, 10 How. 137, 13 L. Ed. 348, 576. The matter was submitted on briefs without oral argument.

Charles A. Hess (Jerome S. Hess, of counsel), for the claimant.

Henry L. Stimson, U. S. Atty. (Winfred T. Denison, Asst. U. S. Atty., of counsel), for the United States.

HOUGH, District Judge. I cannot agree, as argued by claimant's attorney, that the sections of the Revised Statutes regarding the entry of passengers' baggage have no application owing to the fact that another entry was subsequently made; nor do the cases cited from our Circuit Court of Appeals bear out such doctrine.

In this case there was a confessedly fraudulent entry, or endeavor to make entry, of the seized goods. Suspicion prevented the success of this scheme, and sent the goods to public stores.

The only question that could be here raised is whether occurrences subsequent to the happening of the events which gave rise to a right of forfeiture can waive that right or estop the United States from asserting it. This query is set at rest by the citations of the district attorney's brief, especially *United States v. Six Packages*, 6 Wheat. 520, 5 L. Ed. 321.

Motion for a new trial denied.

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SHUMATE v. LOUISVILLE & N. R. CO. et al.

(Circuit Court, N. D. Georgia. January 4, 1908.)

CARRIERS—INJURY TO RAILROAD PASSENGER—ORDINARY CARE BY PASSENGER—  
STANDING UPON PLATFORM.

Under Ga. Civ. Code 1895, § 3830, which provides that "if the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover," a declaration in an action by a passenger against a railroad company to recover for a personal injury does not state a cause of action where it shows that plaintiff was a railroad employé, that while riding as a passenger on defendant's road he went out upon the platform of the car as the train was passing through railroad yards approaching a station and stood near the step with one hand upon the hand rail, and that he was thrown to the ground by a violent jerk of the train, ordinary care requiring him under such circumstances to remain in the car until the train stopped.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 9, Carriers, §§ 1376–1379.]

At Law. Action for damages. On demurrer to declarations.

This suit was brought by the plaintiff against the defendants to recover damages for certain injuries alleged to have been received by the plaintiff while endeavoring to alight from a moving train of the defendant companies, as it was slowing down preparatory to stopping at the station in Atlanta. Plaintiff alleges that he was an employé of defendants, but was riding upon defendants' train as a passenger, coming from Ingleside to Atlanta; that as the train approached the station in Atlanta, passing through the railroad yards, plaintiff went upon the platform of the car, preparatory to alighting from the train, and while standing upon the platform, at or near the top step with his hand upon the hand rail or grab iron, the train gave a sudden violent jerk, which threw the plaintiff from the platform to the ground and under the wheels of the car, and that plaintiff's leg was so badly crushed that it had to be amputated. To the declaration setting up these allegations, a general demurrer was filed upon the ground that the declaration failed to show a cause of action. Argument was had on the demurrer, and the matter submitted.

Arnold & Arnold, for plaintiff.

McDaniel, Alston & Black, for defendants.



NEWMAN, District Judge (after stating the facts as above). Under the decision of the Circuit Court of Appeals for this circuit in *Illinois Central R. R. Co. v. Warren*, 149 Fed. 658, 79 C. C. A. 350, it is clear that this suit cannot be maintained unless the doctrine of comparative negligence, as it exists in Georgia, can be invoked by the plaintiff.

This doctrine of comparative negligence is gathered from two sections of the Civil Code of Georgia of 1895. Section 2322 is in this language:

"No person shall recover damage from a railroad company for injury to himself or property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him."

And section 3830 is as follows:

"If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained."

From these two sections it is clear that if the plaintiff, by the exercise of ordinary care, could have avoided the injury he cannot recover. Here, the plaintiff went voluntarily upon the platform of the car while it was in motion, and was, as he says in his declaration, at or near the top step with his hand on the hand rail or grab iron, and when the sudden and violent jerk came he was thrown from the platform to the ground under the wheels of the car. The train was at that time, as gathered from the declaration, passing through the railroad yards, and near the depot. It should, it seems to me, be a matter of common knowledge as to how trains stop and start in passing through railroad yards, when approaching a depot. This should certainly be true in the case of a railroad employé, as the plaintiff was. In going upon the platform in this situation he took the risk. If he had remained in the car until it stopped, there is no reason whatever to suppose that he would have been injured in any way. I do not think the case comes within the authority cited by plaintiff's counsel in *Suber v. Railroad Co.*, 96 Ga. 42, 23 S. E. 387, but rather within the class of cases such as *Blitch v. Central Railroad*, 76 Ga. 333, *Meeks v. Railroad Co.*, 122 Ga. 266, 50 S. E. 99, and *Railroad Co. v. Edmundson*, 128 Ga. 478, 57 S. E. 877, in which it is held that, where the case discloses the fact that the plaintiff by the exercise of ordinary care could have avoided the injury, the court should so hold as a matter of law.

In *Blitch v. Central Railroad*, *supra*, the plaintiff went upon the platform of a moving train, having apparently been misled by the remarks and actions of the conductor as to the proximity of the train to his station, and was thrown from the platform and injured. In that case the court said:

"We think it quite clear from the plaintiff's own testimony that the railroad company was not at fault or in anywise negligent. The mere announcement by the conductor of the station the train was approaching cannot be construed into an act of negligence on the part of the company. It was but the cus-

tomary warning to passengers to get ready for their departure by looking after their luggage and such parcels as they carry with them. It is also manifest that the injury was caused by the negligence of the plaintiff in going upon the platform of a car moving rapidly in the dark, of his own motion, whereby he was thrown off and seriously injured; and, lastly, it is shown by plaintiff's testimony that if there was negligence on the part of the company's agent, the same could have been avoided by his having used ordinary care and diligence on his part. All he had to do would have been for him to have remained in the car where he was until its arrival at the station, and until it stopped, which course it seems common prudence would have dictated to him. So it appears that the plaintiff, in trying to make out his case, made out a full and perfect defense for the defendant, rebutting all presumption of negligence against it."

The case of *Railroad Co. v. Harmon*, 147 U. S. 571, 13 Sup. Ct. 557, 37 L. Ed. 284, is inapplicable here. That was a street car case. That alone would distinguish it from the case at bar, and any language used by the Chief Justice in the opinion must be taken to have been used with reference to that fact. It would be a very hard rule that would hold a locomotive engineer to the duty of so running and controlling his train as not to injure persons standing upon the platform or steps of a passenger coach. To hold this would in effect be holding that an engineer must anticipate that persons would be upon the platform and steps, and handle his engine and train accordingly. This cannot be the law.

Believing as I do that the plaintiff's declaration fails to state a cause of action, the demurrer must be sustained, and an order may be taken to that effect.

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BIRD et al. v. PEOPLE'S GAS & ELECTRIC LIGHT CO. et al.

AMERICAN TRUST & SAVINGS BANK et al. v. SAME

(Circuit Court, S. D. Ohio, W. D. February 21, 1908.)

**1. CORPORATIONS—APPOINTMENT OF A RECEIVER FOR AN ELECTRIC LIGHT COMPANY—GROUNDS.**

Upon a bill for the appointment of a receiver, for the benefit of all concerned, filed by a bondholder, alleging that the light company had defaulted in the payment of interest for two periods; that default had been made in the payment of all taxes lawfully levied upon the company's property and franchises; that it had permitted part of its property to be sold for such taxes; that the company was hopelessly insolvent, and unable to pay its present and accruing indebtedness; that, by reason thereof, its franchises and contracts were in danger of being forfeited; that its funds had been unlawfully diverted by its officers to their own uses; that said officers had suffered collusive judgments to be taken against the company; that the proceeds of its bonds had been appropriated by its promoters under cover of the Western Gas & Investment Company which owned practically all of its stock, and which operated the mortgagor company; that a large part of its income had been similarly appropriated, thereby preventing the company from meeting its obligations; that said Western Gas & Investment Company and the defendant company with other operating companies were organized in furtherance and for the purpose of defrauding investors in their bonds; and that the trustees, who were residents and citizens of the state of Illinois, and not within the jurisdiction of this Court, had failed to exercise the powers granted to them for the protection of the bondholders—*held*, that a case was made for the appointment of a receiver.

## 2. SAME.

Upon a bill for foreclosure and the appointment or extension of a receiver, as provided in the mortgage deed for the same company filed by the trustees of the mortgage six months later, *held*, that the receiver who had been appointed acted for neither party, but for the court, and for that reason the motion of the trustees for the appointment of a receiver or for extending the receivership will be overruled.

## 3. ACTION—CONSOLIDATION OF SUITS.

Upon motions filed respectively by the original complainant and by the trustees of the mortgage for consolidation of the two actions, both suits seeking substantially the same relief, the motion in the first suit is sustained.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Action, §§ 632-661.]  
(Syllabus by the Court.)

## In Equity.

Upon motion of Evelyn Bird et al. to consolidate the suit of the American Trust & Savings Bank against the People's Gas & Electric Light Company et al. with the suit of Evelyn Bird, et al. against the People's Gas & Electric Light Company et al., and upon the motion of the American Trust & Savings Bank et al. to consolidate the latter suit with the former; also the motion of the American Trust & Savings Bank et al. for the appointment of a receiver or the extension of the receivership.

The People's Gas & Electric Light Company of Xenia, Ohio, during the first month of its existence, with none of its stock paid for and owning no assets, issued bonds of the face value of \$175,000. The proceeds of \$105,000 worth of these bonds were used in purchasing the properties and franchises of existing companies. The stock of the People's Gas & Electric Light Company was owned by the Western Gas & Investment Company of Chicago, which paid nothing therefor. The Western Gas & Investment Company similarly owned the stock of other operating companies, against whose assets bonds amounting to \$1,093,000 had been issued. These transactions were part of a general scheme of the promoters to defraud investors in bonds of the operating companies. The bill of complaint of Evelyn Bird et al., filed March 19, 1907, alleged the above facts, and that the bond issue of the People's Gas & Electric Light Company was far in excess of the total value of all its assets; that the total proceeds of the bond issue were converted by the promoters, under the guise of the Western Gas & Investment Company, to their own uses; that the receipts of the People's Gas & Electric Light Company in amounts of \$5 or more were forwarded daily to the Western Gas & Investment Company at Chicago, and converted by the officers of the latter company to their own uses; that, by reason thereof, the People's Gas & Electric Light Company was unable to pay its employes or keep its plant in repair; that the books of the light company were kept outside of the state of Ohio; that the light company had defaulted in payment of interest for two periods; that default had been made in the payment of taxes for more than two years; that the taxes in arrears amounted to \$6,000; that suit had been filed, judgment obtained, and execution was about to be levied upon the properties to satisfy tax judgments; that part of the property had been sold for taxes; that the president of the Western Gas & Investment Company was president of the People's Gas & Electric Light Company; that as president of the latter company he confessed judgment in favor of the former company for \$27,177.57; that this judgment was collusively and fraudulently obtained; that execution was issued thereon, and that the property of the People's Gas & Electric Light Company was about to be sold in satisfaction thereof; that the value of the properties had been impaired; that the franchises and contracts were in danger of being forfeited; and that the trustees of the mortgage had failed to exercise the powers granted to them for the protection of the bondholders. The allegations of the bill were established by affidavits. The court appointed a receiver who qualified, took possession, and has since operated the plant.

On September 19, 1907, the American Trust & Savings Bank et al., trustees under the trust deed, filed a bill for foreclosure and the appointment of a receiver as provided in the mortgage deed. On November 9, 1907, Evelyn Bird et al. filed a motion to consolidate the suit of the trustees with the original

suit. On November 18, 1907, the trustees of the mortgage filed a motion to consolidate the original suit with their suit. On November 22, 1907, the motion of the trustees for a receiver and the two motions for consolidation were noticed for hearing.

William J. Shroder, Russell B. Harrison, and Ralph L. Peck, for complainants Evelyn Bird and others.

Wood & Oakley and Maxwell & Ramsey, for complainants American Trust & Savings Bank and others.

THOMPSON, District Judge. The bill in this cause, independent of the alleged breaches of the covenants of the trust deed, shows grounds justifying the action of the court in appointing the receiver herein. In substance, it is charged in the bill, and supported by affidavits, that the Western Gas & Investment Company and the underlying companies were organized in furtherance of a scheme to defraud investors in the bonds of the underlying companies, and that the monies received from the sale of these bonds, and a large part of the income of the underlying companies were appropriated by the Western Gas & Investment Company, or rather by the promoters of the scheme under cover of that company, thereby crippling the underlying companies, and disabling them from meeting their bond obligations, presenting a case justifying the court through its receiver, in taking possession of the property of the People's Gas & Electric Light Company, and as said by Judge Brewer in *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 23 Fed. 863:

"It matters not, for the ultimate determination of the suit, at whose instance the receivers were appointed. They act for neither party. They represent neither party. They stand here simply as the hand of the court, holding the property for disposition at the end of the litigation, for the benefit of all."

The motion of the complainants Evelyn Bird et al. to consolidate cause No. 6,288 with this cause will be sustained; and the motion of the American Trust & Savings Company and Frank H. Jones, complainants in cause No. 6,288, for a consolidation of the two causes and the extension of the receivership, will be overruled.

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IN RE DI CLERICO.

(District Court, E. D. New York. January 28, 1908.)

ALIENS—NATURALIZATION—PROOF OF MORAL CHARACTER.

Under the naturalization act of June 29, 1906, c. 3592, § 4, subd. 4, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 422], which provides that to authorize the naturalization of an alien it must be shown to the satisfaction of the court that he has resided continuously within the United States five years at least, and that "during that time he has behaved as a man of good moral character," an applicant who continued to make use of a certificate of naturalization previously issued to him, after learning that he was not entitled to the same under the law and until it was canceled, cannot be considered as having behaved as a man of good moral character during that time, and is not entitled to apply for naturalization again until the expiration of five years.

On Motion for Leave to File Petition for Naturalization.

Arthur M. King, for petitioner.

CHATFIELD, District Judge. The applicant had previously a certificate of naturalization, which he obtained after a residence of 3½ years, the residence having been proved by the witness and not by the applicant himself. As now shown by the applicant, he could neither speak nor write English, and answered such questions as were asked him through the agency as interpreter of the very person who told him that he could be admitted as a citizen. Under such circumstances it is unjust to impute criminal knowledge to the applicant at the time of obtaining his original certificate. He seems to be a man of intelligence, and of some property, and in most ways would seem competent for admission. Two of his children were born in the United States. He states that in or about the year 1900 he learned something as to the five-year residential requirement of the naturalization law. He continued to make use of his papers until September, 1904, when they were taken away and subsequently canceled. In the spring of 1905, the applicant and his wife and two children went to Italy, where he stayed until February, 1907, upon a farm belonging to himself and his wife, where two more children were born.

The Naturalization Law of June 29, 1906, contains the following provision:

"Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the state or territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Act June 29, 1906, c. 3592, 34 Stat. 596 [U. S. Comp. St. Supp. 1907, p. 422].

The applicant has asked permission of this court to be allowed to file a petition for admission as a citizen, under the rule of this court that no petition shall be filed by a person whose papers have previously been canceled, until after a preliminary investigation of his moral character and of the circumstances of the cancellation.

The applicant is required by Naturalization Law, § 4, par. 2, to state whether he has been denied admission as a citizen of the United States, and under this section a clause is inserted in the petition requiring the applicant to make an oath as to whether he has ever applied for citizenship papers. This, of course, brings out the fact of cancellation, as well as any previous denial of an application, and allows the applicant to bring before the court evidence to show that he has behaved as a person of good moral character for five years preceding his application.

In the present case Di Clerico continued to make use of his papers until September, 1904, and it does not seem to the court that he could have behaved as a person of good moral character prior to that time. Since that time he has plainly lived in Italy for such a period that it is impossible to determine upon the present application that he has retained a residence in the United States, or whether he continued of the intention to reside permanently in the United States, which intention was evidenced by his declaration of such intention, taken out in 1904, immediately after the surrender of his former papers. It

may also be questioned whether his long residence abroad would not defeat in any event the effects of such declaration.

But to return to the question of moral character. A person may be under indictment, may plead guilty, may serve a sentence, and during this time so live that he could be considered to be of good moral character, if the sentence were for a crime of which repentance and rectitude of life could show a reformation of character. Some crimes are such an index of bad moral character as to forever prevent the criminal from enjoying the benefits of citizenship, and willful and deliberate perjury, at the time of obtaining a certificate of naturalization, should impose upon the applicant the full effect of section 5392, Rev. St. [U. S. Comp. St. 1901, p. 3653]. This would prevent a person convicted or pleading guilty to such a charge from ever again making application for citizenship. Such a case as this is shown in *In re Spenser*, 5 Sawy. (U. S.) 195, Fed. Cas. No. 13,234. But it would seem that the frequent and unintelligent acts of illiterate and misled aliens should not be looked upon in the same light as a false oath of such character as to justify prosecution under section 5392, Rev. St.

However, it would seem to necessarily follow from the language of the statute above referred to, and from the nature of the crimes defined in the statutes relating to naturalization, that a man cannot behave as a person of good moral character, with respect to the rights of citizenship, when knowingly and willfully making a fraudulent or criminal use of his citizen papers. The statutory period of five years cannot begin until such fraudulent and criminal use has entirely ceased, and repentance, at least, can be observed. This applicant cannot claim such a return to a proper moral standard prior to September, 1904.

The application must be denied, without prejudice to renewal at a time when the above disabilities are entirely removed, and when he can show five years' residence in the United States.

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## BLANTON v. CHALMERS.

(Circuit Court, N. D. Illinois, E. D. February 6, 1908.)

No. 28,828.

### 1. EQUITY—BILL—EXCEPTIONS—IMPERTINENCE.

Where a bill and answer are in the files, it is not proper practice on exceptions to the answer for impertinence for complainant to restate the allegations of the answer, and then add "in all which particulars plaintiff excepts to said answer" as impertinent, and insists that the allegations should be expunged, but the particular matters excepted to should be stated in the exceptions as required by Equity Rules 27, 61.

### 2. SAME.

Exceptions to an answer must be definite and exact, and cannot be founded on general objections to an answer, part of which is clearly good.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 527.]

## 3. SAME—"IMPERTINENCE."

"Impertinence" in a pleading in equity consists in the introduction of any matter into the pleading which is not properly before the court for decision at the particular stage of the suit.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 434.

For other definitions, see Words and Phrases, vol. 4, p. 3423.]

## 4. SAME—EXCEPTION—DEMURRER.

An exception for impertinence is not equivalent to a general demurrer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 521-525.]

## 5. SAME—HEARING ON PLEADINGS.

Where complainant in equity desires to rest his case on the allegations of the answer, the matter should be set down for hearing on the bill and answer.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, §§ 710-712.]

## 6. CORPORATIONS—TRANSFER OF STOCK—PLEDGES—ACCOUNTING—LACHES.

Complainant delivered certain stock to defendant to secure a guaranty of certain indebtedness which defendant was afterwards required to pay, whereupon, about December 10, 1904, defendant appropriated the stock, and claimed the same as his absolute property. Complainant filed a bill October 2, 1907, for an accounting, claiming that the transaction constituted a pledge, and not a conditional sale. *Held* that, in the absence of anything to explain complainant's delay, complainant on the face of the pleadings was guilty of laches.

Follansbee, McConnell & Follansbee, for complainant.  
George M. Eckels, for defendant.

KOHLSAAT, Circuit Judge. This cause is now before the court on exception to the answer for impertinence. Inasmuch as the bill and answer are in the files, it was not proper practice for complainant to restate the same, and then by adding, "In all which particulars the plaintiff excepts to said answer of said defendant, William J. Chalmers, as impertinent, and he insists that said allegation ought to be expunged from said answer," leaving the court the task of ascertaining just what is claimed by him. There are a number of matters set up by way of answer, and proper practice would require that the particular matters excepted to be named in the exceptions. Equity Rules 27, 61. The briefs, however, indicate that the exception is filed only to the defendant's version of the contract in suit, whether new, or in legal effect the same as that set up in the bill, and, for the purposes of this hearing, the matter debated in the briefs may be accepted as a designation of the particular part of the answer excepted to, although "exceptions to an answer must be definite and exact, and cannot be founded on general objections to an answer, part of which is clearly good." *Mutual Life Ins. Co. v. Cokefair*, 41 N. J. Eq. 142, 3 Atl. 686; *Arnold v. Slaughter*, 36 W. Va. 589, 15 S. E. 250. The matter in suit, for the purposes of this hearing, may be stated as follows, viz.: The complainant desired a certain credit from Allis Chalmers & Co. This they refused to allow him without some sort of security. In consideration that defendant guarantee his account, complainant conveyed certain shares of stock made out in defendant's name to the Allis Chalmers & Co. under an agreement with defendant that if he was compelled to pay the account, the stock was to be his absolute

property. Complainant failed to pay, and Chalmers assumed the debt and took the stock.

Impertinence consists in the introduction of any matters into a bill, answer, or other pleading in a suit, which are not properly before the court for decision at any particular stage of the suit. *Wood v. Mann*, 1 Sumn. 506, Fed. Cas. No. 17,951; *Chapman v. School Dist., Deady*, 108, Fed. Cas. No. 2,607; *Woods v. Morrell*, 1 Johns. Ch. (N. Y.) 103. The briefs in this cause are mainly directed to a discussion of the question as to whether the contract set up in the answer and the proceedings thereunder constituted a pledge or a conditional sale. Complainant insists that the answer, in substance, confesses his contention that certain shares of stock are held by the defendant, merely as a pledge or bailee, to be accounted for. Granting, for the time, that such is the case, can it be held as a matter of law, that an answer, or matters contained in an answer, which concedes complainant's case, is foreign to the issues raised by the bill and open to exception for impertinence? An exception for impertinence is not equivalent to a general demurrer. If complainant desires to rest his case upon the allegations of the answer in respect to whether there exists a bailment or a conditional sale, then the matter should be set down upon bill and answer. This proceeding under equity rules amounts, practically, to a general demurrer.

There is another phase of the case which should dispose of the exceptions as presented. The stock was delivered to and appropriated and openly claimed by Chalmers as his absolute property on or about December 10, 1904, that being after the date fixed for the payment of the account for which he had become surety and after his payment thereof. The bill was filed October 2, 1907, almost three years later. No sufficient explanation of this delay is shown in the bill. It is well known that situations change, so that delays amounting to laches have been held to constitute a good defense to such proceedings as now before the court. 22 Am. & Eng. Ency. of L. p. 877, and cases cited. Whether or not there was laches would be a matter of proof. On the face of the pleadings, I am inclined to hold that it existed.

For these reasons, the exceptions are overruled.

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GREENE v. AURORA RYS. CO.

(Circuit Court, N. D. Illinois, E. D. January 24, 1908.)

No. 28,519.

1. EQUITY—PLEADING—EXCEPTION TO ANSWER.

Exceptions may not be taken for insufficiency to new matter alleged in an answer which constitutes a substantial defense.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 19, Equity, § 524.]

2. CORPORATIONS—ACTIONS—PLEADING—IMPERTINENCE—CONSTRUCTION OF PLEADING.

An answer of a corporation in equity, which sets up an amendment to its charter which under the statute may or may not constitute a substantive defense to the bill, depending on whether it was made before or after the commencement of the suit, but which fails to allege the date of the



amendment, must be construed against the pleader, and is subject to exception for impertinence.

In Equity. On exceptions to answer.

Newman, Northrup, Levinson & Becker and Chester E. Cleveland, for complainant.

Dolph, Buell & Abbey, for defendant.

KOHLSAAT, Circuit Judge. This cause is now before the court on exceptions to answer. Defendant's original charter was held bad in the case of *Gillette v. Aurora Railways Company*, decided in 228 Ill. 263, 81 N. E. 1005. To meet the objections of the court set out in that case, defendant amended its charter, which fact it sets out in its answer in the following words:

"\* \* \* And this defendant states and charges the facts to be and avers: That its articles of incorporation have been duly and legally amended so as to read as follows: 'Second: It is proposed to construct the said railroad from the city of Aurora, Kane county, Illinois, to the city of Naperville, Dupage county, Illinois.' That certificate of such change and amendment to the articles of incorporation of this defendant have been duly filed in the office of the Secretary of State of the state of Illinois, in the office of the recorder of deeds of the county of Kane, in the state of Illinois, and in the office of the circuit clerk and ex officio recorder of deeds of the county of Dupage, in the state of Illinois. This defendant states and charges the fact to be that said amended articles of incorporation do contain the places from and to which the Aurora Railways Company intends to construct its proposed railway, and that this defendant has the right to construct its proposed railroad under its said articles of incorporation"

—omitting, as will be noted, the date of such amendment. The statute (paragraph 56 of chapter 32, entitled "Corporations," Hurd's Rev. St. Ill. 1905), under which clause the amendment was made, provides that changes of charter "shall not affect suits pending in which such corporation or corporations shall be parties, nor shall such changes affect causes of action, nor the rights of persons in any particular."

The exception is taken both to the form of the answer as to sufficiency and to the substance thereof as for irrelevancy and impertinence. Exception may not be taken for insufficiency to new matter alleged in an answer which constitutes a substantial defense. 1 Ency. P. & P. p. 898, and cases cited. Whether such a defense is set up by the answer, therefore, becomes a primary inquiry. There seems to be some authority under the decision of the Illinois court in the case of *Bradley Mfg. Co. v. Chicago & So. Traction Company*, 229 Ill. 170, 82 N. E. 210, for holding that the charter in question might have been legally amended under the statute above quoted, limited as therein stated. On the face of the answer, it does not appear but that the amendment may have been made prior to the institution of the proceedings herein. In the *Bradley Case* the court held good a charter which had been amended in substantially the same respect as was that now before the court, although the validity of the amendment, and of the charter as amended, was not directly in question. I am not prepared to say, in view of the *Bradley Case*, that if the amendment to the charter set out in that part of the answer which is excepted to had been made before the filing of the bill herein the answer would

not have constituted a substantive defense to the bill, and, therefore, subject to exception for impertinence. Clearly, the answer leaves the court and party complainant in an uncertain state of mind as to whether it comes within the conditions of the statute quoted. In *Peipho v. Peipho*, 88 Ill. 438, and *Phelps v. McDonald*, 99 U. S. 298, 25 L. Ed. 473, it is decided that in such cases the doubts must be resolved against the pleader. The application of this rule seems most reasonable and fair in the present suit.

Following this rule, the court finds that the amendment to the charter was presumptively made subsequent to the filing of the bill herein, and is, therefore, under the statute aforesaid, irrelevant, and is not proper matter of defense herein. It is therefore ordered that the exception for impertinence be sustained and said matter stricken from the answer.

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JONES et al. v. SMITH et al.

(Circuit Court, E. D. Pennsylvania. January 24, 1908.)

No. 25.

NEW TRIAL—GROUNDS—VERDICT NOT WARRANTED BY EVIDENCE.

Where, on the evidence submitted to the jury, the plaintiff was entitled to a verdict in some amount, but the jury, not being so instructed, returned a verdict for defendant, a new trial must be granted regardless of the reservation at the instance of defendant of the question whether plaintiff was entitled to recover as matter of law.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, §§ 57, 59.]

At Law. On motions by plaintiff for new trial and for judgment notwithstanding the verdict.

Burr, Brown & Lloyd, for plaintiffs.

Henry C. Boyer and Wm. A. Glasgow, Jr., for defendants.

J. B. McPHERSON, District Judge. The verdict in this case was wholly unexpected by the court. I assumed that the jury would find in favor of the equitable plaintiff for some amount, and that the legal question—whether there was any evidence at all to go to the jury in support of his claim—could then be determined upon considering further the reservation of the defendants' first point. As it has turned out, however, it would have been better if I had given the instruction in so many words that the plaintiff was entitled to a verdict, leaving the amount only to be determined by the jury. The sole reason for not taking this course was because I did not see how a verdict against him could be rendered; and it seemed, therefore, that a formal submission could do no harm. But, as now appears, the submission did do harm, for the unlooked-for verdict has put the record in a condition that cannot be defended.

For obvious reasons, the motion for judgment in favor of the plaintiff notwithstanding the verdict cannot be granted, and is now refused; but the motion for a new trial must prevail.

## THE PERSIANA.

(District Court, S. D. New York. November 20, 1907.)

**1. ADMIRALTY—PROCEDURE—MOTION TO DISMISS.**

In a suit in admiralty, a motion to dismiss at the close of libelant's case will not be entertained, unless the claimant or respondent also rests.

**2. SAME—REOPENING CASE TO INTRODUCE DEPOSITIONS.**

After both parties have rested in a suit in admiralty, and the case has been argued, it will not be reopened to permit the libelant to introduce depositions previously taken by the claimant, which the libelant might, if he had desired, have offered as a part of his own case.

**3. SAME—COSTS—DEPOSITIONS NOT OFFERED.**

A party in admiralty can tax neither costs nor disbursements in respect of depositions taken by him which he did not offer in evidence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 1, Admiralty, § 849.]

**In Admiralty.**

On the final hearing of this action in admiralty, brought to recover for damage to cargo laden upon the steamship, it appeared that the injury arose from one of the causes excepted in the bill of lading. Libelant having rested, claimant moved to dismiss on the ground that libelant had not affirmatively shown that the injury was caused by the ship's negligence. This motion was denied at the close of the court's morning session. At the opening of court in the afternoon claimant rested without offering evidence; and thereupon the cause was fully argued by counsel. At the close of argument, libelant moved for leave to introduce in evidence on his own behalf certain depositions *de bene esse* taken by the claimant five months before the trial.

Kneeland & Harrison, for libelant.

Convers & Kirlin (John M. Woolsey, of counsel), for claimant.

HOUGH, District Judge. It has been the uniform practice of this court not to entertain motions to dismiss at the close of libelant's case, unless the claimant or respondent also rests. If the party defendant considers that any testimony is necessary to overcome that offered by libelant, it should be produced, and the court not asked to dispose of the litigation before all the testimony is submitted.

Libelant's motion to reopen and introduce in evidence claimant's depositions must be denied. He could have offered these depositions as part of his own case, but did not choose to do so. He was not surprised, and will therefore not be permitted to support his case by evidence at hand when the cause opened, but only sought to be used after both sides rested and argument developed infirmity in his deliberately chosen position.

The libel is dismissed; but as claimant did not offer his depositions in evidence he can tax neither costs nor disbursements in respect of said depositions.

## GUARANTY TRUST CO. OF NEW YORK v. CHICAGO UNION TRACTION CO. et al. (three cases).

(Circuit Court, N. D. Illinois, E. D. August 12, 1907.)

Nos. 26,727-26,729.

## STREET RAILROADS—FORECLOSURE OF LIENS—POWER OF COURT TO LEASE PROPERTY.

Various street railroad properties in the city of Chicago owned by different companies, and covering a large portion of the city, were, by a succession of leases, transferred into the possession of a single company which operated the same as one system. Such company and its preceding lessees had largely replaced the property and equipment of the original companies and extended the lines, the whole being subject to successive liens created by the different companies. The final lessee becoming insolvent, creditors' suits were instituted in which all the parties interested in the property were eventually brought in as parties, and the court took possession of the property by its receivers. At this time the franchises granted by the city to the several companies to operate their lines in the streets had largely expired, and those remaining had but short terms to run and the city refused to extend the same, leaving practically only the physical property at the disposition of the court, the value of which was much less than the indebtedness. In such condition of affairs the city passed an ordinance granting a franchise to a reorganized company for 20 years on certain conditions, among which were that it should retain possession of all the property in the hands of the receivers, should replace, repair, and re-equip the same as necessary to give an improved service, and operate all the lines as a single system. All except a few creditors and stockholders having small interests approved of such reorganization scheme. *Held* that, in view of the great benefit which would result from it to the creditors and stockholders as a body by giving the property value as a going concern as well as to the public, the court had power to authorize its receivers to transfer the property by lease or otherwise, and on such terms as should be equitable to all, to the reorganized company for the term of its franchise, and to authorize such company to create a first lien on the same to obtain the money necessary to comply with the requirements of the ordinance.

In Equity. Bills by the Guaranty Trust Company of New York against the Chicago Union Traction Company and others against the North Chicago Street Railroad Company and others and against the West Chicago Street Railroad Company and others.

In each of these causes the Chicago Railways Company (hereinafter called the "Railways Company") on the 15th day of July, 1907, filed its petition asking that the court order its receivers therein to deliver to the petitioner full and lawful possession of all the lines of street railway operated by the receivers of the Chicago Union Traction Company on February 1, 1907, with all the plant and equipment in use on or in connection therewith at the time of such delivery, in order thereby to enable the Railways Company to accept and comply with an ordinance of the City of Chicago, passed February 11, 1907, as amended, (hereinafter called "the Ordinance"). The declared purpose of the Ordinance was to provide for the reconstruction, re-equipment and extension of such street railway system and for the unified operation thereof, together with the street railway system maintained and operated by the Chicago City Railway Company (hereinafter called the "City Company"), to which another and substantially like ordinance was granted at the same time, and also to provide that the City of Chicago might be in a position, as soon as practicable, freely to deal with the subject of transportation in its streets as a whole and to fix and determine the definite terms and conditions upon which said City should have the right to purchase and take over, at any time, said street

railway system. The Ordinance made it a condition precedent to the right to accept it, that the Chicago Railways Company, at or before the time of accepting the Ordinance should be in lawful possession of the Traction Company's said system with power and authority to comply with the provisions of the Ordinance with respect to the operation, maintenance, extension, reconstruction, re-equipment and improvement of said railways, and to make from the receipts thereof all the deposits and payments required by the provisions of the Ordinance to be made from such receipts and with power to transfer to the City, or its licensee, all such possession, rights and powers in accordance with the provisions of the Ordinance in that behalf.

The Chicago River divides the City into three parts, known as the North, South and West divisions. That part lying north of the main channel of the Chicago River and between the north branch thereof and the lake is the North Division. That part lying south of the main channel of the River and between the south branch thereof and the lake is the South Division. That part between the north and south branches of the River is the West Division.

The surface street railway lines in the South Division, except terminals of lines from the North and West Divisions, are those operated exclusively by the City Company and are not here directly involved. The lines from each of the three divisions use that part of the South Division between Van Buren Street and the Chicago River in order to reach the congested part of the City.

The companies directly involved herein, owning or operating the surface street railway lines and property appurtenant thereto in the North and West Divisions and the tunnel and other property used in connection therewith, are the North Chicago City Railway Company (hereinafter called the "North City Company"); the North Chicago Street Railroad Company (hereinafter called the "North Street Company"); the Chicago West Division Railway Company (hereinafter called the "West Division Company"); the West Chicago Street Railroad Company (hereinafter called the "West Street Company"); the Chicago Passenger Railway Company (hereinafter called the "Passenger Company"); the West Chicago Street Railroad Tunnel Company (hereinafter called the "Tunnel Company"); the Chicago Union Traction Company (hereinafter called the "Traction Company").

Each of said companies (except the Tunnel Company) for a number of years has been a street railway corporation organized under the laws of Illinois, owning certain portions of the surface street railway lines covered by the Ordinance.

Prior to June 1, 1899, the North Street Company and the West Street Company operated independently separate systems of surface street railroads in the North and West Divisions of the City, respectively, with termini extending into the South Division. The systems of the North Street and West Street Companies, respectively, consisted in part of all the lines owned by the North City and West Division Companies, respectively, but leased by them in May 1886 and October 1887, respectively for the period of 999 years to the North Street and West Street Companies, respectively, and in part of extensions of those leased lines under grants made by the City directly to the North street and West Street Companies, respectively.

On June 1, 1899, the North Street and West Street Companies leased and conveyed, for the period of the unexpired lives of the lessor companies, respectively, and all extensions and renewals thereof, all their properties, franchises and rights (including said leased lines) to the Traction Company, which thereafter, as lessee, operated them as one system until the appointment of receivers of the Traction Company in said causes on April 22, 1903, since which time they have been operated as one system by said receivers. As lessee the Traction Company was obligated to pay or renew all notes, bonds and mortgages of said lessor companies and not only to pay the rentals payable by the North Street and West Street Companies as lessees, respectively, of the properties of the North City and West Division Companies, but also to pay as rentals to its lessors, the North Street and West Street Companies, respectively, amounts equal to dividends of 12% per annum on the capital stock of the former and of 6% per annum on the capital stock of the latter. The leases to the Traction Company further required that to secure performance of its obligations as lessee, the Traction Company should deposit such amount of

cash or security as should be agreed upon by the parties to be held subject to the conditions of a tripartite agreement by which the sum of \$10,000,000 in cash or in securities approved by the North and West Street Companies, was required to be deposited; the income of the fund to be paid to the Traction Company until default in its obligations as lessee, and upon default such income and any of the principal thereunto needed to be appropriated and applied in equal and ratable payment and discharge of the debts and obligations assumed by the Traction Company. The leases to the Traction Company also provide that should stocks of corporations constitute part of the deposit, the trustee should vote them in accordance with the instruction of the Traction Company or, if requested by the Traction Company, should execute a voting proxy to the person designated from time to time by that company. Under the tripartite agreement there were deposited 20,000 shares and 32,000 shares, respectively, of the capital stock of the North Street and West Street Companies, those shares being still held by the trustee under such agreement.

The lines of the system in the North Division were owned by the North City and the North Street Companies; those in the West Division of the City were owned by the West Division, West Street, Passenger and Tunnel Companies. The cars of all these different lines reach the business district of the City in the South Division between Van Buren Street and the main channel of the Chicago River by running over the tracks of some one or more of these companies.

These companies interested in the street railway lines covered by the Ordinance have outstanding capital stock aggregating the par value of \$57,699,300, of which \$49,393,800 are held by the general public and \$8,305,500 were controlled by some of the companies when the above mentioned leases were made, subject to pledge as security for certain of their obligations; the beneficial interest in, and control of, such pledged stock having, under the leases, passed to the Traction Company, and in turn to its receivers.

The indebtedness of all those companies, including various bond issues with varying maturities, aggregates \$28,592,126.58, exclusive of receivers' certificates which aggregate \$1,982,000, making the total indebtedness \$30,575,126.58.

On April 22, 1903, the Guaranty Trust Company of New York brought three suits at law in the Circuit Court of the United States, for the Northern District of Illinois, against the North Street Company, the West Street Company and the Traction Company, respectively. On the same day the general issue was filed in each case, issue was joined, the jury duly waived and, upon trial, judgments were rendered against the respective defendants in those suits for \$565,052.66, \$270,440.00 and \$318,690.66 respectively. Thereafter, on the same day, execution having been awarded and returned, no property found, the Guaranty Trust Company filed its three separate judgment creditor's bills in the Circuit Court of the United States, for the Northern District of Illinois, against the three judgment debtors, respectively, in each bill praying for the appointment of a receiver and in the bill against the Traction Company praying that the receivers take possession of and operate the railways. In each case the judgment debtor was the only defendant. In each case the defendant company filed its answer confessing the bill and the court forthwith appointed receivers with authority in the case of the receivers of the Traction Company to operate the property under the order of the court. The receivers of the three defendant companies forthwith qualified and the companies thereupon transferred to them respectively all their properties, rights and franchises, the receivers of the Traction Company taking possession of the property in the custody of the Traction Company as lessee.

Under an order of the court, entered July 18, 1903, the receivers filed two ancillary bills, one against the City of Chicago, the West Division Company, the Traction Company and the West Street Company; the other against the City, the Traction Company, the North Street Company and the North City Company. On appeal from the decree entered in those ancillary suits by the Circuit Court, it was decided by the Supreme Court of the United States, (Blair, et al., receivers, v. City of Chicago, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801) that the claim of the companies that they had a ninety-nine year franchise (extending to 1958) was wholly unfounded and that the fran-

chises covering the lines of the North City Company in the North Division and their termini in the South Division with the possible exception of the Wells Street line, absolutely expired in July 1903, and that the franchises covering most of the lines of the West Division Company in the West Division and their termini in the South Division expired at the same time, subject, however, as to a portion thereof, to the right of the company to continue operation until the City should purchase, at an appraised value, the tangible property used in such operation.

Of the unexpired franchises covering lines in the West Division the average life remaining after January 1, 1907, was slightly more than six years. Out of a total mileage of 306.046 miles of track the franchises for 136.44 miles had absolutely expired; the franchises for 70.35 miles were subject to be terminated at any time by the City upon six months' notice and purchase of the tangibles; and the franchises for 99.256 miles had only a short period to run. The franchises covering the trunk lines and the terminals had either absolutely expired or were subject to termination by the City on six months' notice and purchase of the tangibles.

On June 30, 1906, in the first of the above entitled causes, and on July 23, 1906, in each of the other of said above entitled causes, the Guaranty Trust Company of New York, complainant in each of those causes, filed an amended and supplemental bill making, in each case, parties defendant each and every person or corporation which had or claimed an interest in any of the property, rights or franchises of the original defendant therein. Service was had upon each defendant, and on March 2, 1907, all defendants, who had not appeared, pleaded, answered or demurred, were duly defaulted, and each of said causes was still pending in court and undetermined when the petition of the Railways Company was filed. Each of the companies, except the Tunnel Company, before enumerated as being interested in the street railway lines covered by the Ordinance filed its answer to the amended and supplemental bill in said causes, respectively. The North City Company and the West Division Company each filed in each of said causes a cross-bill asking that its rights and those of its mortgagees and stockholders be established against the North Street Company and the West Street Company, respectively, and against the Traction Company.

All said companies, by their answers, and said North City and West Division Companies, also by their cross-bills, expressly surrendered, transferred and delivered to and vested in the court all their properties, assets, franchises and rights to be administered, operated, sold, leased or otherwise dealt with or disposed of as to the court might seem meet and proper and submitted themselves and their properties, etc., to the jurisdiction of the court and undertook to abide by and carry out such orders as the court might from time to time make concerning said properties, etc., or directing or concerning the execution of any conveyance or any instrument affecting the title, lease, possession, user, delivery or custody of the same.

The amended and supplemental bill prayed, among other things, that the court appoint a receiver or receivers of the entire property, estate, interest and possession theretofore vested in the separate receivers of the Traction, North Street and West Street Companies; that such new receiver or receivers be invested with power to utilize the income and credit of the properties as a unit in order to maintain, improve and operate them as a single system; that the court marshal all the assets of said respective companies and ascertain and enforce the several and respective liens and priorities existing on each and every part of said system; that all parties to the amended and supplemental bill be required to assert their rights, claims or liens with respect to any part of said street railway system and be enjoined from enforcing any such lien in any other court, and that in the event of the failure to pay, within a time to be limited by the court, any claim or debt secured by lien upon any part of the property in the receivers' hands, the entire property to be sold in such manner as to the court might seem most effective not only to recognize the distinct and several rights of the various lienors and mortgagees against parts of said estate, but also to preserve for the general benefit the element of value arising from the association of said parts into a single system capable of maintaining the continuity of its operations as a going concern and of rea-

sonably meeting the requirements of public travel, and that the proceeds of such sale should be applied, first, to the satisfaction of the debts due to the creditors of said several corporations according to their several rights and priorities and the surplus, if any, distributed among the stockholders as the court might direct.

The Ordinance, passed February 11, 1907, as amended July 8, 1907, granted to the Railways Company for a period ending February 1, 1927, the right to construct, maintain and operate the system of street railways in all the streets in which lines of street railway were being operated by the receivers February 1, 1907, the grant containing the following conditions and provisions:

(a) A plan of reorganization and readjustment, approved by Judge P. S. Grosscup and Professor John C. Gray of Harvard College, should be promulgated by September 14, 1907, which plan should offer opportunity to every person directly or indirectly interested in said street railway system, or any part thereof, to participate in the transfer to and the acquisition thereof by the Railways Company and to participate ratably and equitably in the benefits of the new grant, provided that no right under the Ordinance should inure to the benefit of any such person except and only as he should accept and become a party to such plan.

(b) By September 14, 1907, there should be deposited with a designated depository a specified number of shares of the capital stock of the companies interested in said street railway system, which shares with those owned by the companies and controlled by the receivers would constitute a majority of the stock of the various companies and be used in carrying out the plan of reorganization and readjustment.

(c) If by September 14, 1907, the Railways Company should be in lawful possession of said street railway system, it could then (but not otherwise) accept the Ordinance and have three years within which to perfect title to the property; and the petition of the Railways Company seeks such possession to enable it to accept the Ordinance.

(d) The Ordinance required the Railways Company forthwith to improve, reconstruct, rehabilitate, extend and equip the system in accordance with the specifications contained in the Ordinance and under the direction and certification of the Board of Supervising Engineers created by the Ordinance.

Under the Ordinance the City has the right to purchase the properties for \$29,000,000, their value as appraised and fixed (for the purpose only of such purchase) plus any additions thereto between June 30, 1906, and February 1, 1907, and to take the property subject to the lien for rehabilitation, for the cost of which, plus an agreed percentage representing contractors' profit and expense of financing, the Railways Company was authorized to issue bonds, to be secured by a mortgage which, as against the City or its licensee and all persons ever having or claiming any benefit under the Ordinance, should always be a first lien upon the entire street railway system and the franchise rights granted by the Ordinance.

(e) From the gross receipts of the system there is to be deducted all expenses of operation, including maintenance, repairs and renewals ascertained by an agreed method; all amounts contributed during the year and held in reserve under sections 16 and 18 for maintenance, repairs, and personal injury claims; all taxes and assessments exclusive of City license fees; salaries and expenses of the Board of Supervising Engineers; and a sum equal to 5% per annum upon the amount of the cash purchase price which the City would be obligated to pay if it were purchasing the property for municipal operation; the balance, representing the net receipts, to be divided, the City taking 55% thereof and the Railways Company retaining 45% thereof.

(f) The Ordinance provides for a system of through routes to, from and over the lines of the City Company and the Railways Company, and a system of universal transfers as between all the lines of the two companies, except within a certain small limited territory in the congested business district.

(g) Simultaneously with the passage of the Ordinance a substantially like ordinance was passed in favor of the City Company. In each of the two ordinances there was reserved by and given to the City the right to require the grantee in that ordinance to extend its lines over the streets covered by the other ordinance in case of nonacceptance or forfeiture thereof, and to furnish



whatever money should be required to purchase the physical property upon such streets of either company so defaulting; so that if the Railways Company fails to accept the Ordinance the City may give to the City Company a franchise over all the streets covered by the Ordinance to the Railways Company if as and when any franchises covering the same have expired and may require the City Company to extend its lines over the same and to furnish all money needed to enable the City to exercise its right of purchase reserved with respect to some certain streets.

The petition of the Railways Company, after setting forth the corporate and fiscal relations to each other of the several companies interested in the Traction Company's system, and their franchise relations to the city, alleged that in view of said decision of the Supreme Court of the United States both the City Company and the Traction Company were at the mercy of the City, that it became and was necessary to obtain a renewed franchise ordinance, which the City would not grant except upon the condition that the entire surface street railway system in Chicago should be dealt with as a whole so that the City might be in a position to acquire and operate the property for the benefit of the public; that on February 11, 1907, the City Council passed, and thereafter in due time the people by vote approved the ordinances to the City Company and the Railways Company, respectively; that the City Company has accepted its ordinance; and that the Railways Company as grantee in the Ordinance submits itself to the jurisdiction of the Court for the enforcement against it on the terms and conditions therein named, of its obligations under the plan of reorganization and the deposit agreement in the Ordinance mentioned and any order made upon the petitioner and accepted by it. The petition further alleges that the specified number of shares of the stock of the various companies interested has been deposited with the depository designated in the Ordinance; that a plan of reorganization and readjustment in accord with the requirement of the ordinance had been presented to Peter S. Grosscup and John C. Gray for their approval thereof; that the petitioner is ready and willing upon approval of said plan to consummate the same; that the petitioner's negotiations for the funds required for rehabilitation are ready to be concluded and the funds to be provided by a sale of a sufficient number of bonds authorized and secured by the rehabilitation mortgage authorized by the Ordinance as soon as the petitioner is vested with power to comply with the conditions made precedent to its right to accept the Ordinance; that it is absolutely essential to the conservation of the interests of all the parties interested in the Traction Company's system that the petitioner be invested with lawful possession of all the lines of street railway operated by the receivers of the Traction Company February 1, 1907.

The petitioner then prays "That the court by proper orders will (1) order and direct its receivers herein to surrender and deliver to it, its lessees, successors and assigns, and will invest it, with the full and lawful possession of all the lines of street railway operated by said receivers on February 1, 1907, with all the plant and equipment in use on or in connection with said lines at the time of such delivery, and (2) adjudge and decree that the petitioner has power and authority (a) to comply with the provisions of the Ordinance with respect to the operation, maintenance, extension, reconstruction, re-equipment and improvement of said railways, (b) to make from the receipts thereof all the deposits, and payments required by the provisions of the Ordinance to be made from such receipts, (c) to transfer to the city, or its licensee or nominee, all such possession, rights and powers in accordance with the provisions of the Ordinance in that behalf, (d) to execute the bonds and mortgage above referred to and to charge a first lien upon the said property and the possession thereof and otherwise, all as in said form of mortgage set forth, to the ends, for the amounts and for the purposes in said form of mortgage set forth or authorized thereby, (e) to accept the said Ordinance and to comply with each and every of the terms, conditions and provision thereof but for the use and benefit of the beneficiaries who have accepted or who may hereafter accept in accordance with and subject to the provisions thereof, the aforesaid Plan and the Agreement therein referred to, and (f) generally, and from time to time, to do each and every act and thing in and by the said Ordinance and Deposit Agreement required on its part, in order to fully and completely in-

vest it with all the rights, consent, permission, authority, grants, privileges and benefits in the Ordinance mentioned, or to follow therefrom or from any ordinance amendatory thereof or supplemental thereto, all upon such reasonable and proper terms and conditions as to the court may seem meet and proper in the premises."

Much evidence was heard in support of the allegations of the petition, but the main issue, raised by the answers filed by the trustees in various mortgages of the companies interested in said street railway system and by others, was as to the jurisdiction and power of the court to surrender or deliver possession of said street railway property to the petitioner, the Railways Company.

George W. Wickersham, L. C. Krauthoff, and Frank Hagerman, for appellee Chicago Railways Company.

GROSSCUP, Circuit Judge. Under the bills in these cases, receivers were appointed, who, for four years now, under the direction of the court, have been operating the properties. The history of the cases, up to April, 1906, is fully set forth in *Blair v. City of Chicago*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801. Since that time, by amended and supplemental bills and answers, the control, custody and disposition of the properties, as street railway properties, have been expressly surrendered to the court by the companies.

The petition under consideration is by the Chicago Railways Company; and it asks that the Chicago Railways Company be put in possession of the properties of the several street railway companies named, in accordance with the terms of an ordinance of the city of Chicago passed Feb. 11th, 1907; which ordinance granted to the Chicago Railways Company, for the term of twenty years from Feb. 1st, 1907, the right to construct, maintain and operate, over the streets of Chicago, a street railway covering the present lines of the Union Traction Company, lessee.

The ordinance provides that the Chicago Railways Company shall not have the right to accept it unless at the time of acceptance certain specified numbers of the shares of said Chicago Union Traction Company, North Chicago Street Railroad Company, West Chicago Street Railroad Company, North Chicago City Railway Company and Chicago West Division Railway Company shall have been deposited with a named trustee in token of approval of the ordinance, that is to say, under a deposit agreement in form substantially like the one annexed to the ordinance; and unless also, at the time of the acceptance, the Chicago Railways Company shall be in lawful possession of the lines of the Chicago Union Traction Company "with power and authority to comply with the provisions of this ordinance with respect to the operation, maintenance, extension, re-construction, re-equipment and improvement of said railways and to make from the receipts thereof all the deposits and payments required by the provisions of this ordinance to be made from such receipts, and with power to transfer to the City, or its licensee, all such possession, rights and powers in accordance with the provisions of this ordinance in that behalf hereinafter set forth." The ordinance, as amended, provides further that all rights under it shall cease and determine unless by September 14, 1907, there be

formulated a plan of re-organization and re-adjustment of the several interests involved in these lines approved by certain persons therein named,—the conception of such ordinance being that so far as possible the interests of the old companies be transplanted to the new.

The stockholders of these companies are in a situation now, under the terms of the ordinance, to accept the same; and such plan having now been approved as provided for, the question presented by the petition is, shall the properties be turned over accordingly?

No interest of any consequence, so far as I have heard (the stockholders and creditors really dissenting holding very small amounts) dispute the business necessity of the order asked. The whole discussion at the hearing, so far as it was a discussion at all, revolved about the question of power—the power of the court to do this confessedly necessary thing. On the question thus presented there are abundant analogies in the cases in the books, but nothing that can be called a precedent. And being without precedent, to be rightly judged, the peculiar facts that constitute this case must be rightly comprehended.

For the purposes of street railway operation, the city of Chicago, spreading out into the country like a fan, from the business center immediately adjacent to the lake, fell naturally into three subdivisions, the north, the west, and the south sides, respectively. In 1886 and 1887, the street railway systems on the north and west sides were still horse railways—the cars, the barns, and much of the tracks being adapted only to horse railway purposes. At that time the city had a population of over three quarters of a million; in every direction its population was pushing out; from every quarter came demands for extensions and better methods; the south side, the companion system, already had a successful cable system; and the alternative put up to the north and west side companies, including the Passenger Railway, by the very nature of their obligation to the public was, either to undertake a readjustment of their lines to the requirements of the times, or to make arrangements with others who would perfect such readjustment; for no public utility of this character can rest upon the purely private right of standing still or going forward as it may choose; the nature of the undertaking and the obligation to the public determine that it cannot stand still—that it must go ahead.

In this situation of affairs, the North Chicago City, the West Division, and the Passenger Railway chose to turn over their holdings to two new companies, the North Chicago Street Railroad, and the West Chicago Street Railroad, taking, for the future, stipulated dividends on their stock, and guaranties of their bonds and lending to the new companies the financial credit of the old, for the purposes of new bonds and other obligations; and under this arrangement, involving as it did the issue of many new securities, and followed as it was in 1899 by the consolidation of the properties in the Union Traction Company, has come the system of railroads that is now in the custody of the court, and the series

of securities that are involved in the question presented by this petition.

This system of railways, on its physical side, is different from any case in the books; for unlike the private rights of way of the steam railroads that have gotten into the courts for reorganization, the so-called rights of way of this system are mere permissive grants, that having been extended, from time to time toward the outlying districts, now present on the map the appearance of zones—in the nearer zones most of the rights already expired, and in the outer zones the rights having varying periods still to run.

Then, too, in the matter of the lien of specific securities upon specific property, this case is different from what appears ordinarily in the books; for here, as already indicated, the older properties have been almost wholly replaced by the newer, and what is left of the older is bound up with the newer, as realty and equipment, in a single united system. And parties buying the securities of such corporations, take them with imputed notice that the property covered, whether it be real estate or personalty, is part of a system—a system that in the very nature of things must continually be replacing the old with the new—adding, discarding, fusing, until in many instances the original identities are all but lost.

But marked as these differences are, they are not the chief considerations that distinguish this case from preceding cases. In nearly all the cases in the books, the right of way is a permanent right—as permanent a part of the property as a whole, as is the roadbed itself—and dependent on no negotiation from time to time with the public for renewals. Here there is no roadbed; there is no permanent right of way; there is, except in the extreme outer zones, no right of way at all. What the court as custodian of this property has from the city, is only an offer of a right of way—an offer that if accepted, will give to the property immediately, as a going concern, a value of upwards of thirty millions of dollars; but rejected, would leave the property with only its junk value, possibly not one-half the sum named. Ordinarily the presence of such a consideration would determine, by its own logic, the question of power; for it is almost unthinkable that a court of chancery, charged with the conservation of property, and exercising power therein as broad as the power of ownership itself, is powerless to accept for the owners what the owners, in the exercise of ordinary business sense, would not hesitate to accept—is powerless to accept life; but bound, by the narrow technicalities of the law, to take for its wards only a sentence of death.

But notwithstanding this there are those who oppose this motion, professing that they do not accept the facts as stated—professing a confidence that in some way these companies could succeed in holding on to the streets they now possess, though the law does not give them the right of such possession. These people, it seems to me, overlook, or seek to have the court overlook, what every man carefully seeking information in the history before the court cannot help but see. Had the history of the street railways been different from what it was; had the chief promoters, in the dispo-

sition of the earnings, done what was at one and the same time their duty to the stockholders, and their duty to the public; had the corporation policy of Illinois not been wholly indifferent to what became of both stockholders and public after the corporate charters were issued, the outlook might be different. But that is not the history before the court. The history before the court shows a great fortune to a promoter, leaving a broken down system in the hands of those who hold the bag; the public indignant; the public determined that such a thing shall not occur again. And in the face of these facts, it seems plain enough to me that an offer more favorable to the companies, and less guarded than the one embodied in the ordinance to the Chicago Railways Company, ought never to be expected, for the sufficient reason, if there were no other, that an ordinance more favorable and less guarded ought never to be granted.

What, then, in the presence of this situation, ought the court to do on the petition presented? To obtain just such an offer as this—an offer that safeguards the public interest at the same time that it puts into the new arrangement all the interest of the old, big and little, on the basis of the old—the court, and those aiding it, have for four years now patiently waited and faithfully worked. To be able to obtain such an offer the court refused the demand of one set of stockholders that forfeitures should be declared, and the suggestion of another that the properties should go to the auction block, because, as things looked to the court, a forfeiture would be a means whereby one set of stockholders might recoup some of their losses out of the other, and to sell the properties at auction would have put it in the power of the big interests to recoup their losses out of the little. To obtain this offer the court, and those aiding it, have gone through misunderstandings, criticism—private interests not always generous or just, and public opinion not always discriminating—trying faithfully to hold the bow of the ship into the face of the storm until the storm should subside. And with this offer at last obtained, a safe port is at last in sight. Should that port be now rejected merely because no precedent can be found for the last act of piloting that is needed? To my mind conduct like that would be the suppression of good business sense—the surrender of equity, in its broadest sense and broadest power, to a possible legal fetish. I do not feel called upon, by anything yet called to my attention, to make such surrender. The situation confronting me calls much more convincingly that the court take the responsibility of creating a precedent. This is made less difficult by the fact that the order asked for will not cut off any dissenting bondholder or creditor from any of his legal rights under the mortgage or under the law—the order reserving to such bondholders or creditors, as elect to have their legal rights further than come in under this plan, full opportunity to prosecute the same, by foreclosure or otherwise, the same as if the order were not entered.

The conscience of the court satisfied that the order ought to be entered, and the judgment of the court satisfied of its power to enter the order, the form that the order shall take, whether the lawful

possession to be lodged in the petition, the Chicago Railways Company, shall be by lease, or by operating agreement, or in some other way, is only a matter of ways and means, the legitimacy of which is to be determined only by their adaptability to the purpose intended.

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MERCHANTS' LOAN & TRUST CO. et al. v. CHICAGO RYS. CO. (three cases).

(Circuit Court of Appeals, Seventh Circuit. September 7, 1907.)

Nos. 1,415-1,417.

1. RAILROADS—FORECLOSURE OF LIENS—POWER OF COURT TO DISPLACE.

A court which has by its receivers taken possession of railroad property, of either steam or street railroad companies, has no power to displace vested contract liens thereon except in favor of the comparatively small claims for operating expenses which under the rule of the Supreme Court are entitled to equitable priority or similar claims represented by receivers' certificates issued to keep the property in operation or in operative condition.

2. STREET RAILROADS—REORGANIZATION SCHEME.

A court is without power to direct its receivers in possession to lease the properties of street railroad companies, having more or less relation to each other, for a term of years to a single reorganized company, and to authorize such company to issue mortgage bonds to an indefinite but necessarily large amount to cover the cost of replacing, re-equipping, extending, and improving the properties under the direction of a board of engineers representing the city and not the owners, and to make such mortgage a first lien, over the objections of prior mortgagees whose liens are thereby displaced.

Appeals from the Circuit Court of the United States for the Northern District of Illinois.

These appeals were taken from the order entered the 12th day of August, 1907, in the matter of the petition of the Chicago Railways Company filed in the three cases of the Guaranty Trust Company of New York, one against the Chicago Union Traction Company et al., another against the North Chicago Street Railroad Company et al., and the third against the West Chicago Street Railroad Company et al., reported in 158 Fed. 913. The order entered by the Circuit Court contained these specific findings:

And it appearing to the court that the rights of the owners of a large portion of the lines of street railway operated by the receivers of the Chicago Union Traction Company under ordinances from the city of Chicago have expired, that the rights of a considerable portion of said lines will expire from time to time at short intervals from and after March 1, 1908, and that the rights with respect to a considerable portion of said lines are subject to be terminated by the city at any time on six months' notice and upon purchase of the tangible properties of said companies, respectively;

And it further appearing to the court that the said properties are and have been for several years past so commingled and connected that it is impracticable to separate them without great loss to all parties in interest;

And it further appearing to the court that Chicago Railways Company has promulgated a plan of reorganization and readjustment in accordance with the provisions of the ordinance of the city of Chicago passed on February 11, 1907, under which plan an opportunity is conferred upon each individual holder of a direct or indirect interest in or lien upon said property, franchises, or claims, or any part thereof, or of any right, claim, or demand as creditor, or otherwise, entitled to enforcement against such property, franchises, rights or claims, or payable out of any part thereof, to participate in the transfer of

said property, franchises, rights, and claims to and the acquisition thereof by the said company, and to receive such stocks, securities, or other benefits as said plan of reorganization and readjustment may provide, on the terms and conditions in said plan set forth, which plan has been approved by Peter S. Grosscup and by John C. Gray, in accordance with the provisions of the deposit agreement annexed to said ordinance marked "Exhibit D"; copies of which ordinance, plan, and approval have been filed with this court in these causes;

And it appearing to the court that unless said plan and agreement be availed of, and the Chicago Railways Company be vested with possession of the lines of street railway above referred to on or before the 15th day of September, 1907, the right to avail of said ordinance will terminate, and great loss will ensue to the holders of all liens upon, claims against, or interests in the said property, and that in view of such exigency this order should be made;

And it further appearing to the court that all of the said lines of street railway and the property connected therewith are held and operated under statutes of the state of Illinois and ordinances of the city of Chicago, subject to the obligation that adequate street railway transportation and service shall at all times be furnished thereby to the public, and that the rights of all of the parties to this cause and of those claiming by, through or under them, respectively, are held subject to such obligation;

And it further appearing to the court that the present condition of the said lines of street railway and their equipment and the property connected therewith is not such as to enable adequate street railway transportation and service to be rendered to the public by means of the said street railways, or any part thereof, and that unless such adequate street railway transportation and service is promptly and continuously rendered, the right to maintain and operate the said lines of street railway will be terminated to the great loss and injury of all of the parties to this cause and of all those who claim by, through, or under them, or any of them;

And it further appearing to the court that, in order to enable the said lines of street railways and property to be so maintained and operated as to furnish adequate street railway transportation and service to the public, it will be necessary to reconstruct, re-equip, and rehabilitate the said lines, and in general to comply with the provisions of the ordinance of the city of Chicago passed on February 11, 1907, to the Chicago Railways Company, in respect thereto;

And it further appearing to the court that it is impossible to procure the necessary means to enable the said street railway system to furnish adequate street railway transportation and service to the public, except by procuring a loan of sufficient funds to pay the cost of necessary construction, reconstruction, equipment, re-equipment, extensions, and additions, and that such moneys can only be obtained by means of a loan secured by a lien superior to the liens of all and every the existing mortgages on said system of street railways, or any part thereof, and to all and every the liens now existing upon the said system of street railways, or any part thereof, in favor of any party to any of the above-entitled suits, or those claiming by, through or under any such party;

And it further appearing that there have been deposited with the Chicago Title & Trust Company, as trustee, under the provisions of said ordinance and of Exhibit D thereto attached, the following numbers of shares of the capital stock of the following companies, respectively, to wit:

North Chicago City Railway Company.....	1,773	shares
Chicago West Division Railway Company.....	4,409	"
West Chicago Street Railroad Company.....	80,087.50	"
North Chicago Street Railroad Company.....	49,568.20	"
Chicago Union Traction Company, preferred.....	109,158	"
Chicago Union Traction Company, common.....	158,244	"

Following these findings the vital provisions of the order are in paragraphs, 1, 3, 4, 5, and 7 thereof, reading as follows:

1. The receivers heretofore appointed in this cause shall forthwith execute and deliver unto Chicago Railways Company, in form to be approved by this court, a lease of all of the lines of street railway operated by the receivers of

Chicago Union Traction Company on February 1, 1907, with all the plant and equipment at said last-mentioned date or at the present time in use on or in connection with the said lines of street railway, whereby the Chicago Railways Company shall be vested with the lawful possession of all of said lines of street railway together with all the said plant and equipment, to have and to hold the same from the day of the date hereof until the 2d day of February, 1927, unless and until prior to said date said lines of street railway, plant, and equipment shall be sold pursuant to decrees of this court, or final decrees in said causes are entered without sale, and in case of such sale until delivery of possession thereof to the purchaser thereof pursuant to a decree or decrees of this court confirming such sale, upon the terms, covenants, and stipulations to be contained in said lease as hereinafter provided. And it is further ordered, adjudged and decreed that upon the delivery to and acceptance of said lines of railway and plant and equipment by said Chicago Railways Company, the said Chicago Railways Company shall be and is hereby authorized, empowered, and directed to comply with each and every of the provisions of the said ordinance of the city of Chicago passed February 11, 1907, with respect to the operation, maintenance, extensions, reconstruction, re-equipment, and improvement of said railways, holding the receivers appointed in each of the above-entitled causes harmless from any liability arising therefrom, and to do and perform all the things required of said Railways Company by said ordinance, including the making from the receipts of the demised property all the deposits and payments required by the provisions of the said ordinance, in consideration of which, among other things, said Railways Company shall be entitled to collect and receive the tolls and income of the demised property; and said Chicago Railways Company is hereby further empowered to transfer to the city or its licensee the lawful possession of said street railways and property as provided in said ordinance, together with all the rights and powers of the said Chicago Railways Company in or connected with said street railways in property in accordance with the provisions of the said ordinance in that behalf. And the receivers heretofore appointed in each of the above-entitled suits are hereby ordered to surrender and deliver to the Chicago Railways Company immediately upon the execution of the said lease the possession of all of the said lines of street railway, plant and equipment embraced in the said lease, whereupon said company shall be vested with the lawful possession of all the lines of street railway operated by the receivers of the Chicago Union Traction Company, on February 1, 1907, with all the plant and equipment in use on or in connection with said lines at the time of said acceptance, with power and authority to comply with the provisions of said ordinance with respect to the operation, maintenance, extension, reconstruction, re-equipment, and improvement of said railways, and to make from the receipts thereof all the deposits and payments required by the provisions of said ordinance to be made from such receipts, and with power to transfer to the city, or its licensee, all such possession, rights, and powers in accordance with the provisions of said ordinance.

3. And it is further ordered, adjudged, and decreed that, for the cost (so certified) of such construction, reconstruction, equipment, re-equipment, extensions and additions, including the percentages under section 7 of said ordinance specified, whether or not the same be represented by bonds or obligations held, negotiated or sold by said Chicago Railways Company or in accordance with the provisions of said section 7 of said ordinance, a lien in accordance with the provisions of said ordinance shall exist upon all of the said property constituting the said system of street railways embraced in said lease in favor of the said Chicago Railways Company, its successors and assigns, which lien, as against all parties to this cause and all parties claiming under them, or any of them, or under any order or decree hereafter made herein, and any and all other persons having or claiming to have any interest or benefit under the said ordinance, shall at all times be deemed and recognized to be a first lien upon the said entire street railway system, subject however to the provisions of said ordinance.

4. And it is further ordered, adjudged, and decreed that the said Chicago Railways Company, for the purpose of securing payment of moneys borrowed by it to defray the said cost of such construction, reconstruction, equipment,



re-equipment, extensions, and additions to said system of street railways, required by said ordinance passed February 11, 1907, including the percentages in section 7 of said ordinance mentioned, to an amount not exceeding the amount certified by the said board of supervising engineers in accordance with the provisions of section 7, may issue its bonds or obligations, bearing interest at a rate not exceeding 5 per cent. per annum, payable semiannually on the 1st days of February and August in each year, maturing not earlier than 20 years after the passage of the said ordinance, in denominations not less than \$500 each, redeemable at par and accrued interest after published notice on any day appointed for the payment of interest, and may secure the payment of such bonds or obligations by a mortgage or deed of trust executed in compliance with the provisions of the said ordinance, and approved as therein provided, which mortgage shall constitute a first lien upon the said entire street railway system to the amount of the said bonds or obligations issued in accordance with the provisions of section 7 of said ordinance, and in addition thereto to the amount certified by said board of supervising engineers (including said percentages) which shall not be represented by bonds and obligations as aforesaid, for which last-mentioned amount a lien in favor of the company is created by said ordinance, and which mortgage as against all parties to this cause and any and all other persons having or claiming to have any interest or benefit under the said ordinance shall at all times be deemed and recognized to be a first lien subject to the provisions of the ordinance upon the entire street railway system, plant, and equipment so leased unto said Chicago Railways Company, superior to the liens of all and every the existing mortgages on said system of street railways, or any part thereof, and to all and every the liens now existing upon the said system of street railways, or any part thereof in favor of any party to any of the above-entitled suits.

5. And it is further ordered, adjudged, and decreed that, in further consideration of the covenants and agreements contained in said lease, the said Chicago Railways Company shall account for and settle with the city of Chicago with respect to the tolls and income of the demised premises in accordance with the provisions of the said ordinance.

And it is further ordered, adjudged, and decreed that out of that portion of the tolls, receipts, and income of the demised premises remaining after providing for the payment of the first mortgage bonds of the Railways Company issued as above authorized, and after making the deposits and payments required by the ordinance, which the Railways Company is entitled under the provisions of said ordinance to retain, said Railways Company shall, from time to time when and as required by the court, account for and pay over any portions of said remaining income to which it may be adjudged that any party to either of the above-entitled causes is entitled.

7. And it is further ordered, adjudged and decreed that all parties to this cause and all parties claiming under them, or any of them, or any order or decree heretofore or hereafter made herein, their respective agents, attorneys, or other representatives, are hereby enjoined and restrained from in any wise interfering with the possession by the Chicago Railways Company of the said system of street railways and appurtenant property under said lease and pursuant to this order, or with the doing by said Chicago Railways Company of any of the acts hereinbefore referred to and authorized.

The court retains the power and jurisdiction to in this cause fix, determine and adjudicate the rights, liens, claims and interests of any person or persons, corporation or corporations, in and to said railways and property; provided, however, that the lien hereinbefore authorized to be created with respect to moneys borrowed or expended for the purpose of the rehabilitation of the said properties shall at all times be recognized as prior and paramount, subject, however, to the provisions of said ordinance, to any rights or claims of any persons who now are or hereafter may become parties to this cause, and any persons claiming under any such party or under order or decree heretofore or hereafter entered herein, upon all of the property constituting any portion of the said system of street railways and appurtenant property, and any sale of the said property hereafter made shall always be subject to such prior and paramount lien of the said mortgage.

This order and all rights taken thereunder are without prejudice to the statutory lien reserved in car trust agreements under the orders of August 3, 1904, and January 8 and 30, 1907.

Frank H. McCulloch, Horace Kent Tenney, Frank H. Scott, Julien T. Davies, A. M. Breitler, John R. Montgomery, Charles H. Aldrich, Henry Crawford, and James Hamilton Lewis, for appellants.

W. W. Gurley, George W. Wickersham, Frank Hagerman, and John M. Harlan, for appellee.

Before BREWER, Circuit Justice, and BAKER and SEAMAN, Circuit Judges.

BREWER, Circuit Justice. Public interests, the necessity of a unity of operation and control of the street car system in North and West Chicago, are the stress of the argument in favor of the order of the Circuit Court. Section 38 of the ordinance, as well as the statements of counsel, make against this contention, inasmuch as there is by that section given to the company that has the ownership of the south side property the right to proceed into the north and west side, and thus establish a unified system for the entire city. It becomes, therefore, more a question of private rights.

I think I may say for all of us—of course, I speak with a little hesitation in view of my limited knowledge of the conditions—that the ordinance tendered by the city was reasonable and fair, and that as a business proposition it would have been wise for all parties to accept it; but the court does not make contracts for parties. It deals with legal rights, as the parties have, by contract, made them, and although it may believe that a party insisting upon those rights is probably, or even certainly, bound to suffer loss, yet while he insists it must protect him in his insistence. There is no wide discretion vested in the chancellor which permits him to disturb contract rights—rights of property. This question has been before the Supreme Court more than once, and as was said in the case of *Kneeland v. American Loan Co.*, 136 U. S. 97, 10 Sup. Ct. 953 (34 L. Ed. 379):

"The appointment of a receiver vests in the court no absolute control over the property, and no general authority to displace vested contract liens. Because in a few specified and limited cases this court has declared that unsecured claims were entitled to priority over mortgage debts, an idea seems to have obtained that a court appointing a receiver acquires power to give such preference to any general and unsecured claims. It has been assumed that a court appointing a receiver could rightfully burden the mortgaged property for the payment of any unsecured indebtedness. Indeed, we are advised that some courts have made the appointment of a receiver conditional upon the payment of all unsecured indebtedness in preference to the mortgage liens sought to be enforced. Can anything be conceived which more thoroughly destroys the sacredness of contract obligations? One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot. So, when a court appoints a receiver of railroad property, it has no right to make that receivership conditional on the payment of other than those few unsecured claims, which, by the rulings of this court, have been declared to have an equitable priority. No one is bound to sell to a railroad company or to work for it, and whoever has dealings with a company whose property is mortgaged must be assumed to have dealt with it on the faith of its personal responsibility, and not in expectation of subse-

quently displacing the priority of the mortgage liens. It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the sacredness of contract liens, for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

Now, undoubtedly, it is true that when a receiver is appointed of railroad properties, street car or steam railroad, there is power vested in the court appointing to, under certain conditions, authorize the issue of receiver's certificates and those certificates are sometimes given priority over mortgage liens. But, notwithstanding I am forced to admit there have been some exceptions in the action of trial courts, the rule in the Supreme Court, emphasized in this case, is that no serious disturbance can be made of contract obligations or priority. The amount of receiver's certificates is generally small in comparison with the value of the property concerned. In this case it appears that \$822,000 of receiver's certificates are outstanding. Probably the condition required that something should be done to keep the plant in working, serviceable condition, and that amount is, relative to the value of the entire system, not large.

But the case before us involves something more. We cannot rest it upon the theory of *de minimis*, a trifling matter. We have studied, each one of us separately, the plan of reorganization, the order of the court, and the ordinance, and it seems to each of us that it interferes most materially, substantially, to the destruction of vested contract liens. There are some \$13,000,000 mortgage bonds—I may not be right as to the figures, but there is at least that amount—secured by definite contracts upon specific property. This order does not provide for displacing, slightly, the priority by the issue of a minor sum in receiver's certificates, but it takes the whole body of these contract obligations and puts them below a mortgage of from \$12,000,000 to \$15,000,000. It may be wise, and I think we agree that it is, that this bond issue be made and that this railway system be unified and improved, as contemplated in the ordinance; but it is not for the court to assume the power to compel, because it believes that it is wise and good business. Parties have vested rights. Let me put the case this way:

Supposing the Legislature of Illinois had passed an act providing for the displacement of these mortgage liens and giving in place thereof only security upon the property as it shall be perfected, and then subsequently to the \$12,000,000 mortgage. Would the court, if the validity of that action of the Legislature were before it, say that it was within the scope of legislative power thus to disturb priority of liens, and would the court sustain the act upon the theory that it believed the Legislature was acting wisely, that it was a good business solution of a difficult situation? Parties have inherent and sacred rights of property which cannot be disturbed, except under the law of eminent domain, or some provision of that kind, and then compensation is made. It does not lie in the power of the Legislature, or in the power of the courts, to materially affect the liens, either in the property upon which they rest, or their priority. Of course, there can be no question about this. It appears from the discussion that this whole scheme is

predicated upon the fact that the physical condition of the city railway system on the north and west sides is poor; that it needs improvement; that the interests there are conflicting; that franchises are expiring, or have expired; rights are mingled and perhaps confused; and the order proceeds upon the theory that it is best for all that these separate liens and separate corporate interests shall be merged in one corporation, whose duty it shall be to borrow money enough to put the physical property in good condition. Now, that may be a wise business proposition, and if the court had power to take hold of these things and do for the people, who are mortgage bondholders, that which it thinks best for them, we might have no hesitation in sustaining this; but every man in this country decides questions in respect to his own property for himself. Life, liberty, and the pursuit of happiness are guaranteed to each one. They are inalienable rights, and although a man misjudges what is best for him, that fact gives no court the right to compel him to act otherwise.

In this connection, one matter deserves notice, and that is that the scheme implies the destruction of much of the property as it now exists and the replacing it with structures adapted to new conditions. In that respect it differs from many issues of receiver's certificates, especially those of large amounts, which have been merely for the purpose of adding something new to existing property. This rehabilitating mortgage, and it can certainly stand in no higher position than receiver's certificates, is not simply to raise money for additional lines, extension of the system, but largely for the replacement of the present structures with something new and better. In other words, to no small extent the property mortgaged is destroyed, and new property put in its place, subject to a prior lien.

This rehabilitating mortgage is not in terms limited in amount. It is limited, however, by the fact that the moneys to be borrowed are to be expended in the improvement of the unified system, and it is a fact, too, as stated by counsel, that a committee representing the city, a board of engineers I think he called it, has jurisdiction over the amount and character of the improvements. Now, what does that mean? It means that those improvements are not made according to the judgment of the bondholders. It means that they are not made according to the judgment of the present corporate owners of the property, either stockholders or bondholders, but that a body outside of them, not appointed by them, is charged with the responsibility of determining what shall be done in the way of improvements. Now, I have no doubt, as was said by counsel, that the committee selected by the city of Chicago will deal fairly and honestly, and, perhaps, they being civil engineers and experts in their lines of business, with far better judgment than the trustees of these mortgages, or the officers of the corporations. But, at the same time, no man is compelled to turn his property over to the control and management of another. At least, the courts are not authorized, except in the case of insanity or imbecility, to take one person's property, and put it into some one else's care to determine what is best for it. These voluntary reorganizations, which are going on all over the country do involve, sometimes, moral

pressure upon certain interests to concede something in the hope that they will get a larger benefit from the reorganization, but the action is voluntary. They are the acts of the parties themselves. They are making new contracts. They are entering into new relationship with one another. The individual is making the contract, and not the court for him.

In reference to the superintendency by this committee, it is not provided, as I think, that that superintendence shall be under judicial control. The Circuit Court, in making this order, does not reserve to itself the power to supervise the action of the board of engineers to whom the character and amount of the improvements are entrusted. The full control of those properties in the rehabilitation is given to a committee not selected by the present owners, and not within judicial control.

While the city names one engineer, the company a second—that is, the company that takes these properties—a gentleman, Mr. Arnold, is selected and appointed as the third member. Yet he holds life by the same tenure that the rest of us do and may not live long, and who the city will appoint in his place cannot be foreshadowed. At any rate, with reference to the personnel, while I do not mean to cast any reflection upon this man, or suggest the probability of the city selecting an unfit man, it is enough that it is a selection not made by the owners of the property. As I said a while ago, it is conceded that the amount of this mortgage—the rehabilitating mortgage—is uncertain. It is limited in two ways: One, that the proceeds must be used for improvements, and another that the improvements are subject to the decision and judgment of this committee. But it is, as shown in the plan of reorganization, something uncertain, and no man can tell certainly what will be. As the amount needed for this purpose cannot be fixed with exactness, it is impossible to fix a limitation as to the authorized issue; and hence such amount must be left without limitation except as stated above.

We have hastened in our examination, because a week from to-day is fixed as the time for the expiration of the option. Thinking that perhaps during the week the parties may come to some agreement with reference to the disposition which should be made of this property, and believing, as we do, that the system proposed has its great advantages, we have, without stopping to write out in full our views upon this or any other question, announced this decision orally. At the same time we reserve the right, each one of us, to put in writing such further expression as may seem to him desirable.

The order will be that the order made by the Circuit Court is set aside, and the case remanded for further proceedings.

## ST. LOUIS &amp; S. F. R. CO. v. DELK.

(Circuit Court of Appeals, Sixth Circuit. March 3, 1903.)

No. 1,747.

**1. COMMERCE—SAFETY APPLIANCE ACT—MASTER AND SERVANT—INJURIES TO SWITCHMAN.**

Where a car loaded with lumber and shipped from another state had not been delivered to the consignee at the time it was stopped in a railroad yard at destination and placed on a side track for repairs to the automatic coupler, which had become defective, the stoppage in the yard was an incident to the transportation, so that the car was still engaged in interstate commerce at the time plaintiff was injured while endeavoring to move it in conducting switching operations on such track, before the repairs had been made, within safety appliance act (Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]), requiring carriers engaged in interstate commerce to be equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of going between the ends of the cars.

[Ed. Note.—Duty of railroad companies to furnish safe appliances, see note to *Felton v. Bullard*, 37 C. C. A. 8.]

**2. STATUTES—DUTY OF JUDGE TO INTERPRET—"DOUBTS AND DIFFICULTIES."**

By "doubts and difficulties" arising in the construction of statutes is not meant those which are engendered by the predilection of the court or its own notions of what the law ought to be, but such doubts and difficulties as are inherent in the nature of the problem to be solved.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 3, pp. 2064, 2167.]

**3. RAILROADS—EQUIPMENT OF TRAINS—SAFETY APPLIANCE ACT—CONSTRUCTION—DUTY OF MASTER.**

Safety Appliance Act (Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]) is entitled "An act to promote the safety of employes and travelers on railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers," etc. Section 2 provides that after January 1, 1898, no carrier engaged in interstate commerce shall haul or permit to be hauled over its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be coupled without the necessity of men going between the ends of the cars. Section 6 (27 Stat. 532 [U. S. Comp. St. 1901, p. 3175]) declares that any carrier hauling or permitting to be hauled or using any locomotive or car in violation of the act shall be subject to a penalty; and section 8 (27 Stat. 532 [U. S. Comp. St. 1901, p. 3176]) provides that any employe of such carrier who is injured by any locomotive, car, or train used contrary to the act shall not be deemed to have assumed the risk, although continuing in the employment with knowledge of such use. *Held* that, while such act imposes on the carrier the absolute duty of equipping its cars with such couplers in the first instance, and thereafter keep them so equipped, the carrier is only required to use reasonable care after the cars have been so equipped to keep such automatic couplers in repair.

Richards, Circuit Judge, dissenting in part.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

This is an action in which the plaintiff, Delk, sought to recover damages for a personal injury suffered by him, as he alleges, in consequence of the negligence of the railroad company in failing to provide that protection for his safety which the law requires, while he was engaged in coupling freight

cars in its yard at Memphis. At the trial he obtained a verdict, and judgment was entered in his favor. The cause was brought here on writ of error; and upon the suggestion of the Interstate Commerce Commission that the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], was involved, and upon its request, and the assent of the defendant in error, this court permitted special counsel for the government to participate in the argument at the hearing and be heard upon the question of the construction and application of the act. This is the principal question in the case, and is the one upon which the judgment of the court is turned. The statement of the facts made by the special counsel in his brief is, with some slight additions, adopted as correct, and is this:

"The car alleged to be defective was what is known as K. C., F. S. & M. No. 21,696. The car was loaded with lumber consigned from Giles, Ark., to Memphis, Tenn. The car arrived in Memphis September 28, 1906, at 4:30 p. m., and was delivered by the plaintiff in error to the Union Railway Company of Memphis, commonly called 'The Belt Line,' October 2d, for delivery to the consignee. The car was returned to the plaintiff in error by the Union Railway Company of Memphis, October 3d, at 7:30 a. m., on account of there being a defect in the coupling and uncoupling appliance on one end of the car. The car was in a string of nine cars on what is known as the 'dead track' in defendant's new yard. This dead track was a team track; that is, the track was so arranged that teams might load from or into the car into or from wagons hauled alongside the car.

"On the morning of October 4, 1906, defendant in error, acting under instructions of the plaintiff in error, undertook to switch certain cars out of the string of nine cars so as to get two empty cars and three coal cars for removal to some other portion of the defendant's line. The cars were on a track extending in the general direction of east and west, the engine being on the western end of the nine cars. The nine cars were drawn off this team track onto the lead track. The easternmost two cars, being empties, were left on the lead track. The remaining seven cars were then pushed back on the team track. The easternmost two cars of the seven cars, loaded with brick, were left on the team track. The remaining five cars were again drawn onto the lead track, and three cars loaded with coal were left thereon. The engine, with the remaining two cars, again went upon the team track, and defendant in error undertook to couple the eastern end of the two cars attached to the engine to the western end of the two cars just left on the team track, but, owing to a defect in the coupler on the eastern end of the two cars attached to the engine, the coupling could not be made without a man going between the ends of the cars. The defect on car K. C., F. S. & M. No. 21,696 was this: The chain connecting the uncoupling lever to the lock pin or lock block was disconnected, owing to a break in the lock pin or lock block. The drawbar also had a lateral motion of four inches. Defendant in error undertook to hold the drawbar away with his foot from the side upon which he stood, so that the two couplers would couple by impact. In so doing, his foot was badly injured. Plaintiff in error had what is known as a car inspector or light repair man in the new yard. It was his duty to make repairs of the kind necessary on this car whenever found by him. When the car was returned by the Belt Railway on account of the defect in the coupler, plaintiff in error's inspector placed a red card about three inches by six inches upon the car, and with a blue pencil wrote on said card, 'Out of order.' This card is what is commonly known as a 'bad order' card. The car had been on this team track from 7:30 a. m., on the 3d until 10 or 11 o'clock on the 4th, when the accident to defendant in error occurred.

"There was evidence tending to show that the inspection was made in the latter part of the 3d, and that the inspector thereupon ordered an employé to go to the repair shops which were some two and a half miles distant and get the material for repairing the coupler, but that the employé did not return until after the accident. The trial court held that the safety appliance act applied to the car with the defective coupler, and that by virtue of section 3 of said act plaintiff in error was denied the defense of assumption of risk on the part of defendant in error, and stated the language of the act to the jury."

C. H. Trimble and Lon O. Hocker, for plaintiff in error.

W. A. Percy and T. K. Kelley, for defendant in error.

L. M. Walter, amicus curiæ, for the Interstate Commerce Commission.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge, having made the preceding statement, delivered the opinion of the court.

The question which seems first in order is one raised by the plaintiff in error, and is whether the car to which the defective coupling was attached was at the time of the accident employed in interstate commerce. The plaintiff in error claims that it was not, and was laid by for repairs. But we are inclined to think otherwise. Its cargo had not yet reached its destination, and was not then ready for the delivery to the consignee wherewith the commerce would have ended. Its stoppage in the yard was an incident to the transportation. The injury to the coupler was one easily repaired without being taken to a repair shop, and the car was being hauled upon the track when the accident occurred. *Johnson v. Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363; *Chicago, M. & St. P. Ry. Co. v. Voelker*, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264.

The principal question involved in this controversy relates to the construction and effect of the safety appliance act, so called, enacted by Congress March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]. The Act is entitled:

"An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip their Cars with Automatic Couplers and Continuous Brakes and their Locomotives with Driving-Wheel Brakes, and for Other Purposes."

Section 2 provides:

"That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its lines any car used in moving interstate traffic not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars."

Section 6 provides:

"That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the District Court of the United States having jurisdiction in the locality where such violation shall have been committed."

And section 8 provides:

"That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The contention for the defendant in error is that the effect of these provisions is such as to have required the railroad company, in the ex-



isting conditions, to have had upon this car an automatic coupler, such as is described in section 2, and, further, to have had it at the time when the plaintiff below undertook to make the coupling in good sound working order, so that he would not have been obliged to go between the cars to effect the coupling; and that it is of no consequence that it had at some time previously, no matter how near, been in good order; or whether the railroad company had been at fault in not sooner having it repaired; in short, that the only question in respect to the railroad company's conduct is whether at the time of the accident it had equipped the car with the prescribed coupling apparatus, and had it then in good order.

On the other hand the railroad company contends that it had complied with its duty if it had equipped the car with the prescribed coupling apparatus, and kept it so equipped, and had used due diligence in endeavoring to keep it in good order. It may be admitted that upon a casual reading of the statute it might be that the impression would be taken that the duty is absolute and without any qualification by the circumstances. The court below gave the law to the jury by stating the language of the statute, and in such a way as to lead the jury to suppose that it imposed an absolute duty to keep the car in order, and applied to the circumstances of the case on trial. But the duty of the court goes deeper than this, where the statute, in order to be understood, requires construction. It is bound to consider the conditions to which the statute applies. And if it is seen that in its practical application doubts and difficulties arise, it becomes its duty to scrutinize the statute, and resolve whether, by a sensible construction of it, those difficulties may be avoided. Being bound to administer the law, it is obliged to determine what the law really means and explain it to the jury. These duties are inseparable, but they are equally obligatory. The general rules of interpretation are presumed to be familiar to the courts, and it is the right of the parties who are affected by the result to have them properly applied. In 2 Sutherland on Statutory Construction, § 453 (2d Ed.) it is said:

"Statutes are but a small part of our jurisprudence. The principles of the common law pervade and permeate everything which is subject to legal regulation. Such law defines rights and wrongs of every description and the remedies for public and private redress. By its principles statutes are read and construed. They supplement or change it, and it adjusts itself to the modification and operates in conjunction and harmony with them. \* \* \* Rules of interpretation and construction are derived from the common law, and since that law constitutes the foundation, and primarily the body and soul of our jurisprudence, every statutory enactment is construed by its light and with reference to its cognate principles."

By "doubts and difficulties" we, of course, do not mean those which are engendered by the predilection of the court or its own notions of what the law ought to be, but doubts and difficulties which are inherent in the nature of the problem to be solved. These propositions we presume no one will deny, and it may be thought a work of supererogation to state them. But they are not always remembered by those who make unthinking haste to reach what they believe to be a desideratum. Questions of difficulty arise in the application of this statute. Some of

them have been solved or attempted to be solved by the courts to which they have been presented.

The first rule of construction which occurs is that we are to have regard to the scope and purpose of the statute, not so much the general purpose, as the immediate purpose of this particular enactment. For, if we look too intently upon some ultimate good we would wish to accomplish, we are very liable to distort the law or make out of it some other enactment than that which the Legislature has in fact passed. We think the immediate purpose of Congress in this enactment, in the respect we are now considering it, is that disclosed by its title, wherein it is declared to be "An act to promote the safety of employees and travelers upon railroads, by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers," etc. The general purpose is to promote the safety of employes and travelers; but the immediate purpose of the act is to prescribe a way of doing this, namely, by compelling common carriers to equip their cars with automatic couplings. The method or means by which the ultimate good is expected to be accomplished is the subject of the enactment. The safety of employes, etc., is a thing beyond, an expected result of the enactment, which latter is the substantive thing before us for interpretation. True, we should have regard to the result intended for it, but we cannot carry into it words foreign to its meaning, or strain those used beyond their fair import. By this reference to the title to the act we do not mean that the title is competent to override any express language in the enacting parts, but simply as a clue or an index pointing to the right construction of what follows. It is of the more significance in that, instead of using general language, it specifically signalizes the very purpose of the act, and embraces the whole of it, differing in this respect from the class of statutes which Mr. Justice Field was considering, and instanced in *Hadden v. Barney*, 5 Wall. 107, 18 L. Ed. 518, where the subjects of legislation were so heterogeneous that it could not be expected that the title would with any reasonable certainty indicate the scope and purpose of the act. To the extent to which we propose this use of the title we are justified by several decisions of the Supreme Court. *United States v. Fisher*, 2 Cranch, 358, 2 L. Ed. 304; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; *Coosaw Mining Co. v. South Carolina*, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537; *Patterson v. Bark Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002; *White v. United States*, 191 U. S. 545, 24 Sup. Ct. 171, 48 L. Ed. 295. In *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, at page 611, 9 L. Ed. 773, Mr. Justice Story said:

"The title of the act puts this beyond all controversy; for it is 'an act for incorporating certain persons for the purpose of building a bridge over Charles river, between Boston and Charlestown,' etc. But then we are told that no rule in construing statutes is better settled, than that the title of an act does not constitute any part of the act. If, by this, no more be meant than that the title of an act constitutes no part of its enacting clauses, the accuracy of the position will not be disputed. But if it is meant to say that the title of the act does not belong to it for any purpose of explanation or construction, and that, in no sense, is it any part of the act, I, for one, must deny that there is any such settled principle of law. On the contrary, I understand that

the title of an act (though it is not ordinarily resorted to) may be legitimately resorted to, for the purpose of ascertaining the legislative intention, just as much as any other part of the act. In point of fact, it is usually resorted to whenever it may assist us in removing any ambiguities in the enacting clauses. Thus, in the great case of *Sutton's Hospital*, 10 Co. 23, 24b, the title of an act of parliament was thought not unworthy to be examined in construing the design of the act. In *Boulton v. Bull*, 2 H. Bl. 463, 500, the effect of the title of an act was largely insisted upon in the argument as furnishing a key to the intent of the enacting clauses. And Lord Chief Justice Eyre admitted the propriety of the argument, and met it, by saying that, in that case, he would, if necessary, expound the word 'engine,' in the body of the bill, in opposition to the title to it, to mean a 'method,' in order to support the patent."

When we come to the enactment itself we find that in the second section it corresponds with what the title has heralded. It forbids the use of cars which have not been equipped with automatic couplers, which are a little more fully defined by adding that they are to be such as will obviate the necessity of going between the cars to uncouple them, or as we are disposed to think, couple them. And this is all there is of the statute which by direct language imposes the duty upon the carrier in respect to the use of automatic coupling. But it is necessarily implied that the railroad company shall keep up the equipment, for it forbids the use of the cars without it. In this connection it seems proper to refer to the last clause in section 2 which is:

"And which can be uncoupled without the necessity of men going between the ends of the cars."

We understand this to be a part of the description of the type of the automatic couplings with which the cars must be equipped. And further, we may here remark that the coupling with which this car was equipped was of the kind required by the act. Section 6 declares that the use of any car in violation of this provision of the act shall constitute an offense punishable by a fine of \$100. And section 8 declares that the employé shall not be deemed to have assumed the risk occasioned by the failure of the railroad company to equip its cars as required by the second section.

Now, the statute clearly and positively devolves upon the railroad company the duty of equipping its cars with those couplers, and makes it a penal offense to use its cars without them. All this is simple enough. The company could make no mistake about it. But we can find no warrant for imposing such drastic consequences upon the failure of the railroad company to at all times and under all circumstances have the couplings in repair. One of the recognized rules of construction of statutes is that we are to look to the state of the law when the statute was enacted in order to see for what it was intended as a substitute, and another is that it is not to be presumed that the statute was intended to displace the former law, whether it be statute or common law, further than was fairly necessary to give it place and operation. Now, prior to this enactment, other methods were employed by railroad companies for coupling their cars—generally, if not universally, by a link and pins. And the law was that in respect of this coupling the company was bound to exercise that reasonable degree of diligence in keeping them in repair which was proportionate to the danger of their use. The rule was expressed in various forms,

but that was the substance. Conceiving that the new form or method of automatic coupling by impact would mitigate the danger to employes, Congress enacted this statute to compel the carrier to substitute the new form for the old in operating its cars; and of course it is necessarily implied that it shall be done in good faith as is always implied in the enactment of laws. If the carrier does this, it has complied with the requirement of the statute, and the old method is displaced by the new. But it is now proposed to add to the obligation of the carrier by requiring that he shall be bound to see that the substituted coupling shall at all times and places be in good order, a burden well nigh to impossible. The coupling apparatus on railroad cars is subject at all times while they are being operated, to almost constant wrench and strain and liability to breakage. Much of the time the cars are connected up in trains running on time schedules, and under orders of train dispatchers which must be observed, or fatal and disastrous consequences ensue. Moreover, accidents to the couplings or unknown defects appear at places more or less remote from repair shops. It is reasonable and just to require that the carrier should exercise a high degree of care to keep the couplings in proper condition. But it seems unjust and unreasonable to say that having fulfilled its utmost duty in this regard, it should be held responsible for conditions which may occur without its fault. We do not say that Congress has not the power to impose such an obligation as it is contended this statute imposes; but what we mean to say is that if a statute seems to impose obligations so extraordinary and difficult to perform the courts would be bound to see whether the language employed is not susceptible of a more reasonable construction. Undoubtedly there are many cases in the multitude of statutes where the command is so imperative and unconditional that there is no escape from an exact and literal observance. The industry of counsel has accumulated a considerable number of them in his brief. In such cases if the statute is within the power of the Legislature, there is, as the phrase goes, "no room for construction," and the business of the court is simply to administer the law as it is written. But this in no wise relieves the court from the duty of construing statutes which are not of that character, but are subject to the amelioration which the common law affords by its rules of construction. But with regard to this statute, on turning back from the consideration of the consequences to the language employed, we find nothing which in terms imposes such an obligation. It is said to be implied; and the singular result is that, instead of shading down the express language of an act so that it shall not have an effect which we cannot suppose to have been intended by the Legislature, we should by implication infer an intent which, if seemingly expressed, we should be bound, if fairly possible, to suppose did not exist. Then, again, the statute is penal. The facts which would be necessary to maintain a criminal prosecution are the same as those which would support a private action. The only difference would be in the greater certainty with which the facts should be proven. And in the construction of such statutes the court is not justified in extending their operation beyond the plain meaning of the language used into regions of doubt and uncertain implications.

In this case we do not think it could be held as matter of law that the

railroad company was guilty of a violation of the statute. In view of the evidence given at the trial, it was a question for the jury to determine as one of fact whether the railroad company should, if it had used reasonable diligence, have put the coupling in repair before the accident happened.

As we have said, questions have heretofore arisen in the courts upon the construction and application of this statute, among them the question most fully considered here; and there is some conflict in their decisions. In *United States v. Atchison, T. & S. F. Ry. Co.* (D. C.) 150 Fed. 442 (Judge Lewis), *Voelker v. Chicago, M. & St. P. Ry. Co.* (C. C.) 116 Fed. 867 (Judge Shiras), *United States v. Illinois Central R. Co.* (D. C.) 156 Fed. 185, *Elmore v. Seaboard Air Line R. Co.*, 130 N. C. 506, 41 S. E. 786, and *Missouri Pacific Ry. Co. v. Brinkmeier* (Sup. Ct. Kansas, not yet reported) 93 Pac. 621, similar views in regard to this statute to those we have indicated as our own were expressed. It is proper to observe that the view of Judge Shiras in the *Voelker Case* (C. C.) 116 Fed. 867, are not there so clearly stated as in his charge to the jury printed in the record of that case, with which we have been supplied. Opposed to these decisions are the views expressed in *United States v. Southern Ry. Co.* (D. C.) 135 Fed. 122, by Judge Humphrey; by Judge Whitson in *United States v. Great Northern Ry. Co.* (D. C.) 150 Fed. 229, and possibly, by the Circuit Court of Appeals for the Eighth Circuit, in *Chicago, M. & St. P. Ry. Co. v. Voelker*, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264, where the court was reviewing the ruling of Judge Shiras in 116 Fed. 867, *supra*. We say "possibly," because there are several reasons for thinking that the Court of Appeals did not intend to decide anything to the contrary of the construction of the statute which we approve. There were two counts in the petition; one upon the statute, and the other upon the common-law liability for negligence. Upon the first count the court below had charged the jury in respect to the statutory liability in accordance with the view we take of it, and the Circuit Court of Appeals affirmed that ruling. It appears from the report that the railroad company made three points for reversal, neither of which presented the question here presented. The court negatived each of them, and naturally did not go into questions not raised. It reversed the judgment upon another ground. It seems obvious enough that it is not an adverse decision. If we had thought it otherwise, we should have more anxiety about the correctness of our own view. Judge Humphrey expressed an adverse opinion, but he finally rested his judgment upon another ground. But Judge Whitson cited Judge Humphrey's opinion, and adopted the view which had been expressed by him but not made the final ground of decision.

It is urged that, if the courts fail to give the statute the construction that it imposes an absolute duty, it defeats the purpose of Congress in enacting it, and leaves the obligation of the carrier as vague as before. But we see no reason for this contention. The benefit of the equipment of the cars with that kind of "safety appliances" and the maintenance thereof, which, as we think, was the purpose of the law, is secured. The question about which the difference arises is simply whether, in addition to supplying and maintaining the appliances, the

carrier is absolutely bound to insure their constant good order, or whether it is bound only to the extent of its best endeavor. The question whether it has fulfilled its duty in the latter respect is no more difficult of determination than such as are constantly arising in cases where negligence is charged in other conditions.

The court below instructed the jury, in substance, that it was competent for them to find that the plaintiff below was guilty of contributory negligence, and if they did that he was not entitled to recover. But the railroad company insists that the evidence was so clear and positive that the court should have given a peremptory instruction that the jury should render their verdict for the defendant on that ground. But as the case must be remanded for a new trial, we need not express our opinion upon evidence which may not assume the same aspect upon the new trial.

The judgment must be reversed with costs, and a new trial awarded.

LURTON, Circuit Judge. I entirely concur in the conclusion of the court and the interpretation given to the car coupler act, but I cannot agree that this car was so clearly "in use" contrary to the provisions of that act, as herein interpreted, as to take that question from the jury. I think the stoppage of this car on the dead track was not in any true sense an incident of its transportation in interstate traffic. True, its journey was not finished, but its further journey had been stopped because the next carrier refused to receive it with this defective coupler. There was evidence tending to show that it was not a case of a temporary stoppage, such as that in *Johnson v. Southern Pacific Company*, 196 U. S. 1, 25 Sup. Ct. 158, 49 L. Ed. 363, but a withdrawal from all use in any kind of traffic until it could be repaired. It was placed on a track where cars needing only light repairs were ordinarily placed and was tagged as in "bad order." There was also evidence tending to show that the effort to couple this car was solely for the purpose of holding the car, against gravity, in its place on this track until it could be repaired. A car withdrawn from its journey and held upon a dead track to be repaired is not in my judgment "a car in use" contrary to the provisions of the car coupler act any more than a car in a shop awaiting repairs. In *Johnson v. Sou. Pac. Company*, before cited, the dining car having a defective coupler had not been withdrawn from its journey to be repaired. Its stoppage was one usual and incident to its journey, and that it might be returned over its usual route in the ordinary course of the kind of interstate commerce it was habitually engaged in. No question of withdrawal from traffic for the purpose of repairs was in that case. The point decided is well shown by the Chief Justice, where he says:

"Confessedly, this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

The facts are quite like those recently considered by the Court of Civil Appeals of Tennessee, not yet reported, in the case styled "*McLaughlin v. Union Railway Co.*," where that court held that a car withdrawn for repairs was not a car in use contrary to the act, and the

movement of such a car necessary to getting it into the shops was not a use which brought the car within the car coupler act. See, also, *Railway v. Bowles*, 71 Miss. 1003, 15 South. 138, and *Taylor v. Boston Railway*, 189 Mass. 390, 74 N. E. 591, being cases under state laws similar in character, and presenting in each the question of whether a disabled car being handled as a "bad order" car for purposes incident to repair was a car engaged in service.

RICHARDS, Circuit Judge (dissenting). The car which caused the injury had a defective coupler. It would not couple automatically. As a result, the plaintiff below, under orders, went between it and the car it was to be coupled to, and tried to force a coupling by using his foot. In consequence, his foot was caught in the impact of the cars and seriously injured. In the opinion of the majority, the question is discussed whether the car was being used in interstate traffic, and it was held by one of the judges, a view in which I concur, that the testimony showed the car was being so used. That question being so determined, it seems to me that, under the facts as shown by the record, the court was right in charging the jury as it did.

After the coupler became defective and could not be coupled without going between the ends of the cars, it became unlawful for the railroad company to haul it, or permit it to be hauled, or used, on its line. It then became the duty of the railroad company to withdraw the car from use, and have it repaired to conform with the law before using it further. It did not do this, but continued to use the car in its defective condition. It could only do this under the penalty of the law. The car was defective, liable at any time to cause an accident, and it could not be kept in use at the constant risk of a serious accident, either upon the excuse that it would be inconvenient to withdraw it from the service, or that the company had sent for the required appliance, and would repair the car when it should be received.

Certainly no ground is suggested why the employé, to protect whose life and limb this act was passed, should be deprived of its benefit in a case like the present, where he has already suffered the very injury which a compliance with it would have prevented.

This is a case peculiarly within the provisions of the act. A car loaded and being used in moving interstate traffic was found with a defective coupler. The car was marked "in bad order," and a repair piece sent for. After thus being notified of its condition, the car should have been withdrawn; but it was not, and the company kept on moving it about in connection with other cars, and finally ordered the injured employé to couple it to another car. This he tried to do, with the natural result, and he has been crippled for life. The case amply justifies the verdict, and the judgment should be affirmed.

## FRANKLIN v. MATOA GOLD MIN. CO.

(Circuit Court of Appeals, Eighth Circuit. December 28, 1907.)

No. 2,650.

**1. FRAUDS, STATUTE OF—SALES OF GOODS—CONTRACTS WITHIN THE STATUTE.**

A statute of frauds applies equally to contracts of sale and contracts of barter or exchange, it being immaterial in what manner payment for the property to be transferred is to be made.

**2. SAME—COLORADO STATUTE—PAYMENT BY BUYER "AT THE TIME."**

Under the Colorado statute of frauds (Mills' Ann. St. Colo. 1891, § 2025), which provides that every contract for the sale of any goods, chattels, or things in action for the price of \$50 or more "shall be void, \* \* \* third, unless the buyer shall, at the time, pay some part of the purchase money," a verbal contract to deliver stock of a corporation in part payment for services "thereafter to be rendered" is not taken out of the statute by the subsequent rendition of the services which is not a payment "at the time" within the exception of the statute nor a part performance which can validate the contract at law.

**3. SAME.**

The performance by one party of that portion of a contract which is not within the statute of frauds will not validate the unexecuted part which is within the statute.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Frauds, Statute of, §§ 299-326.]

**4. SAME—OPERATION AND EFFECT OF STATUTE—DOCTRINE OF PART PERFORMANCE.**

The doctrine of part performance by the buyer, such as paying the purchase price and the like, to take a contract out of the statute of frauds obtains only in equity, and has no place in an action at law for damages founded on the contract, nor is it under the better authority available in equity to render the contract enforceable, the buyer having a sufficient remedy at law to recover back the money paid or the value of the property delivered, or on a quantum meruit if payment was in services.

In Error to the Circuit Court of the United States for the District of Colorado.

Charles J. Hughes, Jr., and Charles W. Franklin (Harry B. Tedrow, on the brief), for plaintiff in error.

David P. Strickler and Tyson S. Dines (Dines, Whitted & Dines, on the brief), for defendant in error.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff brought an action at law against the defendant corporation for breach of contract in failing to deliver 100,000 shares of the capital stock of the company, of the face value of \$1 per share. The first count alleges that in January, 1904, at Colorado Springs, Colo., the defendant promised and agreed with Pence, Franklin & Babbitt, a firm of lawyers in said city, that it would pay them \$25 per day "for services thereafter to be rendered by the said Charles W. Franklin, and the further sum of twenty-five dollars (\$25) per day for each day's service thereafter to be rendered by the said Kurnal R. Babbitt, in and about prosecuting, defending, counseling, and advising the said defendant com-



pany in and about certain suits hereinafter described; the said sum of twenty-five dollars (\$25) per day to be paid for each day when either the said Franklin or Babbitt were absent from their respective offices for and on account of the said business and litigation; and to deliver to the said copartnership fifty thousand (50,000) shares of the capital stock of the said defendant company." The complaint alleges that said services were duly rendered, and that portion of the contract requiring the payment of said \$25 per day had been complied with by the defendant; but it had failed and refused to deliver said stock. It alleges that the claim sued for had been duly assigned, for a valuable consideration, to the plaintiff Franklin. Damage is laid under this count at \$20,000.

The second count alleges a like contract between the defendant and another firm of lawyers, to wit, Lunt, Armit & Brooks, at Colorado Springs, Colo., on the same terms; the payment of the per diem to be made while the said Lunt or the said Brooks were so engaged, and for the delivery to the copartnership of 50,000 shares of the capital stock of the defendant company. Performance on the part of said Lunt, Armit & Brooks is alleged; and payment by the defendant of the \$25 per diem as agreed is admitted, but default is charged in the delivery of the 50,000 shares of stock aforesaid. This claim was also assigned to the plaintiff by said Lunt, Armit & Brooks. The damage on this count is laid at \$20,000. The answer denies the making of the alleged contract, and alleges that the matter of the \$25 per diem had no connection whatever with the alleged agreement for the delivery of the shares of stock. Among the various special defenses pleaded, the defendant interposed the plea of the statute of frauds, in that the contract in question was not reduced to writing. As the decision of the case, predicated on the plea of the statute of frauds, is determinative of the right of recovery, it is unnecessary to consider the other matters of defense tendered by the answer. The replication denied that the agreement or understanding with reference to said per diem pay had no connection with the agreement for the delivery of the shares of stock; "but plaintiff alleges and states the fact to be that under the agreement alleged in the complaint, the said per diem compensation and the capital stock together were to be the consideration for the services thereafter to be rendered."

At the trial to a jury the following occurred: Mr. Dines, of counsel for defendant, stated that the contract was not in writing and was within the statute of frauds:

"The Court: The replication does not deny that? Mr. Dines: In what we claim is an evasive way, so as not to properly deny it. That is what I raise—that the replication does not deny that fact; the contract is not in writing. The Court: Does the plaintiff propose to offer proof that the agreement was a written contract—the contract as set forth in the complaint? Mr. Hughes (of counsel for plaintiff): No, your honor. We will offer to prove in this connection every matter alleged in the replication; we want it to be considered that way; I suppose it would be. By Mr. Franklin we would show that it was done, and in addition the correspondence which I stated in my statement—that ought to be considered. We do not claim that it was a formal written contract, made at the time; we never have said that. We think it is enough, even if

this was within the statute, to take it out by virtue of what is alleged in the replication: and the things which I have stated to the jury we will prove—in my opening statement.”

Upon this statement the trial court directed a verdict for the defendant. We are of opinion that the court was warranted in treating the statement of plaintiff's counsel as an admission that the contract sued on was not in writing. It was either in writing or not in writing. It was not claimed to have been part one and part the other. But the distinct answer was that it was not in writing; and it is clear that what the plaintiff relied upon was the allegation in the replication of performance on the part of the plaintiff's assignors. In his argument to this court it is contended that the Circuit Court erred in directing a verdict on said admission of counsel, because he suggested to the court that there was correspondence between the parties. What was the correspondence relied upon? Was it claimed to be a “memorandum of such contract in writing?” If so, such contention is utterly inconsistent with the statement that the contract was not in writing. The colloquy between court and counsel merely refers back to some statement theretofore made to the jury respecting the correspondence; but what that statement was the bill of exceptions does not disclose. Most certainly before counsel can be heard to complain of the action of the court in proceeding to judgment notwithstanding he proposed to show certain things by correspondence, he should have disclosed to the court what that correspondence contained; and before this court could review it the bill of exceptions should set it forth.

The statute of Colorado (chapter 55, § 2025, vol. 1, Mills' Ann. St.) declares that:

“In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof, be in writing, and subscribed by the party charged therewith: \* \* \*

“Fourth. Every contract for the sale of any goods, chattels, or things in action, for the price of \$50.00 or more, shall be void unless: First, a note or memorandum of such contract be made in writing and be subscribed by the parties to be charged therewith; or, second, unless the buyer shall accept and receive part of such goods, or the evidence of some of them, or such things in action; or, third, unless the buyer shall, at the time, pay some part of the purchase money.”

The first contention on behalf of the plaintiff is that the transaction in question was not a contract for the sale of goods, or chattels, or things in action, within the terms of the statute. Without prolonging the opinion in a review of the authorities touching this question, it is sufficient to say that the decided weight of authority is that such statute, in its application, makes no distinction between contracts of barter or exchange on the one hand, and of sales on the other. A contract is no less within the statute “because something other than money is to be given in return for the goods; contracts of barter being regarded, so far as the statute is concerned, as contracts of sale.” Browne on Statute of Frauds (5th Ed.) c. 14, p. 390, also section 76; Dowling v. McKenney, 124 Mass. 479, 480; Raymond v. Colton, 104 Fed. 219, loc. cit. 224, 43 C. C. A. 501; Bennett v. Hull, 10 Johns. 364; Howard v. Harris, 8 Allen (Mass.) 297. It is well established,

and the generally recognized rule of construction of such statutes, that a contract for the sale of stocks at a future date is within the statute. Smith on the Law of Fraud, etc. (1907) § 373; North v. Forest, 15 Conn. 400; Mayer v. Child, 47 Cal. 142; Meehan v. Sharp, 151 Mass. 564, loc. cit. 566, 24 N. E. 907; Mussel v. Cooke, Pre. Ch. 533; Crull v. Dodson, Sel. Cas. in Chancery, 41. It being conceded that the contract in question was not evidenced by a memorandum made in writing and subscribed by the parties to be charged therewith, it is void, unless the buyer—that is, the plaintiff's assignors—accepted and received part of the stock, or the evidence of such things in action, or unless the buyer at the time paid some part of the purchase money.

There being no pretense of claim that plaintiff's assignors received any part of the things—the stocks—bartered, or the evidence of any of them, within the meaning of this clause of the statute, the right of action turns upon the only remaining exception, “unless the buyer shall at the time pay some part of the purchase money.” The statute in this respect is strikingly different from section 17 of the old English statute of frauds, which prescribed: (1) a written contract or memorandum; (2) acceptance and actual receipt of the property sold; (3) payment of part or all of the purchase price; and (4) payment of earnest money. Under that statute no time was fixed when part of the purchase money should be paid, to avoid the infirmity of the verbal agreement. Whereas, under the Colorado statute, the positive requirement is that the part payment of purchase money must be made at the time of the making of the contract. And this provision differentiates this statute from that of many of the states. Recognizing the force of this requirement counsel for the plaintiff suggested in argument that the services, at least a part of them, rendered by the assignors were contemporaneous with the making of the contract. As the case went off on the pleadings and the admission of counsel that the contract was not in writing, recourse must be had to the allegations of the pleadings for the determination of this question of fact. The object of pleading is to define the altercations of the parties. It is to enable the judge, clearly and separately, to ascertain the matters of fact to be tried and to which the law of the case is to be applied. The allegation of the complaint is that the defendant company promised and agreed to pay said sum of \$25 “per day for each day’s service *thereafter to be rendered*” (italics ours) by the assignors of the plaintiff. The shares of capital stock were, of course, to become deliverable for services thereafter to be rendered. As already shown, the first paragraph of the replication is a reaffirmance that, “under the agreement alleged in the complaint, said per diem compensation and the capital stock together were to be the consideration for the services *thereafter to be rendered*.” (Italics ours.) In the very nature of the case, the buyer did not at the time of the making of the contract pay some part of the purchase money. Looking to the explicit terms of the Colorado statute, it precludes a recovery, because the statute declares the alleged contract sought to be enforced to be void. As is too frequently the case, some courts by mere judicial construction have sought to enlarge the operation of the statute in such fashion as to place its plain terms more or less in the field of uncertainty, in sub-

jecting its application to the temptation of the strained conscience of the litigant seeking to avoid it by post mortem testimony.

It is the accepted fact that the provision in question of the Colorado statute is a transcript of the corresponding statute of the state of New York; and therefore reference to the construction placed thereon in respect of the time of such payment by the highest court of that state is permissible. In *Walrath v. Ingles*, 64 Barb. (N. Y.) 265, the defendant agreed to exchange clover seed, in excess of the value of \$50, for a barrel of sugar and a given amount of money. The barrel was accordingly filled with sugar, and the price per barrel at which it was to be accepted by the defendant was fixed at the time of the making of the verbal contract, but the sugar itself was not weighed nor physically delivered to the defendant. Of this the court pertinently said:

"To allow the parties to agree, by parol, upon a mode of payment to be completed afterwards, would let in the very mischief which the statute intended to avoid."

In *Hunter v. Wetsell*, 57 N. Y. 375, 15 Am. Rep. 508, there was a verbal contract for the purchase of hops, of the value of over \$50, but no part of the price was paid at the time. Thereafter the buyer, at two different times, made payments upon the purchase price, but there was no proof of what occurred when the payments were made. In holding that this was not a compliance with the statute the court said:

"A contract for the sale of personal property for the price of \$50 or more is declared void unless one of three things be done, the last of which is payment by the buyer, at the time, of part of the purchase money. Payment afterwards will not do. The payment must be made when the contract is made. Such is the plain language of the statute. \* \* \* All that took place afterwards was a payment of \$300 towards the hops. If this could be called a payment at the time of making the contract, within the meaning of the statute, then this provision of the statute serves no purpose, as every payment subsequently made, to apply upon the contract, would render it binding within the statute, and the provision requiring payment at the time would be nullified. A payment not made at the time can never, under any circumstances, satisfy the requirement of the statute. But when a contract for the sale of personal property, valid at common law, is made, and the buyer afterwards pays expressly to bind the contract, the parties then reaffirm or restate the terms of the contract, and their minds then meet so as to make a contract, the statute is undoubtedly satisfied."

Further on, the court summarized what conduct subsequent to the making of the contract might take the case out of the operation of the statute: (1) When the parties subsequently meet, and for the express purpose of then complying with the statute, payment is made by the purchaser upon the contract at the request of the seller; and (2) when the parties subsequently meet and substantially restate, reaffirm, or renew the terms of the contract, so as then and there by a meeting of their minds to make a contract on such payment. The subsequent rulings of the Court of Appeals of New York touching this matter have been so thoroughly and fairly reviewed and presented in opinions by Judge Wallace, of the Court of Appeals of the Second Circuit, who, from long experience and study, was quite familiar with the decisions of the state court, as to render it sufficient for us to refer to those opinions. In *Raymond v. Colton*, 104 Fed. 219, 43 C. C. A.

501, the plaintiff and defendant owned practically all the shares of stock of a company, and plaintiff being indebted to defendant, the latter held as security therefor plaintiff's stock. Upon differences arising between them it was agreed that the defendant should buy the plaintiff's stock, paying the difference between its value and the plaintiff's said indebtedness, in consideration of the plaintiff resigning from the office he held in the company, and also obtaining the resignation of his brother and father. After some delay the plaintiff delivered the resignations, stating at the time that it was "in compliance and fulfillment of the trade that we have made," and then calling for a settlement for the stock. Although the defendant received and retained the resignations, the court held that the contract was void under the statute because there was no delivery or part payment at the time of making the contract. After reviewing the state decisions the learned Judge said:

"The action was not tried or submitted to the jury upon the theory that the shares were the things purchased, or the consideration of the defendant's promise. It was assumed upon the trial that there had been no acceptance of the shares by the buyer, and upon this theory the certificate was tendered to the plaintiff upon the trial. There was no evidence that anything had been said or done by the parties, either at the time of the contract or subsequently, which had the effect of changing the relations of pledgor and pledgee. Unless the acceptance of the resignations was evidence of an acceptance of the shares, there was no evidence in the case to show that the defendant had accepted and received some part of the goods, or the evidences, or some part of them, of the things in action, which were the subject of purchase. The trial judge adopted the theory of the complaint, and treated the delivery of the resignations as the consideration for the defendant's promise to purchase. They were in part the consideration of that promise, and no other effect can be given to the delivery of the resignations than as a part payment of the consideration or purchase money. As there was no restatement or reaffirmation of the terms of the prior oral agreement between the parties at the time of the delivery of the resignations, except by implication, and as they were not delivered for the express purpose of complying with the statute and validating the contract, it must be held that there was no part payment at the time of the contract, within the meaning of the statute as construed by the highest courts of the state. Irrespective of this consideration, if the defendant should be deemed to be the buyer, there was no part payment by him, such as there was having been made by the seller. We conclude, therefore, that the contract was void under the statute of frauds."

After the case was remanded for a new trial and came on for retrial, as is painfully frequent after the contending plaintiff has been advised by the reviewing court wherein his evidence was deficient, he undertook to supply the missing link by testifying that the original agreement was made on August 3d, and that on August 15th, when he delivered the resignations to the defendant, he said: "I am going to give you my resignation, my father's resignation, and my brother's resignation, to take effect to-night at six o'clock, in compliance and fulfillment of the trade that we made on August 3d;" that defendant asked plaintiff if the latter would not regret it, and the reply was in the negative; that afterwards, on August 19th, plaintiff's attorney called on defendant, and inquired if he wanted anything further, and defendant said he wanted the plaintiff's resignation as trustee, and this was subsequently sent to him by mail. The Circuit Court, notwithstanding this evidence, directed a verdict for the defendant on the ground that

the proof did not take the case out of the interdiction of the statute of frauds. On a second appeal (reported in 114 Fed. 863, 52 C. C. A. 382) the court affirmed the judgment, holding that the transaction of August 15th and thereafter was a payment under the void contract of August 3d, and was not a payment made for the purpose of validating the prior void contract. The court reviewed in extenso all the later decisions of the state Court of Appeals, including *Jackson v. Tupper*, 101 N. Y. 515, 5 N. E. 65, in which that court held a subsequent payment insufficient to validate a verbal contract for the reason that "by implication they recognized that it (the old contract) was still existing, but they did not reassert its terms so as to agree upon a new one of essentially the same purport. \* \* \* Upon principle, and logically, there can be no payment made at the time of the contract unless it is made as part of the negotiations, or at the time when the negotiation is concluded; otherwise the statutory provision would be nugatory." There is no sufficient allegation in the replication of the plaintiff to bring the payment of the \$25 per diem within the foregoing rule, to validate the contract.

The case at bar, as disclosed by the pleadings, aptly illustrates the necessity of a strict adherence to the plain terms of the statute in question. In its answer the defendant insists that the matter of the payment of \$25 per day was an independent contract, separate and apart from that asserted by the plaintiff in respect of the delivery of the shares of stock. This the plaintiff denies. Had the contract been reduced to writing it would have settled this contention and taken it out of the vexing uncertainty of conflicting statements of the parties litigant.

The ultimate position of plaintiff's counsel is that the case is taken out of the operation of the statute by reason of the performance of the contract on the part of the plaintiff's assignors. There is much of illogical assertion by courts touching this question of part performance. In many cases there is an utter confusion of part performance and entire performance. Of course, when a contract is performed on both sides there is no longer a contract to be executed and enforced. In such case the statute of frauds has no application. Without pursuing this question, it is sufficient to say that both the weight of reason and authority is that the doctrine of part performance by the buyer, such as paying the purchase price, and the like, obtains only in equity, and has no place in an action at law founded on the contract for damages. *Kling v. Bordner*, 65 Ohio St. 86, 61 N. E. 148, 152; *Smith v. Phillips*, 69 N. H. 470, 43 Atl. 183, 184; *Butler v. Shehan*, 61 Ill. App. 561; *Nally v. Reading*, 107 Mo. 350-355, 17 S. W. 978; *Koch v. Williams*, 82 Wis. 186, 52 N. W. 257; *Ballantine v. Yung Wing* (C. C.) 146 Fed. 621; *Clark v. Davidson*, 53 Wis. 317, 10 N. W. 384; *Smith on the Law of Fraud*, etc. (1907) § 348, p. 414; *Warner v. Texas & Pacific Railway Company*, 54 Fed. 922, 4 C. C. A. 673. While the last-named case was reversed by the Supreme Court (164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495), it did not touch the question under consideration. The decision was placed solely on the ground that the contract was not within the operation of the one-year statute of frauds, as it might have been performed within one year.

In *Clark v. United States*, 95 U. S. 542 (24 L. Ed. 518), the court said:

"We do not mean to say that, where a parol contract has been wholly or partially executed and performed on one side, the party performing will not be entitled to recover the fair value of his property or services. On the contrary, we think that he will be entitled to recover such value as upon an implied contract for a quantum meruit. \* \* \* The special contract being void, the claimant is thrown back upon the rights which result from the implied contract."

In *Dunphy v. Ryan*, 116 U. S., loc. cit. 497, 6 Sup. Ct. 488 (29 L. Ed. 703), the court said:

"It is well settled that when one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon a count for money paid to the use of defendant at his request, or recover for the services upon the quantum meruit count."

Further on the court said:

"But defendant's counsel further insist that there has been such a part performance of the contract as entitles the defendant to equitable relief, on the ground that it would be a fraud on him not to enforce the contract. The case, as stated in the defendant's answer, is not, either in the averments or prayer, one for equitable relief. There is no averment, and no proof was offered, that the refusal of the plaintiff to accept the deed and pay the purchase price of the land has subjected the defendant to any loss. \* \* \* The mere breach of a verbal promise for the purchase of lands will not justify the interference of a court of equity. There is no fraud in such refusal. The party who so refuses stands upon the law, and has a right to refuse. \* \* \* If the mere refusal of a party to perform a parol contract for the sale of lands could be construed to be such a fraud as would give a court of equity jurisdiction to enforce it, the statute of frauds would be rendered vain and nugatory. The defendant knew or ought to have known that the statute requires such a contract as the one he seeks to enforce to be evidenced by writing. That he did not exact a contract in writing is his own fault. Courts of equity are not established to relieve parties from the consequences of their own negligence or folly."

In *Purcell v. Miner*, 4 Wall. 513, 18 L. Ed. 435, Mr. Justice Grier, speaking to this question, said:

"A mere breach of a parol promise will not make a case for the interference of a chancellor. It is plain that a party who claims such interference has the burden of proof thrown on him. He knows that the law requires written evidence of such contracts, in order to their validity. He has acted with great negligence and folly who has paid his money without getting his deed. When he requests a court to interfere for him, and save him from the consequences of his own disregard of the law, he should be held rigidly to full, satisfactory, and indubitable proof."

Further on he said:

"The mere payment of the price, in part or in whole, will not, of itself, be sufficient for the interference of a court of equity, the party having a sufficient remedy at law to recover back the money."

This must be so under such statute as the one in question where the action is based on a contract not in writing, and unassisted by either of the exceptions named therein. It is a solecism to assert an action at law predicated of a void contract. The discussion of this question by Depue, Judge, in *McElroy v. Ludlum*, 32 N. J. Eq. 828, is not only instructive, but exact and unanswerable in its logic.

The plaintiff sued upon a contract for services rendered the defendant, which was within the statute of frauds. The learned judge said:

"The suit is in substance an action to enforce a legal demand. It must, therefore, be decided upon the legal principles by which the right of a party to recover compensation for services rendered, under a contract invalid by the statute of frauds, is determined. Performance of a contract invalid by the statute will not validate the contract so as to enable a party to enforce it by an action upon the contract. Unless in cases specially provided for in the statute, part performance will not validate the contract at law. The dictum that part performance will make valid a contract invalid by the statute of frauds is exclusively the creature of equity, and applies only to contracts relating to lands, and does not extend to contracts relating to other matters. *Birckhead v. Cummins*, 4 N. J. Law, 44-50; *Brittain v. Rossiter*, 18 Am. Law Reg. (N. S.) 716. The only remedy in such cases is by an action on a quantum meruit to recover the value of the services."

He then adverted to the older rulings of some highly respected courts, holding that in a quantum meruit action the contract might be employed in ascertaining the measure of recovery, but had been later overruled by them because of the great abuses and harsh results to which it led. He then said:

"The pretext upon which evidence of the class referred to has sometimes been admitted is that its admission was necessary to prevent fraud. The argument is that the statute was designed to prevent fraud, and should not be made the means of perpetrating a fraud. But in such cases it is not necessary, in order to prevent fraud, to give the contract effect practically by means of an action. The law accords the injured party full compensation for the value of the consideration he has given on the faith of the contract which his adversary repudiates. However uncertain and incapable of precise valuation the services, rendered under an executory contract invalid by the statute, may have been when the contract was made, their value has ceased to be uncertain at the time when the action is brought. The services having then been performed, are then capable of exact ascertainment, and their value can easily be estimated upon such evidence as is ordinarily submitted to a jury upon any other issue involving the value of services. Further than this we cannot go, without giving the party the benefit of his contract in his action, although the statute declares that it shall not be enforced by an action. The policy of the statute is to prevent frauds which may be accomplished by setting up contracts of the interdicted class, by parol testimony. That policy is infringed upon equally, whether the contract be used for the purpose of influencing the amount of the recovery, or be made the foundation of the action. Experience shows the danger incident to frittering away, under plausible pretexts, the provisions of a statute which has repeatedly been declared to be one of the wisest laws upon the statute book."

The leading case in the English courts is that of *Earl of Falmouth v. Thomas*, 1 Crompton & M. 88. The action was to recover the value of crops under a verbal agreement for a lease of the lands on which the crops were made. It was held that the contract was within the statute, although the defendant had accepted and received the crops, and that the plaintiff was only entitled to recover their value in *indebitatus assumpsit*. Lord Lyndhurst said:

"Admitting that the defendant is to pay for the crops, he ought to pay for them, not upon the terms and footing of the bargain and sale, but upon a quantum meruit; the crops at the time of the bargain and sale were, upon these pleadings, an interest in land; and to allow the plaintiff to recover upon this bargain and sale, and to have the price regulated by it, would be in direct opposition to the statute, because it would be giving effect to an action upon a verbal contract for an interest in lands."



It is no answer to the foregoing that the contract pertained to an interest in land. Browne on the Statute of Frauds (5th Ed.) par. 115, adverting to this section of the statute respecting contracts affecting interest in lands and those under the seventeenth section of the statute respecting personal contracts, says:

"There seems to be no reason to attribute to the latter phraseology any force, or to draw from it any inferences, different from those which attend the construction of the former. 'Allowed to be good' appears to mean considered good for the purposes of recovery upon it; and the remaining portions of the two sections in question being very similar, and the policy of the two being very clearly the same, we should not be justified in laying much stress upon the change of phrase. Many of our states, in adopting the substance of it, have disregarded the difference alluded to, and put the sales of goods into the same section with other contracts, extending to them a common provision, that no action shall be brought," etc.

In so far as the per diem part of the contract in question is concerned, it was not necessarily within the statute of frauds. Not only might it have been fully performed within the year, but it might have been performed by the designated attorney giving one day's separate attention thereto. There was no requirement that this special service should be rendered for over one day, as no given number of days was prescribed. *Warner v. Texas & Pac. Ry. Co.*, 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495. As that part of the contract was fully discharged, and the only feature of the verbal contract within the statute is that which pertained to the shares of capital stock, which had not been performed by the vendor, it seems illogical and absurd to say that the executed part of the contract not within the statute could be regarded as such performance as to take the void part out of the statute. "If B., who by the terms of the contract is to do an act which is not within the statute, performs the contract fully on his part, while A., who by the terms of the contract was to perform an act which is one of those named in the statute, has not performed on his part, the contract is within the statute. \* \* \* This view is generally taken both in law and equity." Page on Contracts, vol. 2, par. 716.

It results that the judgment of the Circuit Court must be affirmed.

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#### RUGGLES v. BUCKLEY et al.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1908.)

No. 1,637.

#### 1. PARTNERSHIP—EXISTENCE OF RELATION—EVIDENCE TO ESTABLISH.

Partnership is a fact, which like any other fact may be established by circumstances, and it is not essential to its existence that there should be a partnership name or a formal partnership agreement.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 1, 64, 75.]

#### 2. SAME—EVIDENCE CONSIDERED.

Defendant, who was without capital, entered into an agreement with complainant to render services in the business of dealing in timber lands, which complainant was to control, and for which he was to furnish the

capital. He was to receive interest on such capital as a preferred profit, and defendant was to draw a certain sum annually on which he was to pay interest, the remaining profits to be divided between them. After a few years the business was extended to include the manufacture of lumber, and defendant took in a partner for that purpose and later incorporated. A railroad company was subsequently organized and a road built. For all these enterprises the capital was largely supplied by complainant, but no formal partnership agreement was made between the parties nor were they publicly known as partners. Later on, however, two written agreements were made between them defining the interest of each in the entire business, and one of which contained a statement of the amount due therefrom to complainant on account of capital and advances, and also the amount due to the business from defendant on account of withdrawals. *Held*, that the relations of the parties were those of partners, and that the partnership continued and extended to all of the various enterprises.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 13-28.]

3. SAME—PARTNERSHIP CONTRACT—INTEREST ON SURPLUS CAPITAL.

Where one partner furnishes all or more than his share of the capital in the business, he may contract for any rate of interest on the surplus of capital so furnished to be paid out of the profits as preferred profits.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Partnership, §§ 121-123.]

4. SAME—EFFECT OF DISSOLUTION.

An agreement made between existing partners containing stipulations for the future conduct of the business ceases to be operative on and after a dissolution of the partnership by a decree of court.

5. SAME—DISTRIBUTION OF ASSETS—DISCRETION OF COURT.

On the dissolution of a partnership by a decree of court, where the assets include stock in corporations it is within the discretion of the court to divide the same in specie when other assets are sufficient to pay all obligations of the firm.

Appeal from the Circuit Court of the United States for the Southern Division of the Western District of Michigan.

This bill was filed by Charles F. Ruggles against Edward Buckley et al., to wind up an alleged partnership business between the complainant, Ruggles, and the defendant Buckley. Prior to 1875, and for many years thereafter, both Ruggles and Buckley (hereinafter called complainant and defendant, respectively) resided in Manistee, Mich. The complainant was a successful business man at the date mentioned, dealing principally in buying and selling timber lands. The defendant, who was a hardware dealer, had failed in business and was a bankrupt. These parties were brothers-in-law, the defendant's wife being complainant's sister. In 1875 they entered into a business relation wherein the defendant was to render certain services in the timber land business of the complainant, and the latter was to furnish the capital and to manage the business. The complainant was to be paid out of the business, as a preferred profit, 10 per cent. interest annually on the money he advanced, and the defendant was to withdraw \$1,200 per annum from the business, and pay 10 per cent. interest annually thereon. Complainant was to have two-thirds and defendant one-third of any profits of the business that remained. In 1878 they also engaged in the lumber manufacturing business, to which the defendant principally gave his attention, while the complainant exercised a general management of all the business, including the lumber business. In 1880 they decided to interest in this business a Mr. Douglas, who was a logger, and the firm of Buckley & Douglas was formed, in which Buckley was to have three-fourths of the profits, and Douglas one-fourth. From 1875 down to, and including, 1880, the business transacted by complainant and defendant was entered on the books of the complainant, used by him prior to 1875. To distinguish Ruggles' former business from this joint

business, the latter was designated new business. No firm name as between the complainant and the defendant was ever adopted. Their business relation was not made public. The profits of the business down to, and including, 1880 were divided in the proportion as before stated. Soon after the firm of Buckley & Douglas was formed, the open accounts of the business of complainant and defendant from 1875 down to that time were transferred from Ruggles' books to new books labeled "Edward Buckley," on which thereafter the business of Buckley & Douglas was also entered. At the time the firm of Buckley & Douglas was formed, complainant and defendant agreed to divide the net profits of their business thereafter equally. In 1887, in order to reach a large body of timber, the Manistee & North Eastern Railroad Company was organized, and a railroad 18 miles long was constructed, known as the Manistee & North Eastern Railroad, at a cost of more than \$65,000, which was largely furnished by complainant. Buckley took three-fourths and Douglas one-fourth of the stock of this railroad company, of which the defendant was president, complainant vice president, and Douglas secretary. The road has been extended until now it is more than 100 miles long. In 1892, the firm of Buckley & Douglas was incorporated under the name of "The Buckley & Douglas Lumber Company." Buckley took three-fourths and Douglas one-fourth of its stock. Down to this time, 1892, the complainant had furnished practically all the money that had been used by Buckley in these enterprises, and had been constantly consulted and advised with about the conduct and management of these different businesses, and largely controlled them. In September, 1891, complainant left Manistee on account of certain troubles wholly unconnected with his business, and remained away until 1900 at which time he returned to Manistee. Until just prior to complainant's return to Manistee, his personal relations with the defendant had been of a most cordial and confidential character. During the latter part of complainant's absence from Manistee, he became dissatisfied with defendant's conduct in relation to their joint business, which culminated in the filing of the bill in this case in August, 1900. During his absence he was often visited by defendant and their business affairs were discussed, and he continued to participate in directing and managing the business. On October 2, 1891, while complainant was sojourning in Canada, he transferred and delivered all of his property and holdings to the defendant. These transfers were made to cover complainant's property, in consequence of his troubles at Manistee, and the property was afterwards retransferred to complainant. On April 22, 1893, at Clifton, Canada, complainant and defendant entered into a written agreement, which is known in the record as the "Clifton Agreement." It is in the following words and figures, to wit:

"That the business and property represented by and in the books labeled Charles F. Ruggles, is and always was the property of Charles F. Ruggles, individually.

"That the business and property represented by and in the books labeled Edward Buckley, and also the books labeled Minnesota Land business, is the property of said Buckley and Ruggles, jointly, each owning one undivided half interest.

"That the three-quarter interest of Edward Buckley in the business and property represented in and by the books of Buckley and Ruggles, and the Buckley & Douglas Lumber Co., and the Manistee & North Eastern R. R. Co., belongs to and is the property of said Buckley and Ruggles jointly, each owning one undivided half.

"That upon the commencement of the business represented in all the books above mentioned—excepting the books labeled Charles F. Ruggles—it was agreed by and between the parties hereto, that the time of Edward Buckley and his whole and undivided attention should be used in attending to and promoting all the business above referred to, and protecting and caring for the property above represented, regardless of to whom it belonged, including the individual property of Charles F. Ruggles, and that said Buckley was and is to make no charge for his time and services. Further, that said Buckley was to keep the whole of said Ruggles' money invested in the above business, and to allow interest at the rate of 10 per cent. per annum, payable annually the 31st day of December of each and every year, on the money of said Ruggles, so invested, and on the daily balance of said Ruggles, both in his own (Rug-

gles' books) and all the other books, until said money, together with interest thereon, was fully returned to said Ruggles, after which one half of the surplus and profits should go to said Ruggles, and the other half to said Buckley, in full for his services, time and profits, for managing the whole business, including the private business of said Ruggles, in which said private business said Buckley is at no time to have any interest in or any profit from."

Defendant's wife, who was complainant's only sister, died, and in March, 1894, he married the second time. In June, 1894, defendant executed a last will and testament in which complainant was made the residuary legatee. After deducting the special bequests provided for therein, there was left for the residuary legatee, property about equal in value to complainant's interest in the business, as is shown by an inventory of the joint business of December 31, 1893, and also as is shown by the Clifton agreement of 1893. A copy of this will defendant sent to complainant. The Clifton agreement contains several clauses, setting out the business relation between complainant and defendant, and the interest each had in the business. On February 3, 1896, in Chicago, Ill., a second written agreement was entered into between complainant and defendant, in which was incorporated the Clifton agreement, and the same reaffirmed. In the Chicago agreement it is agreed that the amount due complainant on December 31, 1895, from the business on account of the capital and advances he had invested in said business, including interest thereon, is the sum of \$881,525.05. It is further agreed that the amount due from defendant to said business on December 31, 1895, for money withdrawn by him from the business, including interest thereon, over and above the amount of capital and advances made by him to said business, is the sum of \$226,253.72, and that of this amount, \$77,412.79 was drawn by the defendant in excess of the amount that he should have drawn. On this last amount, defendant was to pay additional interest at the rate of 5 per cent. per annum. The remainder of this last agreement refers to questions of interest and application of payment, and the securing of certain indebtedness, not necessary to mention here. It was evidently intended as a starting point from which to begin to bring the business to a close.

The defendant does not deny the execution of either the Clifton or the Chicago agreements, but insists that they are not true, and do not correctly state the relation between him and the complainant. The bill alleges that they are and have been partners since 1875, the answer admits that they were partners from 1875 down to 1880, but denies they were partners after 1880, except in the buying and selling of timber land, and sets up that since that date complainant has had no interest in the lumber or railroad business, and that the money advanced by complainant to him was a loan to him, and that for such money the relation between himself and complainant is that of debtor and creditor. The bill prays that the partnership existing between them be dissolved, and the business wound up, and for that purpose that a receiver be appointed to take charge of all the partnership property, that the case be referred to a special master for an accounting between the complainant and defendant, and for general relief.

An interlocutory decree was pronounced in the case on December 12, 1903. Therein it was decreed: (1) That complainant and defendant were partners. (2) That said partnership be dissolved. (3) That the cause be referred to a special master for an accounting with reference to said partnership, with full directions for taking and stating the account. (4) That Jno. Patton be appointed receiver of all the property and assets of the partnership (with certain exceptions). (5) That a preliminary injunction as prayed for in the bill be granted.

The case was finally heard upon its merits on March 15, 1906, and the decree of March 12, 1903, approved, except as to one or two matters relating to the question of interest. The special master was spared a vast deal of labor by the parties agreeing in writing as to the condition of the account between them, assuming that the court below was correct in holding that they were partners. It was, however, expressly provided in this agreement that nothing in the language or terms used therein should be construed as an admission by the defendant of the existence of a partnership between Chas. F. Ruggles and Edward Buckley, nor of the validity or effectiveness of the contracts of 1893 and 1896.

The complainant and the defendant Buckley excepted to the decree of the Circuit Court, assigned errors, and have appealed.

F. W. Stevens and G. D. Van Dyke, for appellant.  
Benton Hanchett and W. S. Humphrey, for appellees.

Before LURTON and RICHARDS, Circuit Judges, and McCALL, District Judge.

McCALL, District Judge (after stating the facts as above). The controlling question here is whether or not complainant and defendant have been partners since 1875 in the timber land business, in the manufacture and sale of lumber, and in the construction and operation of the Manistee & North Eastern Railroad. The defendant assigns 29 errors, the first 4 of which raise the main question of fact, and may, therefore, be stated together, and so disposed of.

They are to the effect that the Circuit Court erred in decreeing that complainant and defendant were partners in the business recorded in the books labeled "Edward Buckley," and that complainant was a subpartner with defendant in the business of Buckley & Douglas, and that the three-fourths of the capital stock standing in the name of Edward Buckley in the Buckley & Douglas Lumber Co., and also in the Manistee & North Eastern Railroad Co., were assets of the partnership of Ruggles and Buckley. It is neither contended by any one that there was a written partnership agreement between the complainant and the defendant, nor that there was a partnership name adopted. The business relation of the parties in this case must, therefore, be determined from the facts and circumstances under which the business was begun and conducted. And for this purpose, we may consider what the parties said, their correspondence, the manner of keeping their books, the source of the capital invested, the disposition of the profits, the relation or connection of each party to the business, and its character, and, more important still, the relation the parties themselves understood they bore each to the other and to the business during the years in which and while the business was going on. The fact of a partnership, like any other fact, may be established by circumstances. It does not follow that because there was no partnership name, nor formal partnership agreement, there was, therefore, no partnership. "Partnership is a fact—a fact sometimes made out like other facts, from circumstances as well as by direct evidence." *Fechtelor v. Palm Bros. & Co.*, 133 Fed. 462, 66 C. C. A. 336; *In re Neasmith*, 147 Fed. 165, 77 C. C. A. 402.

When we examine the record for facts and circumstances tending to prove that a partnership existed between Ruggles and Buckley from 1875 down to March 12, 1903, the evidence clearly preponderates in favor of the proposition that such a business relation existed between them, and there is no escape from the conclusion to that effect reached by the Circuit Court.

True, the parties did not make public the fact of their business connections, indeed, for reasons satisfactory to themselves, they may have concealed that relation; yet, if in point of fact, they were co-partners, the concealment from the public of their true relation would

not in the least affect that relation as between themselves. But we are not left to mere circumstances from which to determine the business relation existing between complainant and defendant. That is made clear, and the interest complainant had and has in the business, and his relation to it is stated by Buckley himself in the Clifton agreement of April 22, 1893, and the Chicago agreement of February 3, 1896. In addition, in August, 1895, the defendant wrote a letter to his legal adviser, Mitchell J. Smiley, in which he says that while he has appeared to own and control the capital invested in the business conducted by him at Manistee, Mich., and elsewhere, since 1874, and the business conducted by himself and Douglas, including the Buckley & Douglas Lumber Co., and the Manistee & North Eastern Railroad Co., and the construction company that built said road, the fact is, and always has been, that Charles F. Ruggles is, and always has been, the owner of said capital, etc. These two agreements, and this letter, together with other facts and circumstances in the record, are wholly inconsistent with the claim attempted to be set up by the defendant for the first time after the bill was filed, to the effect that complainant was only a creditor of Buckley for money loaned him since 1880, and with which he had conducted this extensive business. The facts and circumstances here make a case that falls squarely within the definition of a partnership as laid down by Mr. Justice Gray in *Meehan v. Valentine*, 145 U. S. 611, 618, 12 Sup. Ct. 972, 973, 36 L. Ed. 835. He said:

"The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or service, and having a community of interest in the profits." *Ward v. Thompson*, 22 How. 330, 16 L. Ed. 249; *Fleming v. Lay*, 109 Fed. 954, 48 C. C. A. 748.

We considered and discussed somewhat fully this question in *Fechtelner v. Palm Bros. & Co.*, supra, and there held that "the intent to be partners is made out when we find a business carried on for the joint benefit of two or more persons, with an agreement for a mutual participation in profits, as profits."

It is earnestly and ably insisted by counsel for defendant that the terms of the partnership as disclosed by this record, and insisted on by counsel for complainant are illegal and unconscionable. Illegal, in that it provides for usurious interests compounded. And to permit the business to be wound up under such terms would be against public policy, and a great hardship on the defendant.

In the view we have taken of the case, the question of usury is eliminated. Where one partner furnishes all or more than his share of the capital in the business, he may contract for any rate of interest on the surplus of capital so furnished by him, to be paid out of the profits of the business, as preferred profits. If there are no profits, or the business fails, he gets no interest and loses his capital. It is for this additional risk that he is permitted to charge and receive from the business as a preferred profit, in the event it is earned, a return exceeding the legal rate of interest upon the capital so advanced. *Paul v. Cullum*, 132 U. S. 546, 10 Sup. Ct. 151, 33 L. Ed. 430; *Duden v. Maloy*, 63 Fed. 183, 11 C. C. A. 119.

In *Paul v. Cullum*, supra, Mr. Justice Harlan, speaking for the court, says:

"While in the absence of written stipulations or other evidence showing a different intention, partners will be held to share equally both profits and losses, it is entirely competent for them to determine, as between themselves, the basis upon which profits shall be divided and losses borne, without regard to their respective contributions, whether of money, labor, or experience, to the common stock. Story on Partnership, §§ 23, 24. Such matters are entirely within the discretion of parties about to assume the relation of partners."

The terms of the partnership agreement, considered from the present, may appear hard. But even a court of equity cannot grant relief from a legal contract entered into freely and understandingly, and from time to time reaffirmed and complied with without complaint for a quarter of a century. Especially is this true, when the party seeking such relief admits its execution, and does not allege and prove deceit, fraud, duress, or that he was in some way overreached in its execution.

As was said by this court in *Blake v. Pine Mountain Iron & Coal Co.*, 76 Fed. 624, 22 C. C. A. 430:

"It is just these hardships which a court of equity cannot relieve by rescinding contracts, or making new ones by construction, through the process of balancing blame for nonperformance, and going into parol proof of other or different intentions than those expressed in the contracts themselves, intentions relating to failures not anticipated at the time the contracts were made, or not provided for by the terms of the agreement, as they would have been if the parties had not been improvident in neglecting such protection as was open to them against possible failure and change of conditions. The reasonableness of a contract, its fairness and justice, are to be determined as of the time when the parties entered into it, and so of the intentions involved in the construction of their agreements, and none of these are to be influenced by the force of subsequent changes in events or circumstances. Fry, Spec. Perf. p. 193, c. 6. It may be an improvident contract, but improvidence or inadequacy does not determine a court of equity to rescind, or to decree against specific performance."

The defendant, however, under the terms of a partnership which his counsel insist are hard and unconscionable, began as a bankrupt, and in a quarter of a century has accumulated an estate amounting to nearly \$1,000,000, and withdrew from the business during this time quite a quarter of a million for expenses.

This bill, however, is not brought to enforce specific performance of a contract, but rather to dissolve a partnership and to wind up its business, which is quite another proposition.

We come now to consider the two errors assigned and pressed upon our attention by the complainant.

First. It is insisted that the Circuit Court erred in decreeing that the contract of February 3, 1896, was binding on the parties only until the date of the decree dissolving the partnership. The agreement of February 3, 1896, was an account stated of past transactions, and contained stipulations regarding the future conduct of the business. This agreement is not an article or a contract of copartnership. It is evidence tending to show that a copartnership existed. That copartnership ceased to exist when it was dissolved by a decree of

the Circuit Court, and it is proper that the business be wound up as of the date of the dissolution of the partnership.

Second. It is insisted that the court erred in decreeing that in case there was sufficient property of the partnership when sold to bring an amount sufficient to pay to Ruggles the amount found due him from the business, that in that event, the shares of stock belonging to the partnership in the lumber company and in the railroad company should be divided equally between complainant and defendant. This presents the question as to whether or not the stock in the two corporations shall be sold or divided in specie. The general rule is that a sale shall be had of what remains of partnership property after the debts are paid. The reason of the rule is that a sale furnishes the best means of ascertaining the value of the property, and its equal division. 3 Bates on Partnership, 974. But under the facts in this case, we think the question addressed itself to the sound discretion of the court. In the exercise of that discretion, the trial judge decreed that said shares of stock should be divided equally between the complainant and defendant, unless it become necessary to sell them in order to pay debts of the firm, and in that event, only enough thereof should be sold as will be sufficient to pay any debts remaining unpaid after all the other property of the firm had been exhausted. The decision of a question which is within the discretion of the trial judge will not be disturbed on appeal, except it clearly appears that such discretion was abused. It does not appear that there was an abuse of this discretion in this case. Each share of stock is of equal value. The entire amount of stock is susceptible of equal and exact division in specie. If there is no need of its sale to pay debts, it should be divided as decreed by the court below. *Kelley v. Shay*, 206 Pa. 205, 55 Atl. 925; *Harper v. Lamping*, 33 Cal. 641. Each of these assignments is without merit.

The remaining errors assigned by complainant were abandoned at the hearing.

Upon the whole case, we are satisfied with the holdings of the court below, and its decree is affirmed.

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#### WYMAN v. LEHIGH VALLEY R. CO.

(Circuit Court of Appeals, Second Circuit. January 14, 1908.)

No. 96.

1. MASTER AND SERVANT—INJURIES TO SERVANT—RAILROAD EMPLOYÉS—EMPLOYERS' LIABILITY ACT.

Where a complaint for injuries to a railroad employé was expressly drawn under the New York employers' liability act, and the answer admitted that the notice required by the provisions thereof had been received by defendant, a ruling that such act had no application to the case was erroneous.

2. WRIT OF ERROR—REVIEW—HARMLESS ERROR.

Where, in an action for injuries to a railroad employé by the alleged negligence of the wrecking master of the road, the court charged that such master was the representative of the road and was liable for his negligence, such instruction was even more favorable to plaintiff than the full



recognition of the New York employers' liability act under which the action was brought would have justified, so that plaintiff was not prejudiced by an erroneous ruling that such act had no application to the case.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, §§ 4052-4062.]

3. MASTER AND SERVANT—INJURY TO SERVANT—DUTY OF MASTER.

It is a master's duty to furnish his servant suitable, safe, and sufficient machinery, means, and appliances, and sufficient and competent helpmates, the master being liable for an injury occurring by reason of a defect in machinery, ways, or works, or by reason of the incompetency of a fellow servant of which he knew or by the exercise of reasonable diligence should have known; but having complied with the law in this respect, neither he nor the person delegated as his representative being guilty of a negligent act, his duty to the servant is performed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171-174, 330-336.]

4. SAME—PROXIMATE CAUSE.

A car having been derailed, defendant's wrecking master, a man of unusual experience and more than ordinary intelligence, was sent for and superintended the rerailing thereof, in the course of which the car was pulled by a cable attached to an engine by a coupling link. After the third pull the link parted, and in some manner flew back 60 feet over the top of the car and struck plaintiff's intestate, who was sitting near the end of the car. *Held*, that the breaking of the link was the proximate cause of decedent's injury.

5. SAME—NEGLIGENCE—METHOD OF WORK.

A railroad wrecking master of large experience used blocks with which to rerail a derailed car, instead of replacers. Decedent was injured by being struck by a link attached to a cable used to pull the car onto the tracks. The car was actually rerailed on the third pull, notwithstanding the breaking of the link, and there was evidence that, by reason of the position of the trucks with reference to "toggle straps," replacers could not be used. *Held*, that the wrecking master, not being required at his peril to select the best method of rerailing the car, but being required only to use his best judgment, was not negligent in using blocks instead of replacers.

6. SAME—EVIDENCE—APPLIANCES USED BY OTHERS.

In an action for death of plaintiff's intestate while assisting in rerailing a railroad car by the breaking of a coupling link, a question asking whether there were other sizes of links used on railroads at the time of the accident was properly disallowed for failure to assume that the conditions were substantially similar.

7. EVIDENCE—MATERIALITY.

Where a coupling link by which intestate was injured during the rerailing of a car was shown to have parted on the third pull, evidence as to whether it appeared from the fractured parts that it was broken suddenly or by a long strain was immaterial.

8. WITNESSES—CROSS-EXAMINATION—LIMITATION.

Where a witness who had testified before the coroner on having his testimony read stated that he had so testified, the court did not err in halting the cross-examination when it went to the extent of implying that the witness' statements at the trial were unreliable because he had stated facts which he had not mentioned before the coroner for the reason that he had not been asked to do so.

In Error to the Circuit Court of the United States for the Southern District of New York.

Writ of error to review a judgment entered upon the verdict of a jury in favor of the defendant, in an action brought by plaintiff to

recover damages resulting from the death of her husband, Frank W. Wyman, while in the defendant's employ as a brakeman.

Jacob Newman (H. L. Schuerman, of counsel), for plaintiff in error.  
Alexander & Green (Allan McCulloh, of counsel), for defendant in error.

Before LACOMBE, COXE, and WARD, Circuit Judges.

COXE, Circuit Judge. The accident occurred July 7, 1904, on defendant's premises at Pier 56 North River, New York. A car float had come to the dock and the movable part known as the "bridge" would not sink low enough, with the weight of the engine alone, to meet the float. Accordingly the defendant's employes took a car known as a gondola, loaded with structural iron from the yard and ran it down to depress the bridge. It was a wooden car about 34 feet long with two trucks, each truck having two pair of wheels. The weight of the car was about 80,000 pounds. In running the car down, the rear truck went off the rails on the bridge and onto the float. The four wheels of the truck had gone off the rails and were resting on wood on the deck of the car float. The wheel that was farthest out of alignment was about six or eight inches from the rail to which it belonged. The rear wheel had gone through the float, had sunk through the wood. The forward truck was on the rails on the bridge. After the engineer of the switching engine had made several abortive attempts to pull the gondola back on the track, the wrecking master Sims was sent for. He arrived shortly thereafter on a tug with appliances, and his crew of five men and assumed control of the work of rerailing the car. He had been in the employ of the defendant since 1866 and had 32 years' experience in wrecking. No question is raised as to his competency. When he arrived he found that the two hind wheels of the derailed truck were between the float and the bridge, the fore wheels being in the toggles.

The first step taken was to chain the truck to the body bolster so that when the body of the car was raised it would raise the truck at the same time, so that the oil box would clear the toggle straps. Having jacked up the car and placed oak blocks under the wheels, Sims and his men lowered the car until the wheels rested on the blocking, when the jacks were removed. A new steel cable was furnished by the agent on the pier, it was 35 feet long with a hook in an eyelet at one end and a link in an eyelet at the other end. An additional link was needed to attach the cable to the engine and Sims and Wyman, plaintiff's intestate, procured the link from a box on the bridge. After the connection was made Sims gave the signal, the engine started and pulled the car up the bridge about five feet. The car was again jacked up and blocking was laid on the lower side lengthwise and crosswise. The car was then lowered and the jacks removed. Sims examined the link, pin and cable and signaled for a second pull which was given, the car moving about 10 feet, bringing the front wheels of the rear truck about 3 inches from the rail. The hindmost wheel of the rear truck was just clear of the upper end of the toggle bar. They then got the car replacers, which were part of the ap-

pliances furnished by the defendant on the premises, adjusted the blocking in front of the wheels, greased the replacers and, after Sims had again examined the link and pin, he gave the third signal to proceed. The engine moved, the wheels dropped on the rails and immediately thereafter the link attached to the engine parted, and in some mysterious manner, flew back 60 feet over the top of the car and struck Wyman, who with Sims and Snyder, the pier agent, was sitting on a truss near the end of the car. Sims testified that he could not use the car replacers sooner than he did because he could not place them between the toggle strap and the string piece. He says, "I could not use the car replacer at any time before the hind wheels of the truck were free of the toggle bar because it would not allow the truck to curve." The link was the ordinary one used in coupling cars before automatic couplers were adopted.

The question submitted to the jury was whether the defendant was negligent in providing an improper link and in failing to inspect it properly prior to using it on this occasion. The jury found for the defendant.

Error is assigned because of the ruling of the trial judge that the New York employers' liability act "has no application to the case." We are at a loss to understand what considerations influenced the trial judge to make this ruling for the reason that the complainant was expressly drawn under the act and the answer admits that the notice required under the provisions thereof was received by the defendant. The ruling though technical error was not reversible error for the reason that the plaintiff was not prejudiced thereby.

In charging the jury that Sims was the representative of the Lehigh Valley Railroad Company and that the company was liable for his negligence, the court stated the rule even more favorably for the plaintiff than if he had given full recognition to the liability act.

The principal question debated is whether the court erred in refusing to submit to the jury the question whether the general method pursued by Sims in rerailing the car was a proper one. The plaintiff insists that it was not for the reason, first, that Sims should not have used blocks, but should have used replacers for getting the car back on the rails. Second, he should have unloaded the structural iron from the car to lighten the load and diminish the friction. Before considering this question it is well to understand what obligation rested upon the master under the conditions presented by this evidence. It is the duty of the master to furnish for the use of his servant, suitable, safe, and sufficient machinery, means and appliances and for his helpmates, competent men and a sufficient number of them to do the work required. He is liable if an injury occurs by reason of a defect in machinery, ways or works or by reason of the incompetency of a fellow servant, of which he knew or of which, by the exercise of reasonable care and diligence, he should have known. When he has complied with the law in this respect and neither he, nor the person delegated as his representative, is guilty of a negligent act, his duty to the servant is discharged.

In *Looney v. Metropolitan R.*, 200 U. S. 480, 486, 26 Sup. Ct. 303, 305, 50 L. Ed. 546, the court says:

"To hold a master responsible, a servant must show that the appliances and instrumentalities furnished were defective. A defect cannot be inferred from the mere fact of an injury. There must be some substantive proof of negligence."

Dobbins v. Brown, 119 N. Y. 189, 23 N. E. 537.

In De Graff v. N. Y. C. Co., 76 N. Y. 125, the court says:

"Railroad corporations should be held to a high degree of care and responsibility; but there is a point beyond which the requirements would be regarded as unreasonable and oppressive, and would in effect make them insurers against all accidents or injuries arising therefrom. As a general rule the degree of vigilance required is measured by the dangers to be apprehended or avoided. It does not appear to be necessary that the full strength of these chains should be kept up. That would involve a test on every trip. \* \* \* And again it does not appear that the breaking of a chain would ordinarily result in such an accident."

Bearing in mind that the question of the sufficiency and inspection of the link was submitted to the jury and answered by them in favor of the defendant, we have a case where all the above conditions which the law imposes on the master were complied with. There was at the pier for the use of its servants suitable and sufficient cables, links, pins, blocks, replacers, chains, jacks, and motive power necessary to rerail the car. There was a wrecking master of unusual experience and, judging from his printed testimony, of more than ordinary intelligence. There were 10 men on the pier ready to assist and, at times, assisting in the work. It would seem that nothing more was required of the master. All must agree that the proximate cause of the accident was the breaking of the link, if that had held there would have been no accident.

The plaintiff seeks to import into the law a new ground of liability which if adopted will practically make the master an insurer of the lives of his servants. Not only must he provide the best and latest machinery and appliances, but he must use such appliances on all occasions. Not only must he do what practical common sense dictates in adopting methods of work, but he must guard against every accident, no matter how extraordinary, which may happen in case some part of his tackle breaks. In short his conduct must be judged not by the conditions surrounding him at the time, but in the light of the opinions of experts who, after the accident, advance plausible theories as to what might have been done to prevent it. We think this is not the law.

In Washington & G. R. v. McDade, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235, the Supreme Court says:

"Neither individuals nor corporations are bound, as employers, to insure the absolute safety of machinery or mechanical appliances which they provide for the use of their employes. Nor are they bound to supply the best and safest or newest of these appliances for the purpose of securing the safety of those who are thus employed. They are, however bound to use all reasonable care and prudence for the safety of those in their service, by providing them with machinery reasonably safe and suitable for the use of the latter."

In Burns v. Old Sterling Co., 188 N. Y. 175, 183, 80 N. E. 927, 930, the court says:

"A master is not bound to furnish the best known appliances for the work in which his servant is employed, but only such as are reasonably fit and safe.

He satisfies the requirements of the law if in the selection of machinery and appliances he uses that degree of care which a man of ordinary prudence would employ, having regard to his own safety if selecting them for his individual use (*Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Stringham v. Hilton*, 111 N. Y. 188, 18 N. E. 870, 1 L. R. A. 483; *Harley v. Buffalo C. M. Co.*, 142 N. Y. 31, 36 N. E. 813)."

In *McConnell v. Morse, etc., Co.*, 187 N. Y. 341, 80 N. E. 190, 10 L. R. A. (N. S.) 419, the court says:

"The case, therefore, is brought within the rule so often recognized and applied in this court, to the effect that where the master has upon hand at the place where the work is performed sufficient suitable material or appliances for the doing of the work, he is not liable for injuries resulting to a workman by reason of an error in judgment of the foreman or of a co-employed in selecting defective material or appliance (*Vogel v. Am. Bridge Co.*, 180 N. Y. 373, 73 N. E. 1, 70 L. R. A. 725; *Kimmer v. Weber*, 151 N. Y. 417, 45 N. E. 860, 56 Am. St. Rep. 630, and cases cited)."

As to the method employed by Sims it will be seen that practically the sole accusation against him is that he did not use the car replacers. Sims testifies that he did use them as soon as they could be successfully employed and he is corroborated by two other witnesses and no one swore that they were not used. It is difficult to comprehend upon what theory this testimony can be ignored. The engineer who was on his engine, with the car between him and the rear trucks, did not mention the use of the replacers and another witness did not remember seeing replacers used. Because of this negative testimony it is argued that there was sufficient doubt on the question to warrant its submission to the jury. Assume this to be so, or let us go a step farther and assume that the testimony shows affirmatively that replacers were not used at any time. How then stands the question? Sims, after an inspection of the situation concluded to jack up the truck and use blocks. He gives reasons why replacers could not have been used at the outset owing to the position of the truck with reference to the rails and toggles. The plaintiff's expert testified that the use of blocks was a well-known and alternative method. He says:

"The usual method is to jack the car up when the wheels are off the track and before jacking them they put chains under the truck to hold it in position and keep it from dropping. They jack it up and use either blocks or car replacers. They can use either one or the other. After they put the block under and after they have jacked the cars and done the other things, they then pull the car by engine power with the cable. In order to use a car replacer you must have a surface so that you can place the car up to the car replacer on. I know what a toggle is. You could not put a car replacer on top of a toggle. If a toggle is close to the rail and the wheel is jammed down on the toggle you cannot put a car replacer in."

That Sims chose a perfectly practical method is demonstrated by the fact that, notwithstanding the breaking of the link, the car was actually rerailed on the third pull. That he did not expect such an accident as happened is demonstrated by the fact that he and the pier agent were sitting by Wyman's side when he was struck. Even on the doubtful assumption that he might have chosen a better method, the defendant is not liable for it was merely an error in judgment, and a master is only required to possess the faculties which belong to finite beings. In short, Sims was not required to take extraordinary

measures to guard against an accident which he had not the slightest reason to suspect and which was beyond the ken of human foresight. Whether the use of the replacers—assuming their use possible—would have prevented the accident is pure conjecture. Sims was not called upon to speculate, it is enough that he used his best judgment.

The expert called by the plaintiff was asked the following question: "Were there other sizes of links used upon railroads in 1904 and in July?" This question was objected to as incompetent, irrelevant, and immaterial and the objection was sustained. We think it was rightly sustained. Assuming that the answer would have been "yes" we fail to see how the information would have been of the slightest assistance to the jury. Even supposing that the answer might have been "yes, larger links," the same observation would apply unless it were shown that the conditions were substantially similar. For instance, the Pennsylvania Railroad might have used in 1904 very much larger links in hauling its heavy freight trains up the sharp grades of the Alleghanies and yet the fact would not have the remotest bearing upon the question as to what sized links should be employed by a pony switching engine engaged in the work of transferring single cars and small trains from car floats to the regular tracks of the railroad. If the question had been, "Were other sizes of links used by railroads in 1904 in hauling cars from car floats?" a different situation would be presented, although we do not intend to intimate that such a question would have been competent.

The same witness was asked, "Can you tell, looking at the fractured parts, whether or not it (the link) was broken suddenly or by a long strain?" In view of the undisputed testimony that the link parted on the third pull, we think the testimony called for by this testimony was immaterial. As the jury had the fact they did not need theories. The alleged errors in not permitting the plaintiff's counsel to cross-examine at length a witness called by the defendant, as to what he said when testifying at the coroner's inquest, were negligible. The testimony of the witness given before the coroner was read to him and he stated that he had so testified. It was only when the cross-examination went to the extent of implying that the statements of the witness at the trial were unreliable because he had stated facts which he had not mentioned before the coroner, that it was halted by the court upon the ground that the witness had not mentioned the facts before the coroner for the reason that he had not been asked to do so.

Other exceptions were taken and error assigned regarding them but we think they are disposed of by what has been already said.

The judgment is affirmed.

## MORGAN CONST. CO. v. FRANK.

(Circuit Court of Appeals, Sixth Circuit. January 23, 1908.)

No. 1,713.

## 1. MASTER AND SERVANT—DUTY OF MASTER—SAFE PLACE TO WORK.

The duty of a master to provide a safe place for the servant to work does not extend to a place made dangerous by the very work in which the workmen are engaged, whether by its inherent character, or resulting from negligent performance by the workmen or those who stand in law in the relation of fellow servants to them.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 171-174, 179, 205, 209.]

## 2. SAME—INJURY TO SERVANT—NEGLIGENCE OF FELLOW SERVANTS.

Plaintiff's decedent, while in the employ of defendant and engaged in digging a pit in a building, was killed by the falling of a pile of iron plates which had been stacked near the side of the pit and by their weight caused the earth to cave in. Defendant was a contractor engaged in making repairs in a manufacturing plant, the floor of which was covered with iron plates. It became necessary to make a pit under the floor, and the plates were taken up by deceased or his fellow workmen and piled in the place from which they afterward fell. *Held*, that the place being safe when the workmen were placed there to work, the negligence, if any, in piling the plates too near where the excavation was to be made was not that of defendant, it not being shown that it directed such piling, nor was it under duty to warn the decedent of the danger, which was as obvious to him as to any one.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 34, Master and Servant, §§ 310-316½.]

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

H. H. McKeehan, for plaintiff in error.

Charles Koonce, Jr., for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. The intestate, Hosie Seidner, came to his death while engaged in the service of the plaintiff in error, and this was a suit by his administrator to recover damages. There was a verdict and judgment against the construction company.

That company was a corporation engaged in the construction and repair of manufacturing plants, and, at the time of this accident, was engaged in doing, under contract, certain improvement work in the plant of the Morgan Spring Company, the deceased being one of its employes engaged in said work. The plaintiff's petition alleged that the intestate, when killed, was engaged with others in the excavation of a pit inside of one of the buildings of the plant under repair or reconstruction. This pit was 7 feet by 7 feet and intended to be carried to a depth of about 12 feet. Alongside of this pit was a pile of old iron plates, which had been a covering of the floor of the building in which this work was being done, and which had been removed by the plaintiff in error and stacked, preliminary to the excavation work. When the excavation had reached a depth of about five feet, the wall of earth next to this pile of plates gave way and some of the heavy plates fell

into the pit, killing the deceased. At the close of the plaintiff's evidence the defendant asked for a peremptory instruction, which was denied, and exception reserved. The defendant, relying upon the insufficiency of the plaintiff's evidence, declined to put in any evidence. The case was then given to the jury under a general charge, to which exceptions were sparingly reserved and now assigned as error.

The case, however, has been mainly presented upon the question as to whether there was sufficient evidence to carry the case to the jury, and we find it unnecessary to consider any other error assigned. The burden was upon the plaintiff to show that the injury was due to some negligent act for which the master was, in law, responsible. If it happened by reason of the negligence of some fellow servant, the master would not be liable, unless the plaintiff went further and showed a negligent employment or retention of an incapable servant, or that the particular matter of negligence was one which the master could not delegate to another. In *Illinois Central R. R. v. Coughlin*, 132 Fed. 801, 803, 65 C. C. A. 101, 103, we said:

"Neither is it enough for the injured employ   to show that the injury may have been the result of the negligence of the employer, or may have been the result of some cause for which the employer was not responsible. The burden of proof being upon him, he must be able to show that the injury was the consequence of the negligence of the employer. As put by the Supreme Court in *Patton v. T. & P. Ry. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361: 'When the testimony leaves the matter uncertain, and shows that any one of a half dozen causes may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employ   is unable to adduce sufficient evidence to show the negligence on the part of the employer, it is only one of the many cases in which the plaintiff fails in his testimony, and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs.'"

It is therefore not required that the defendant should specially plead the act of a fellow servant as a defense, for the averment of a negligent injury by the defendant means actionable negligence, negligence for which, in law, the defendant is liable. *Pennsylvania Co. v. Fishack*, 123 Fed. 465, 59 C. C. A. 269. But the defendant in error insists that the duty of furnishing to the servant a reasonably safe place in which to work is a personal duty of the master, and not capable of being delegated, and that this accident was due to a default in this respect. But here the place was safe enough until it was made dangerous by the reconstruction operations being carried on. The evidence was meager, but enough was shown, in connection with the averments of the plaintiff's petition, to make it clear that the work which the construction company was doing involved the taking up of the iron plates covering the floor, for the purpose of making a trench and pits in which to construct walls and piers of brick work. These plates were thin, about one and one-half inches, and were seventy-two by thirty inches in length and breadth. Thirty of them were taken up from the floor and piled in a stack about four feet high by some of the servants of the defendant Construction Company. When, and by which of defendant's servants, does not appear. The only evidence introduced by the plain-



tiff is that they were so stacked when this particular pit was started at about 3 o'clock p. m. the day before they fell upon Seidner while working in the pit. It is said, in view of the projected trench or pit in proximity to this lot of plates and the loamy, gravelly character of the floor to be excavated, that these plates were insecurely stacked, or negligently placed too close to the projected excavation. One corner rested upon an old brick pier, with an upward projecting bolt, which raised the corner five or six inches above the ground level and gave the plates an inclination toward the side upon which the excavation was afterwards started. This manner of piling up the plates, if we assume it to be negligent, is claimed to be the negligence of the employer, as the place was thereby made dangerous for those who might be called upon to work in the vicinity. This assumes the whole issue. The place, meaning the general premises in which the plates were temporarily stacked and the work of construction going on, was provided by the owner of the plant under alteration. Unless it was made unsafe by the construction work being then carried on by the plaintiff in error, it was in no sense a dangerous or unsafe place for the purpose which required the services of the decedent and his fellows. Neither can it be, at this time, longer contended, that the duty of providing a safe place or structures extends to places or structures made dangerous by the very work in which the workmen are engaged, so far as safety depends upon the due performance of that work by them or those who stand in law in the relation of fellow servants. *Armour v. Hahn*, 111 U. S. 313, 318, 4 Sup. Ct. 433, 28 L. Ed. 440; *Deye v. Lodge & Shipley Tool Co.*, 137 Fed. 480, 488, 70 C. C. A. 64; *American Bridge Co. v. Seeds*, 144 Fed. 605, 613, 75 C. C. A. 407, 11 L. R. A. (N. S.) 1041. A part of the work being carried on in that place involved the taking up of these old iron floor plates and their temporary disposition until certain excavations could be made under the floor, and certain brick walls or piers put down. The workmen who took them up and piled them where they were found, whether the place and manner of piling was by direction of some immediate superior or not, were fellow servants. It was a kind of work which the master might well leave to the men engaged in the general work, and, if they did this work negligently, the risk was one which those engaged in the same general work assumed. The case in this respect is well within and controlled by *Deye v. Lodge & Shipley Tool Co.*, 137 Fed. 480, 483, 70 C. C. A. 64. That was an action for the injury of one by the falling of a pile of castings near which he was called upon to work. We there said:

"\* \* \* The master's obligation to supply a safe place for his work to be done, and to keep it safe, does not impose the duty of always keeping it in a safe condition so far as its safety depends upon the proper performance of the very work which his servants have undertaken to do. If a negligent manner of doing the work makes the place less safe, that is one of the risks which all engaged in the work have assumed as a risk of the occupation. If it was the duty of the defendant company to see that Lutz used sticks in piling these castings while waiting the next step in the work upon them, it would be hard to say why it would not be equally the duty of an employer to supervise the temporary piling or storing of brick or lumber or stone or barrels or boxes containing the material to be used by the men upon the premises. Matters of this kind are not so complex or dangerous as to demand the direct supervision of the master, but are details which, from a reasonable consideration of

the rule of master and servant, may be and must be left to the common sense of the men doing the work, as one of the risks of the business. *Cullen v. Norton*, 126 N. Y. 1, 6, 26 N. E. 905; *Morgan v. Hudson River Ore Co.*, 133 N. Y. 666, 31 N. E. 234; *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021."

In *Armour v. Hahn*, 111 U. S. 313, 318, 4 Sup. Ct. 433, 28 L. Ed. 440, it was held that the court below had erred in not directing a verdict for the defendant where the plaintiff had been injured while engaged with others in the construction of a building, and had fallen by having placed his foot upon a projecting timber which had not been bricked in at its inner end. "If," said the court, "it was at the time insecure, it was either by reason of the risks ordinarily incident to the state of things in the unfinished condition of the building; or else by reason of some negligence of one of the carpenters or bricklayers, all of whom were employed and paid by the same master, and were working in the course of their employment at the same time and place, with an immediate common object—the erection of the building—and, therefore, within the strictest limits of the rule of law upon the subject of fellow servants. \* \* \*"

If the plaintiff had wished to ground liability upon the continuance of an insecure pile of plates in dangerous proximity to the excavation, it devolved upon him to show that the master had had knowledge for a sufficient time to enable him to correct the matter. *Carnegie Steel Co. v. Byers*, 149 Fed. 667, 82 C. C. A. 115, 8 L. R. A. (N. S.) 677. There was not sufficient evidence upon this point to carry the case to the jury.

It has been suggested that the presence of this sloping pile of heavy plates within two or three feet of the western side of the excavation in which Seidner was put to work, in connection with the loamy, gravelly character of the ground, involved danger of a cave-in and precipitation of these plates, of which the deceased should have been warned. But Seidner was not an inexperienced man. Before he went into this pit he had been using a barrow about the premises and part of the time wheeling dirt out from this very excavation. From the meager facts which the plaintiff put in, it is quite evident that Seidner exchanged barrow work for excavation. There is at hand no evidence that the master knew or ought to have known of any danger which was not apparent to any workman of ordinary intelligence, engaged in the work. "It is the knowledge of the master of the inexperience and disqualifications of the servant of the dangers known to the master which fastens upon the latter the duty of taking reasonable care that the servant shall not sustain an injury through such known inexperience." *Felton v. Girardy*, 104 Fed. 127, 132, 43 C. C. A. 439; *L. & N. R. R. Co. v. Miller*, 104 Fed. 124, 43 C. C. A. 436.

There was not sufficient evidence to carry this case to the jury, in any aspect, and it was error to refuse the motion for a peremptory instruction.

## J. C. PUSHEE &amp; SONS v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. January 30, 1908.)

No. 750 (1,575).

## CUSTOMS DUTIES—CLASSIFICATION—BRISTLES "BUNCHED OR PREPARED"—APPLICATION OF THE RULE AS TO THE CONCURRENT DECISIONS OF TWO LOWER TRIBUNALS.

The imported bristles to which this appeal relates had been tied up in small bunches, and had been found, both by the Board of General Appraisers and the Circuit Court, to have been "bunched or prepared" in accordance with Schedule N, par. 411, § 1, of the tariff act of July 24, 1897 (30 Stat. 190, c. 11 [U. S. Comp. St. 1901, p. 1673]); and it appeared that the word "bunched" had no special commercial use in this connection, there is no previous legislation which gave any peculiar force to it, and it is plain that the question involved is purely one of fact, depending largely, if not entirely, on personal inspection. *Held*, that the rule as to the effect to be given to the concurrent decisions of two tribunals applied, and that the classification made by the Circuit Court should be affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decision below, see 155 Fed. 265, in which the Circuit Court affirmed a decision by the Board of United States General Appraisers (G. A. 5,483; T. D. 24,797), which had affirmed the assessment of duty by the collector of customs at the port of Boston.

In describing the property in dispute, the judge at circuit stated that it consisted of bristles in small bunches, with a string tied around the ends of each bunch to hold them together; that in these bunches the butt ends and the flag ends are not mixed indiscriminately, but substantially all the butt ends lie together; and that they are in a partial state of preparation for the brush-maker.

Searle & Pillsbury (Aruthur P. Hardy, of counsel), for importers.  
William H. Garland, Asst. U. S. Atty.

Before PUTNAM and LOWELL, Circuit Judges, and ALDRICH, District Judge.

PUTNAM, Circuit Judge. This is a question of classification under the tariff act of 1897. It depends on the application of paragraph 411 (Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 190 [U. S. Comp. St. 1901, p. 1673]), as follows: "Bristles, sorted, bunched or prepared, seven and one-half cents per pound," and of paragraph 509 (section 2, Free List, 30 Stat. 196 [U. S. Comp. St. 1901, p. 1682]), as follows: "Bristles, crude, not sorted, bunched, or prepared." Paragraph 509 is in the free list.

There is no proof of any special commercial use of the word "bunched" in this connection; neither is there any previous legislation which enables the court to find anything in the statutes to justify giving any peculiar force to it. Therefore, under the circumstances, the court is left to the ordinary signification of the word. There is only one importation in question. As to that importation, the Board of General Appraisers and the Circuit Court, on an inspection of samples, agreed that the bristles in controversy are within paragraph 411. Whether they are bunched is, under the

circumstances, a pure question of fact, depending, like ordinary questions, whether articles are bunched or not, largely, if not entirely, on personal inspection.

It has been held by us, especially in *The Columbian*, 100 Fed. 991, 995, 996, 41 C. C. A. 150, that the rule of the effect to be given to the concurrent decisions of two tribunals applies to instances where a decision of a master or commissioner has been affirmed by the court appointing the master or commissioner. This is also the rule of the Supreme Court, decided so often that we need not trouble to refer to any of its decisions beyond those cited in *The Columbian*. Here we have the concurrent decisions of the Circuit Court and the Board of General Appraisers, which, as the case depends so largely on mere inspection, come peculiarly within the principle of the rule stated on a question of fact like that involved here. The reasons for the conclusion that this importation was bunched are clearly set out in the opinion of the learned judge of the Circuit Court; and, after a reading of that opinion, it is entirely apparent that we cannot satisfactorily determine that the conclusion we are now asked to reverse was not correct.

The judgment of the Circuit Court is affirmed.

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## WARBURTON v. TRUST CO. OF AMERICA.

### WILLIAMS v. SAME.

(Circuit Court of Appeals, Third Circuit. February 6, 1908.)

Nos. 7 and 30.

#### 1. GUARANTY—RIGHT OF ACTION.

An underwriting agreement to provide for the bonds of an automobile company for the benefit of T. provided that the subscribers at any time after 12 months from June 1, 1902, on demand, would pay to plaintiff trust company such proportion of the principal of the advances of the trust company as the amount set opposite their signature bore to \$450,000, together with a like proportion of accrued interest, and that the trust company in case of default should be entitled forthwith to proceed against the subscriber to recover such proportion and interest, and should be entitled to enforce such personal liability until the full amount of the advances with interests and costs had been recovered by the trust company, without recourse to any party or collateral security. *Held*, that the trust company was entitled to sue on such agreement, though it had required T. to indemnify it further by advancing money in anticipation of payment by underwriters and as an indemnity against their nonpayment of the amount advanced.

#### 2. APPEAL—REVIEW—QUESTIONS OF FACT—CORPORATIONS—UNDERWRITING AGREEMENT—ACTION.

In a suit to recover subscriptions on an underwriting agreement, a verdict for plaintiff negatived defendant's defense of fraud in obtaining his signature thereto as well as an agreement between him and the person for whose benefit the agreement was made that defendant should not be required to pay his subscription.

#### 3. EVIDENCE—WRITTEN CONTRACT—PAROL AGREEMENT.

Where, in an action on a written underwriting subscription agreement, it was not claimed that an oral promise that the subscription would not be collected had been omitted from the written agreement by fraud, ac-

efficient, or mistake, the written agreement was conclusive as to the contract between the parties.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 20, Evidence, §§ 1813-1824.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Frank A. Harrigan and A. S. L. Shields, for plaintiffs in error.  
Duane, Morris, Heckscher & Roberts, for defendant in error.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. These were cases brought by the Trust Company of America against Barclay H. Warburton and Joseph D. Williams, respectively, to recover subscriptions of \$15,000 and \$5,000 made by them under contract with the said trust company to underwrite the bonds of the Fournier-Searchmont Automobile Company. The defendants respectively defended on the ground that Spencer Trask was the real plaintiff; that the general underwriting contract was void by reason of fraud on Trask's part in its creation, and the subscriptions made thereto by each defendant were not enforceable, because when they were each made it was stipulated they would not be required to pay them. The cases were tried, and verdicts rendered for the plaintiff therein. From the entry of judgments thereon each defendant sued out a writ of error, and as both cases involve the same general subject-matter they were argued together in this court, and we consider them in one opinion.

The case against Warburton was tried first. As to this first defense the court held that while admittedly Trask was the equitable plaintiff, and the fruits of the judgments were his, the right to bring this suit was in the Trust Company of America. It rightly so held. The defendant's contract was with that company; and by it he agreed:

"That he will at any time after twelve (12) months from June 1, 1902, upon demand, forthwith repay to the trust company such proportion of the principal of the advances of the trust company as the amount set opposite his signature hereto bears to the sum of four hundred and fifty thousand dollars (\$450,000), together with a like proportion of accrued interest thereon, and that the trust company shall have the right, in the event of default in payment by any underwriter, to forthwith proceed against him to recover such proportion and the interest thereon, and that the trust company shall have the right to enforce such personal liability until the full amount of said advances with interest and costs shall have been recovered by the trust company without recourse to any other party, and without recourse to any collateral security being first had or required."

The fact that the trust company required Trask to indemnify it still further by advancing money in anticipation of the payment by underwriters and as an indemnity against their nonpayment in no wise affected its right to collect, or of the underwriter to pay, his subscription. This disposes of the assignments applicable to that question.

As to the second defense, the court gave the widest latitude to the admission of testimony bearing on the alleged fraud, and in a charge of which no complaint is made submitted it to the jury. The verdict for the plaintiff negatives the defense of fraud, as, also, the third defense, that Trask had agreed not to collect Warburton's subscription.

The remaining exceptions refer to certain particular facts and features of the alleged fraud in the evidence, and asked the court to say as matter of law they proved fraud, and, if found, the verdict must be for the defendant. The court was right in refusing them, for an examination of this voluminous record satisfies us that neither by themselves, or in connection with the other testimony, did they make out a defense of fraud to submit to the jury. We agree with the conclusion to that effect which the court itself reached when, on a motion for a new trial, it said:

"It was claimed there were other acts done by Spencer Trask which amounted to a fraud on the defendant. The defendant on the stand, however, frankly stated the history of the organization of the corporation issuing the bonds, for which he subscribed, in a straightforward manner, giving all the facts, as well those which made for him as those against him. His desire seemed to be to tell the whole transaction as he remembered it, and his story, with the documentary evidence, shows clearly there was no fraud."

We are therefore clear the judgment must be affirmed.

When the Williams Case was tried the court was, from the Warburton trial, familiar with all the testimony bearing on the question of fraud, and accordingly ruled it out. In disposing of the assignments bearing on the rejection thereof, it suffices to say that no substantially different facts, from those admitted in evidence in the Warburton Case, were offered. The court was justified in rejecting them, for, united, all the proof proposed did not constitute a defense. The court properly held, as in the Warburton Case, the right of action for the subscription was in the plaintiff, and as the defendant admitted he had signed the contract there remained the sole alleged defense that this agreement was avoided by a contemporaneous oral promise that the subscription would not be collected. It was not alleged that such oral agreement had been omitted from the written agreement by fraud, accident, or mistake. Under such circumstances the court properly held the latter conclusive. *Bast v. Bank*, 101 U. S. 96, 25 L. Ed. 794.

The judgment is affirmed.

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#### THOMAS PROSSER & SON v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 4, 1907.)

No. 65 (4,057).

#### 1. CUSTOMS DUTIES—BOARDS OF GENERAL APPRAISERS—SURRENDER OF JURISDICTION.

Where a board of three General Appraisers has, as provided in Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], acquired jurisdiction over a case through the transmission by the collector of the papers in the case, it is then the duty of that board to "examine and decide the case thus submitted," as prescribed by said section; it may not afterward surrender its jurisdiction to another board; and a rule adopted by the General Appraisers is invalid which, in order to prevent conflicting decisions, provides for the transfer of a case from one board to another when the majority of all the general appraisers is of opinion that a proposed decision in the case by one board conflicts with a previous decision.

**2. MANDAMUS—GENERAL APPRAISERS.**

In the event that a board of General Appraisers, after acquiring jurisdiction of a case under Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], refuses to "examine and decide," as prescribed in said section, an importer would be entitled to apply to the proper court for a mandamus to require the board to exercise its jurisdiction.

Noyes, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision affirming a decision of a board of three General Appraisers, G. A. 6,069 (T. D. 26,477), which sustained the action of the collector of the port of New York in classification for duty of certain imports under the tariff act of 1897.

For decision below, see 154 Fed. 721.

Everit Brown, for importers.

D. Frank Lloyd, Asst. U. S. Atty., and John A. Kemp, Solicitor of Customs.

Before LACOMBE, WARD, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. It appears from the return of the General Appraisers that the protests of the importers, with accompanying documents, were duly transmitted to a board of three General Appraisers who had been duly designated to examine and decide cases arising upon protest, and who were known more specifically as "Board 2." Such board regularly acquired jurisdiction of said protests and had heard evidence and arguments and received briefs of counsel on both sides in them, and had prepared and unanimously signed, but had not promulgated a decision sustaining said protests. Thereafter at a meeting of the nine General Appraisers, the proposed decision was challenged, and after discussion a vote was taken on the question "Shall the challenge be sustained?" The members of Board 2 and one other General Appraiser voted in the negative, and five other General Appraisers in the affirmative. Thereupon the cases were taken from Board 2 and sent to three other General Appraisers, known as "Board 1," which, against importers' objection and exception, took additional testimony, and rendered the decision now under review.

The assumed authority for this procedure is as follows: Section 12 of the Customs Administrative Act of June 10, 1890, c. 407, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1931], provides that the nine General Appraisers "shall be employed at such ports and within such territorial limits, as the Secretary of the Treasury may from time to time prescribe, and are hereby authorized to exercise the powers and duties devolved upon them by this act, and to exercise, under the general direction of the Secretary of the Treasury, such other supervision over appraisements and classifications for duty, of imported merchandise as may be needful to secure lawful and uniform appraisements and classifications at the several ports. Three of the General Appraisers shall be on duty as a board of General Appraisers daily (except Sundays and legal holidays) at the port of New York, during the

business hours prescribed by the Secretary of the Treasury, at which port a place for samples shall be provided," etc.

On December 26, 1903, the Secretary of the Treasury amended the regulations as to the Board of General Appraisers so as to read (T. D. 24,861):

"Art. 1726. The General Board shall adopt such rules as may be necessary to prevent the promulgation of conflicting decisions."

On December 16, 1903, the members of the General Board of General Appraisers adopted the following rule:

"In order to prevent as far as possible the rendering of conflicting decisions in classification cases by the several boards, all opinions, before promulgation, shall be submitted to the several boards on duty at the port of New York, and if a majority of the members of either of said boards are of the opinion that any proposed decision conflicts with another decision concurrent therewith, or theretofore made by the board or by the United States courts, the President shall submit the same to all the members of the General Board present at the port of New York; and, whenever a majority of said General Board so present shall be of the opinion that a conflict exists, the case shall be reassigned by the President for decision to a board of three, the majority of whose members agree with the majority of said General Board."

The judge who heard the cause at circuit expressed the opinion that:

"The reasonableness of a rule or regulation which tends to avoid or lessen conflicting decisions by the board or which points out the way to consistent adjudications of litigated questions is to be commended."

That is true enough; but in the opinion of a majority of this court the particular rule is in conflict with the statute itself. When the old method of customs administration was revised, and the review of the collector's classification by a court and jury was abolished, Congress provided another tribunal to which the importer, if dissatisfied, might resort, and to which, upon giving notice of dissatisfaction, his cause would be committed. *U. S. v. Loeb*, 107 Fed. 692, 46 C. C. A. 562. Nine General Appraisers were provided for to whom, individually, certain powers and duties were assigned. No powers and duties were distributed to the nine collectively, but, quite naturally, they have been organized under treasury regulations into a General Board of General Appraisers to facilitate their administrative work. In creating the new tribunal of review, however, Congress provided that, upon notice of dissatisfaction, the invoice and all the papers and exhibits shall be transmitted "to the board of three General Appraisers, which shall be on duty at the port of New York, or to a board of three General Appraisers who may be designated by the Secretary of the Treasury for such duty at that port or at any other port, which board shall examine and decide the case thus submitted." Customs Administrative Act of June 10, 1890, c. 407, § 14, 26 Stat. 137 [*U. S. Comp. St.* 1901, p. 1933]. It seems entirely clear that Congress contemplated the creation of a definite tribunal of review, to which the importer might resort, which should acquire jurisdiction of his cause when the invoice, papers, and exhibits were transmitted, and which, when jurisdiction had been acquired, should examine and decide the cause. Under the language used, the im-



porter, in the event of that tribunal refusing to proceed after it had acquired jurisdiction, would be entitled to apply to the proper court for a mandamus to require the board of three General Appraisers to exercise the jurisdiction which the statute conferred upon them. This being so, a majority of this court are unable to see how another board of three to whom the papers were not in the first instance transmitted could assume jurisdiction of a cause already within the jurisdiction of the first board, which had a statutory duty to discharge with regard to it.

For these reasons the majority hold that the decision now under review (of Board 1) was rendered without jurisdiction of the controversy, and should be vacated. Since the propriety of the decision of Board 1 is the only matter brought before us for decision by this appeal, the order issued will be simply a reversal of such decision.

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UNITED STATES v. ONE SILK RUG.

(Circuit Court of Appeals, Third Circuit. January 30, 1908.)

No. 39.

1. CUSTOMS DUTIES—FORFEITURE—FRAUDULENT INVOICE—GUILTY SCIENTER OF FORFEITOR.

Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895], provides for the forfeiture of imported merchandise when entered "by means of any fraudulent or false invoice, \* \* \* false statement, \* \* \* or false or fraudulent practice or appliance." *Held* that, to incur this penalty, there must be a guilty scienter and intent on the part of the forfeitor, and that where entry was made on an invoice falsely made out by the foreign shipper, but there was an entire absence of fraudulent intent on the part of those concerned in making the entry, there could be no forfeiture, though the shipper had a financial interest in defrauding the revenue.

2. SAME—CONSTRUCTION.

Under Customs Administrative Act June 10, 1890, c. 407, § 9, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895], which defines various offenses against the customs revenue, and prescribes two penalties—forfeiture of the goods in question, and criminal conviction of the offender—the same guilty intent must be shown for the former penalty as for the latter.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

There was no opinion below. The full title of this cause is United States, Plaintiff in Error, v. One Silk Rug Lately Imported into the United States, John Dunn, Jr., and Davies, Turner & Company, Claimants, Defendants in Error.

Jasper Yeates Brinton, Asst. U. S. Atty. (J. Whitaker Thompson, U. S. Atty., on the brief), for the United States.

Frank P. Prichard, for John Dunn, Jr.

William M. Stewart, Jr., for Davies, Turner & Co.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This was a proceeding brought by the United States in the District Court for the Eastern District of

Pennsylvania to forfeit a silk rug. The rug was purchased by Samuel Small in Cairo, Egypt, from Hatoun, a dealer, for £457, of which sum \$500 was paid in advance. The balance was to be paid by Small on delivery of the rug to him, free of duties and transportation charges, at his home in York, Pa. Hatoun shipped the rug to Davies, Turner & Co., importing agents, with instructions to collect £362, and accompanied the instructions and bill of lading with a consular affidavit in which he placed the value of the rug at £120, and averred said sum was "the actual cost thereof, price actually paid therefor, and all charges thereon \* \* \* and that the currency in which said invoice is made out is that which was actually paid or is to be paid for such merchandise." Thereafter the consignee employed John Dunn, Jr., a custom house broker to attend to the shipment on its arrival in Philadelphia. No copy of the consular invoice made by Hatoun was sent to Mr. Small, nor did he know it had been made, and in ignorance of it he made an affidavit to an importer's declaration, sent to him by Dunn, which declared that he, Small, was "the owner of the merchandise described in the annexed entry and invoice \* \* \* that the entry and invoice which I now produce contains a just and faithful account of the actual cost of the said goods." On receipt of the affidavit, Dunn, in ignorance of the fact that Small had bought the rug at £457 and that Hatoun's consular affidavit, of which he had received a triplicate copy, had untruly stated £120 as the price thereof, delivered Small's affidavit, together with the triplicate copy of the consular invoice, to the custom house authorities. The latter, having appraised the rug at £309 and discovered that the real price thereof was £457, and not £120, as stated in the consular invoice, thereupon brought this proceeding to forfeit the import and named Davies, Turner & Co. and John Dunn, Jr., as claimants. This proceeding was under section 9 of the Customs Act of June 10, 1890, c. 407, 26 Stat. 135 [U. S. Comp. St. 1901, p. 1895], which provides:

"That if any owner, importer, consignee, agent or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoices, affidavit, letter, paper, or by means of any false statement, written or verbal, or by means of any false or fraudulent practice or appliance whatsoever, or shall be guilty of any willful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper or statement, or effected by such act or omissions, such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, which forfeiture shall only apply to the whole of the merchandise or the value thereof in the case or package containing the particular article or articles of merchandise to which such fraud or false paper or statement relates; and such person shall, upon conviction, be fined for each offense a sum not exceeding \$5,000, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court."

It is not contended in this case that the claimants or Small had knowledge of any fraud on the part of Hatoun, or that they are chargeable with bad faith. On the trial, the government requested the court to charge the jury that if there was a fraudulent purpose on the part of Hatoun to defraud the government in forwarding to the United States a false invoice to be used in the entry of the goods, the verdict should be for the government. This the court refused to do, but said

to the jury, "you cannot forfeit the merchandise on the ground of the fraud of Hatoun. If he committed a fraudulent act, and it was subsequently adopted and acted upon by somebody who entered the goods, that is one thing, but certainly, if they were innocent, I do not see that there is any ground of forfeiture." The action of the court as noted constitutes the assignment of error. The government's contention is aptly put in its brief:

"The learned trial judge took the position that the fraud on the part of the foreign broker would not support a forfeiture of the goods unless this fraud was subsequently adopted by the person making entry of the goods, and that if such person were innocent there was no ground for forfeiture. The position of the government is, on the contrary, as indicated in the exceptions filed, to the effect that, under section 9 of the customs administrative act, the entry of goods by means of a fraudulent invoice put into existence by the seller and shipper of the merchandise, and who is financially interested in defeating the customs, is sufficient to forfeit the goods when entry is made on this invoice, irrespective of actual intent to defraud the government on the part of the person actually making entry."

We cannot accede to such a construction. This statute must be construed as a whole. To find its meaning, every part of it must be given due weight. Now the statute contains two separate provisions; one for forfeiture of imported goods, and one for the criminal conviction of a person making, etc., a fraudulent entry. But while these two parts of the act are, as modes of procedure, separate and distinct, yet, for the purpose of interpretation, they must by their very terms be construed by reference to each other. Such course is imperative. The statute, down to the last four lines, "and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court," has to do wholly with the forfeiture proceeding. The clause quoted creates, but does not define, the crime. To determine who "such person" and what "each offense" is, we resort to the forfeiture clause. It follows, therefore, that unless such forfeiture clause requires a guilty scienter and intent on the part of the forfeiter, Congress has, by the crime clause, subjected to fine and imprisonment one guiltless of criminal intent. But we are not driven to such a result, for the use in the forfeiture clause of such terms as "by means of any fraudulent and false invoice," "any false statement," "any fraudulent practice or appliance whatsoever," "any willful act or omission," imply a guilty scienter and intent. But if to properly construe the criminal clause we must, by reference, read into it the forfeiture provision coupled with a guilty intent, we must not exclude such intent when we enforce that clause to forfeit. The court below was therefore right in holding that, in a case like the present, where there was an entire absence of fraudulent intent on the part of all parties here concerned, the government could not forfeit. If, as contended, this construction embarrasses it in the collection of its revenues, the remedy lies in legislative amendment.

The judgment of the court below is affirmed.

## THEODORE OLLESHEIMER &amp; BRO. V. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 4, 1907.)

No. 75.

## CUSTOMS DUTIES—CLASSIFICATION—WILLOW BASKETS—CHIP—"MANUFACTURES \* \* \* OF WILLOW."

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule D, par. 206, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647], relating to "willow prepared for basket makers' use, \* \* \* manufactures of \* \* \* willow," it was the intention for the final clause to cover completed manufactures from the "prepared" willow enumerated in the preceding clause; and baskets made from willow chip would be dutiable thereunder rather than as "manufactures of chip" under Schedule N, par. 449, 30 Stat. 193 [U. S. Comp. 1901, p. 1678].

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here on appeal from a decision of the Circuit Court, Southern District of New York, sustaining a decision of the Board of General Appraisers which affirmed the action of the collector of the port of New York in classifying certain imported merchandise for duty under the tariff act of 1897.

For decision below, see 154 Fed. 167.

Comstock & Washburn (J. Stuart Tompkins, of counsel), for the importers.

J. Osgood Nichols, Asst. U. S. Atty.

Before LACOMBE, COXE, and NOYES, Circuit Judges.

LACOMBE, Circuit Judge. The articles in question are baskets made out of willow which, prior to the manufacture of the baskets themselves, had been subjected to various processes which advanced it to a condition rendering it fit, without further treatment, for the use of the basket maker. These processes are thus described in appellant's brief:

"The round willow is first split into two, three, or four parts, by means of an instrument called a 'splitter.' To each of these several pieces of split willow is then applied an instrument known as a 'shaver,' the object of which is to shave out the inside pith of the willow."

If the willow is small it needs no further operation to fit it for the basket maker, but if it is large, "the pieces are put through a third machine called a 'chipper,' the purpose is to chip off all the rough edges and make each piece of uniform width." The willow when thus prepared is bought and sold, so far as the proof shows, to be made into baskets and furniture.

The appellants contend that the baskets imported should be classified under paragraph 449, which reads:

"Manufactures of bone, chip, grass, horn, india-rubber, palm leaf, straw, weeds, or whalebone, or of which these substances or either of them is the component material of chief value, not specially provided for in this act, thirty per centum ad valorem; but the terms 'grass' and 'straw' shall be understood to mean these substances in their natural form and structure, and not the

separate fibre thereof." Act July 24, 1897, c. 11, § 1, Schedule N, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678].

There seem to have been many varieties of baskets before the board, some made of whole willow, some of willow which had been merely split, and others of willow which had also had the pith removed and edges trimmed smooth. It is understood that no contention is made by the importers as to baskets made of whole willow or of willow which had been merely split. The process of manufacture above described leaves on one side of the prepared strip the tough, smooth, natural surface of the willow undisturbed, even where pith has been removed and edges trimmed. A voluminous record of conflicting evidence is presented on the question whether or not these prepared strips of willow, which the basket makers know as "willow" or "osier skein," are known as "chip" in trade and commerce. It will not be necessary to discuss that evidence. Even if it be recognized as one variety of "chip," viz., "chip of willow" (and it is not to be assumed that we find the testimony to warrant such conclusion), the language of another paragraph, which has no excepting clause in it, clearly indicates the intention of Congress not to include manufactures of "willow skein" or "chip of willow" within paragraph 449. It is provided in paragraph 206 as follows:

"206. Chair cane or reeds, wrought or manufactured from rattans or reeds, ten per centum ad valorem; osier or willow prepared for basket makers' use twenty per centum ad valorem; manufactures of osier or willow, forty per centum ad valorem." Schedule D, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647].

Manifestly, if these skeins were being imported in the condition in which they were before baskets were made from them, they would be covered by the clause "osier or willow prepared for basket makers' use," and we cannot escape the conclusion that the last clause of the paragraph is intended to cover completed manufactures made out of the "prepared" as well as out of the "unprepared" osier or willow. The interpretation contended for by the importer would subject to 40 per cent. duty baskets made of whole willow, while baskets made out of willow which had been subjected to further processes increasing its cost would be allowed entry at 30 per cent.

The decision of the Circuit Court is affirmed.

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AMERICAN STOVE CO. v. CLEVELAND FOUNDRY CO. et al.

DANGLER STOVE & MFG. CO. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. January 22, 1908.)

Nos. 1,717, 1,718.

1. PATENTS—INFRINGEMENT—OIL BURNERS.

The Jeavous patent No. 475,401, for an oil burner, claim 1, was not anticipated, and construed in the light of the specification and drawings is valid for the apparatus therein described, the essential feature of which is "a vapor holder constructed for the free and uniform distribution of the vapor therein by gravity," the dominating idea of the invention being to vaporize the liquid used on its entrance into the vapor holder by the

heat of the metal, and to cause the vapor to flow around the burner in a trough by gravity. The invention is not a pioneer one, however, and the patent must be limited in construction to substantially the means described. As so construed, it is not infringed by a burner in which the trough contains a circular flat asbestos wick standing vertically which carries up the oil from the trough; vaporization and combustion, in part, taking place at its upper edge.

2. **SAME—CONSTRUCTION OF CLAIMS—LIMITATION BY PROCEEDINGS IN PATENT OFFICE.**

An applicant for a patent, who trims away, modifies, and otherwise defines his specification and claims to meet references made by the Patent Office, must be deemed to have surrendered and disclaimed what he conceded, and to have imposed such definitions upon the language of the patent as he attributed to it in order to secure the grant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 38, Patents, § 244.]

3. **TRIAL—NUMBER OF WITNESSES—TESTIMONY OF EXPERTS IN PATENT CAUSES.**

The practice of introducing a large number of expert witnesses in patent causes is not to be commended, one competent witness on each side being usually sufficient to insure a full and fair elucidation of what is recondite in the case. The province of such witnesses is to instruct, and not to decide questions in issue, nor to advocate the cause of the party who calls them.

Appeals from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

For opinion below, see 157 Fed. 562.

Philip Mauro, for appellants.

T. W. Bakewell, for appellees.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. These causes, being similar in all material facts, were heard together in the court below and here. They were suits brought by separate bills against the defendants therein named, respectively, in which the complaint was of the infringement of letters patent No. 475,401, issued to William R. Jeavons, May 24, 1892, for improvements in oil burners. The complainant claimed to be the owner of this patent by assignment. The defendants denied the validity of the patent, and they also denied infringement. The validity of the patent was denied upon the ground that the supposed invention had been anticipated by certain prior patents. The causes were heard in the court below upon pleadings and proofs, and the court being of opinion that the first claim of the patent was valid and infringed decreed for the complainant in both cases, awarding perpetual injunctions, and damages and profits to be ascertained upon a reference to the master, which was ordered. The defendants in each case thereupon appealed.

This patent was the subject of a former suit which came to this court on an appeal from the Circuit Court for the Eastern District of Michigan, wherein it had been held void. But we were of the opinion that the first claim thereof was valid and had been infringed. We therefore reversed the decree, and remanded the cause for further proceedings. *Cleveland Foundry Co. v. Detroit Vapor Stove Co.*, 131 Fed. 853, 68 C. C. A. 233. The fifth claim of the patent was for a process of generating vapor from liquid hydro-carbon and burning it;

but that claim was not relied upon, and we expressed no opinion upon that or any other of the claims than the first. The defendants in the cases before us are other persons than the defendant in the former case, and of course are not concluded by the judgment in that case. But it must be expected that we would adhere to our former opinion upon a record substantially the same.

The claim in question, and principally relied upon here, reads as follows:

"A hydro-carbon vapor burner, consisting of a vapor-holder constructed for the free and uniform distribution of the vapor therein by gravity and having a free opening for the escape of vapor, in combination with perforated combustion-walls, having a flame-space between them in communication with the said holder, substantially as described."

A rude drawing illustrating the invention is shown at page 854 of 131 Fed., page 234 of 68 C. C. A.

Upon the question of the validity of this first claim, the defense that the invention was anticipated is supported by reference to the same patents that were put in evidence for the same purpose in the former case, supplemented by some others, of which a patent to Helme, No. 59,393, granted November 6, 1866, for a hydro-carbon burner, and one to Morrill, No. 55,032, granted in the same year for petroleum stoves, are advanced as being most pertinent. But these latter come no nearer to the Jeavons invention than did those canvassed by us in the former case, and are of no importance, except possibly they may serve as restrictions upon the range of equivalents due to the Jeavons patent, if, indeed, it is entitled to so broad a range as to approach them. We do not consider it worth while to analyze them, though we may refer to them in another place for some particulars. We see no reason for changing our opinion touching the first claim of this patent, either in respect to its validity or its scope. It seems unnecessary to go over in detail the reasons on which our judgment was rested. To sum them up, we held that this claim was too broad if read without qualification; but that in order to save it we might suppose it to refer to the specifications for its interpretation, and being so construed the claim could be held valid for the apparatus described; not that the invention was limited to the exact details of construction, as if there were no equivalents possible, but to those of the kind and character described. We were of opinion that the dominating idea of the invention was to provide means whereby the material employed, whether kerosene or other hydro-carbonaceous liquid, should be vaporized at the place of its entrance into the vapor holder, and thereupon the vapor should flow into and pass around the base of the burner in a trough. The flow of the vapor is induced by the force of gravity, and tends to an even horizontal surface throughout the base of the burner, as does any fluid heavier than air when its way is not obstructed. As the volume of the vapor is increased, its level surface is pressed upward into the combustion chamber as the surface of water in a tube is pressed upward by the pressure of other water let in at the base of the tube by the pressure of a more elevated supply or other kind of force. The theory is that the hydro-carbonaceous fluid is let into the generator drop by drop, and is instantly converted into vapor by the heat of the apparatus, the

heat being communicated through the material of the burner from the combustion chamber. This is the mode of operation within the burner after the action of the burner becomes normal. The initial step of "lighting" it is different, especially when the fluid used is not easily combustible. A small wick, preferably of asbestos, is laid in the bottom of the trough and enough of the fluid is let in to saturate it. Thereupon it is lighted; and the heat generated thereby is communicated to the base of the burner and the walls of the combustion chamber to a degree sufficient of itself to maintain the vaporization of the fluid as the latter comes into the base of the burner. Thereupon the normal process begins, as before explained. What was new in the Jeavons invention, as stated in his first claim, when construed as being for the structure described in his specifications to effect the results stated in the claim, which, as we have said, is the only way in which the claim can be supported, was a construction of the burner which would accomplish such a normal operation as we have described. And as he describes only one organization of means for that purpose, he is restricted to that, or substantially that. The liberality of construction which we think may be given to his claim for the purpose of interpreting it cannot be extended to include all means which might be devised to accomplish even a like result, without such a perversion of the rule applied as would disturb other well-settled doctrines of patent law.

Counsel for the appellee contends that the Jeavons invention was of a primary character, a pioneer in the art, and so is entitled to a broad construction, one as broad as the generality of the language of the claim would include. Evidently this contention is made upon the recognized necessity of construing this claim as covering a wider field than we held in our former opinion it was entitled to, in order to lay the ground for the charge of infringement. It is contended, for instance, that Jeavons was the inventor of wickless burners; that is, of burners in which combustion of the vapor occurs at a place remote from that of the vaporization, and so dispenses with the inconveniences which arise from the use of a wick, such as bad odors from its burning, its uncleanness, its liability to get out of order, and care of management. No doubt if this contention could be maintained it would considerably enlarge the merits of the invention. That Jeavons was not the first to devise a wickless burner is shown by the recitals of former methods in his specifications. He recites four forms of burners then in use; the third and fourth of these were wickless burners, and the vaporization took place before it reached the place of combustion, as follows:

"Thirdly, by generating the vapor in a suitable retort in which the vapor is subjected to a head or pressure and depending on the artificial pressure in the retort to distribute or feed the vapor. This style of burner is exemplified in the well-known vapor-burner which feeds through a jet-orifice; fourthly, by evaporating or vaporizing gasoline or other light hydro-carbon on an exposed surface by passing a current of air over the same and then feeding the carbureted air to the burner, the old and well-known carbureting devices being of this class."

And in the proceedings in the Patent Office, he distinguishes his own from the third form above mentioned by saying that he locates



a valve between the source of supply of material and the vapor-holding basin. And some of the former patents shown in the record confirm this admission. It did not need invention to locate a valve in the supply pipe to regulate the inflow, when but for it the admission of the oil would be unmanageable. In his application for the patent, Jeavons made this regulating valve an element in all his claims. But it entirely disappeared during the course of the subsequent proceedings. For the present, however, we are only concerned with those earlier structures in the respect that they negative the claim that the Jeavons patent first disclosed a wickless burner. In order to differentiate his structure from those of earlier patents, the patentee expressly states that his own "involves, first, the conversion of the oil into vapor by exposing the oil to a heated surface, and then distributing or conveying the vapor by its gravity to the place or places where or about which the vapor is supplied to the burner and maintains combustion," and in his claim he includes as an essential element "a vapor holder constructed for the free and uniform distribution of the vapor therein by gravity." And this element cannot be ignored. And, indeed, it may be added that without it this first claim would have nothing new in it. And we cannot doubt from what occurred in the Patent Office and the references to earlier patents there made that this first claim was allowed because of that novel feature. Another matter which we should notice before passing to the question of infringement is that the patentee states it to be essential that the vapor in the holder shall be protected from air currents and from premature combustion, and to that end he provides a flange projecting inwardly from the upper edge of the outside wall of the vapor holder. This partly covers the opening from the holder into the combustion chamber and partially closes in the vapor holder, and shields its contents from currents of air from the outside, from whence they would be most troublesome. And again he says, in describing the operation of his device:

"The vapor thus generated being protected from adverse air currents, gravitates," etc.

This flange is shown in the drawings and lettered. If we import the specifications into the claims it would seem that this characteristic of the vapor holder should go with it, as showing what vapor holder the patentee means by his claim. The language of the claim is that the vapor holder shall have a "free opening," but he states that by these words he means "an opening of sufficient area to supply the vapor freely to the burner." So read, and taken in connection with the specifications and drawings, we think the claim means only a "sufficient area" in the opening for the purpose of supplying vapor. We further notice that near the end of his description of the invention the patentee uses this language:

"However the vapor might all be generated outside of the holder A in the duct II, for instance, and the action of the vapor traveling within the holder would be substantially the same when discharged into it, the holder, of course, being heated to prevent condensation."

The effect of this is to broaden this element of the claim so as to make it one for a combination in which the vapor holder includes the

adit pipe, for the patentee insists throughout that vaporization takes place in his vapor holder.

Other considerations which affect the scope of the Jeavons patent arising upon the proceedings in the Patent Office on his application for it will be adverted to in discussing the question of infringement. The applicant had a long struggle in securing his patent, and was constrained to trim away, modify, and otherwise define his specifications and claims to meet the references made by the Office until they were brought within very narrow limits, before his patent would be allowed. He must be deemed to have surrendered and disclaimed what he conceded, and to have imposed such definitions upon the language of the patent as he attributed to it in order to secure the grant. *Sargent v. Hall Safe & Lock Co.*, 114 U. S. 63, 86, 5 Sup. Ct. 1021, 29 L. Ed. 67; *Thomas v. Rucker Spring Co.*, 77 Fed. 420, 23 C. C. A. 211, 47 U. S. App. 125; *Dowagiac Mfg. Co. v. Superior Drill Co.*, 115 Fed. 886, 896, 53 C. C. A. 36; *Hale v. World Mfg. Co.*, 127 Fed. 964, 967, 62 C. C. A. 596; *Muller v. Lodge & Davis Machine Tool Co.*, 77 Fed. 621, 629, 23 C. C. A. 357; *Warren v. Casey*, 93 Fed. 963, 36 C. C. A. 29; *Streit v. Kaiper*, 143 Fed. 781, 783, 71 C. C. A. 167; *New York Asbestos Co. v. Ambler Asbestos, etc., Co. (C. C.)* 103 Fed. 316. It is a corollary of this proposition that if the applicant successfully defends his position and secures the assent thereto of those in the Office having charge of the application, and the patent issues notwithstanding the objection which had at one time been urged, the patent is not subject to diminution on that account. The alleged infringement consists of the manufacture and sale of a burner which has a circular trough at its base like that of the patent. In this is located a circular flat asbestos wick, secured between two perforated metallic strips—all standing in the trough vertically. The lower edge of the wick rests in the bottom of the trough. The wick carries the oil upward, and combustion takes place at its upper edge, where the vapor is formed. Not all the vapor is there made, for the heat in the material of the holder probably assists. Nor is the vapor all burned there, for part of it passes up into a combustion chamber and is there burned. But the general features of the process are as stated. The opening from the trough into the chamber is not contracted, and the vapor passes up without constraint. The oil is admitted into the trough by two opposite inlets located in, or at, the bottom of the trough. The important differences from the patent are these: The vaporization does not take place at the entrance of the oil into the trough of the burner, but after the oil has been distributed through the trough and wick to the upper edge of the latter; there is not the distribution of the vapor by the force of gravity, such as the patent contemplates; there is no other manifestation of gravity than must always occur where two fluids of differing density are present and whose relative movements are free. There is nothing new in this element which is made so much of as an element of this invention, if it means no more than the mere natural tendency of a fluid toward a level surface when brought to a state of rest. There is no contraction at the upper edge of the trough or vapor holder whereby the upward flow of vapor is in part restrained and equal diffusion of the vapor in all parts of the holder compelled. It

might be, though we hardly think so, that upon the face of the patent the flange at the upper edge and on the inside of the outside wall of the vapor holder could be regarded, not as essential, but only desirable. But all doubt upon this subject is removed upon examination of the proceedings in the Patent Office. That characteristic was developed into much prominence, and the applicant repeatedly called attention to it as an important part of his invention, and by it differentiated his own from the structures in former patents. He points out that it performs two essential functions: First, that it excludes currents of air until the vapor reaches the place of combustion; and, second, that it tends to compel the equal diffusion of the vapor in all parts of the holder. It is manifest that the flange is a part of the vapor holder. Again, the first claim of the appellees' patent intends a construction of the vapor holder which will permit of a free lateral flow of the vapor therein. The "strand" of absorbent material which is laid in the bottom of the holder for initial lighting when the material used is of a heavy sort does not appreciably obstruct the lateral flow of vapor, and it is proper to say that, notwithstanding it, the flow is free. But it could hardly be said that, in presence of the appellant's wick supported on either side by a metallic strip, there is a free lateral flow of the contents, and we can scarcely doubt that the provision of more than one adit for the material used is intended to accomplish that more equal dissemination of the material in the holder, which the free flow of vapor in the trough under the influence of gravity in the Jeavons holder is intended to supply. We are therefore brought to a different conclusion in regard to the matter of infringement of the first claim of the patent from that reached in the court below.

Not much has been said by counsel about the fifth claim, which is for the process of the apparatus described in the first. And if the apparatus used by the appellant is so far different from that of the appellee that it does not infringe, the process, which, in mechanics, is merely the exercise of the functions of the machine or apparatus, cannot be an infringement of any right secured by the patent. The conclusion we have reached upon this branch of the case makes it unnecessary to consider the defenses that there has been no disclaimer of the fifth claim, that he was a joint inventor with another, that the invention had already been patented by the same inventor, and of an estoppel which is said to have arisen because of a certain license contract made by the appellee with the appellant and other manufacturers; and we express no opinion upon those subjects.

We note that more than two-thirds of the nearly one thousand pages in this record are taken up by the testimony of expert witnesses, of whom there were 11 or 12, arrayed in about equal numbers on the opposite sides, and the reading of it has imposed upon the court a needless burden. As a contest between gentlemen learned in the science of the subject, it might be interesting if one had leisure, though it seems sometimes to run into very attenuated points. This prolixity seems not so much the fault of the witnesses as a mistake of the counsel. It is not the province of witnesses to advocate the cause of the party who calls him, nor to pass upon the questions of law and facts presented by the controversy. Frequently an expert witness may be of much aid

to the court in explaining matters which can only be appreciated and understood by learning higher than the ordinary; but his province is to instruct and not to decide; and even the instruction is of uncertain value when it is colored from standing in the place of a partisan for one of the parties. Usually the testimony of one competent witness on each side is enough to insure a full and fair elucidation of what is *recondite* in the case. The voice of a single teacher is worth more than a confusion of many tongues. And the expense is worse than useless.

The decree of the court below will be reversed, with costs, and the bill will be dismissed.

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PRUDENTIAL INS. CO. v. WESTINGHOUSE ELECTRIC & MFG. CO.

(Circuit Court of Appeals, Third Circuit. February 6, 1908.)

No. 42.

PATENTS—INVENTION AND INFRINGEMENT—FASTENING MEANS FOR CORE-PLATES.

The Nolan patent, No. 582,481, for fastening means for core-plates of electrical machines, claims 2 and 4, disclose invention, and are valid. Also *held* infringed.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 155 Fed. 749.

Thomas F. Sheridan and Clifton V. Edwards, for appellant.

W. K. Richardson and A. D. Salinger, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below a decree was entered in favor of the Westinghouse Electric & Manufacturing Company, holding that claims 2 and 4 of patent No. 582,481, issued to Nolan, its assignor, for fastening means for core-plates of electrical machines, were valid and infringed by the Prudential Insurance Company. From such decree the latter appealed.

This patent concerns electrical generators and motors, and has particular reference to means for fastening the laminæ of the cores of such machines in position. As the device in question is illustrated and fully described in the opinion of the court below in 155 Fed. 749, we limit ourselves to adding that these laminæ are thin annular or segmental iron plates, mounted on the spider or frame attached to an armature shaft. They have a succession of grooves at their outer surface in which the conducting wires are laid. They are insulated from each other to prevent waste currents passing across the core. Without laying stress on the electrical limitations which make objectionable certain obvious mechanical methods by which such laminæ could be bolted in place, it suffices to say that ease in removing laminæ or adding to their number make a device embodying such features greatly desired in the electrical art. This, the avowed object of the patent, is stated therein, *viz.*:

"The object of my invention is to provide a simple, inexpensive, and efficient means for fastening the laminæ of the cores of electrical machines together and to the casting constituting the support of the same, and one which may be readily inserted and as readily removed when it is desired to dismember the machines for any purpose."

To do this Nolan placed the laminæ on the cylindrical outer periphery of an armature spider, and kept them from sidewise movement in one direction by the usual fixed flange or shoulder at one end of the spider. His device related to the other end, and held the laminæ in place, and prevented their sidewise motion in the other direction. This he did by cutting in the periphery of the spider a circumferential groove of square cross-section. He then took a spring split-ring of corresponding square cross-section, but of such size that when compressed it could be wholly seated in the groove, and made not to reach above the spider surface. When uncompressed, and in its normal position, its tension and size was such that a part of it remained in the groove and a part extended above the spider surface and formed a shoulder thereon. He then took an annular, movable plate or flange, adapted to sleeve on the spider, and, when restrained by the protruding split-ring, hold the laminæ in place. On the outer edge of the opening in the center of this plate he made a circumferential cut or enlargement, corresponding in cross-section to and adapted to engage with the split-ring when the latter extended above the spider surface. When thus engaged the conjoint action of the groove, split-ring, and annular plate was such that the groove locked the split-ring against outward lateral movement, the split-ring locked the annular plate against like outward lateral movement, and the annular plate locked the split-ring from flying from the groove through centrifugal force. The device is thus operated. The desired laminæ being in place, the annular plate is pressed inward against them by suitable mechanism to a point slightly beyond the inner side of the spider groove. The split-ring is then sprung into the groove, the core-plate is released and springs outward against the ring. By such coaction the three elements of a split-ring—an outer circumferential groove on a spider, and an inner circumferential groove and shoulder on a core-plate, each of which, in itself, we may assume was old—effected a novel and highly useful advance in armature construction.

The prior art and the merits of this device are so fully set forth in the opinion of the court below that the reference thereto renders needless further discussion. It suffices to say we find, as did that court, nothing in the prior art to anticipate Nolan's device. On the contrary, a study of it but emphasizes the novel, simple, and effective invention he made. The respondent's construction embodies, in combination and in substantial form, all the elements of the second and fourth claims of the patent. The decree of the court below is therefore affirmed.

WESTINGHOUSE ELECTRIC & MFG. CO. v. PRUDENTIAL INS. CO.  
(two cases).

(Circuit Court of Appeals, Third Circuit. February 6, 1908.)

Nos. 41 and 42.

## PATENTS—NOVELTY—FASTENING MEANS FOR CORE-PLATES.

The Nolan patent, No. 582,481, for fastening means for core-plates of electrical machines, claims 1 and 3, which do not include as an element a shoulder on the annular plates for holding the spring-ring in its groove, which constitutes the gist of the invention as disclosed in the other claims, are void for lack of patentable novelty.

Appeal from the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 155 Fed. 749.

W. K. Richardson and A. D. Salinger, for appellant.

Thomas F. Sheridan and Clifton V. Edwards, for appellee.

Before DALLAS, GRAY, and BUFFINGTON, Circuit Judges.

BUFFINGTON, Circuit Judge. This is an appeal by the Westinghouse Electric & Manufacturing Company from a decree of the court below holding invalid claims 1 and 3 of its patent No. 582,481, granted to Edward E. Nolan for fastening means for core-plates of electrical machines. In an opinion heretofore filed, we have discussed and sustained that patent, and held its second and fourth claims infringed. In speaking of the claims held invalid, the court below, and we agree with that view, said:

"The evidence shows that a large armature sometimes revolves at a speed, at its surface, of one mile or more per minute. In such an armature the centrifugal force is so great that it is desirable to have the spring-ring, where it is used, held firmly in the groove. Claims 1 and 3 omit any reference to a shoulder on the outer side of the annular plate, and they are fully sustained by annular plates resting against the inner surface of the spring-ring without any shoulder on the annular plates for holding the spring-ring in the groove."

But, as we have seen in discussing the patent, this restraining shoulder of the annular plate is of the very gist of the device. Discard it or its function in substantial form, and we do not obtain the result which makes Nolan's device useful and patentable. So holding, it follows the court's view of these claims was just, and its decree is therefore affirmed.

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FRANK F. SLOCOMB & CO., Inc., v. TURNER.

(Circuit Court, E. D. Pennsylvania. January 29, 1908.)

No. 28.

## PATENTS—INFRINGEMENT—MACHINES FOR FINISHING LEATHER.

The Anderson patent, No. 457,331, the Pierce & Poinsett patent, No. 623,423, and the Holmes patent, No. 538,914, all relating to staking machines in the art of finishing leather, *held* infringed by the machine of the Scott patent, No. 819,605.

In Equity. On final hearing.

E. Hayward Fairbanks, for complainant.  
Conard & Middleton, for respondent.

J. B. McPHERSON, District Judge. I have given attentive consideration to this case with its few and narrow points of difference between the parties, and am of opinion that the three claims insisted upon, namely, claim 3 of the Anderson patent, No. 457,331, claim 1 of the Pierce & Poinsett patent, No. 623,423, and claim 1 of the Holmes patent, No. 538,914, all relating to staking machines in the art of finishing leather, have been infringed by the defendants' machine, which is manufactured under the Scott patent, No. 819,605. Indeed, the defense brought forward lacks strength so visibly that I have been inclined to believe that not much reliance is placed upon it by the defendants themselves. For the present, therefore, I shall not take what seems now to be the superfluous trouble to say anything further about the case, except to direct the usual decree to be entered in favor of the complainant, with costs. But if an appeal be taken, and the defendants should desire a statement of my views in more detail, I shall endeavor to comply with their wishes.

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CALLAHAN v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division, January 25, 1908.)

No. 185.

**1. NEW TRIAL—EVIDENCE OF JURORS TO IMPEACH VERDICT—COMPETENCY.**

Jurors may testify to any facts showing attempts of others to improperly influence their verdict; but they may not testify to the effect upon them of such attempts. It is for the court to determine whether or not the attempts shown are of a character that the verdict might have been improperly influenced thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 290.]

**2. SAME—GROUNDS—MISCONDUCT OF OTHERS AFFECTING JURY.**

Where an improper attempt to influence jurors in a case on trial was such that it might have had an effect on the verdict returned, it is sufficient to condemn such verdict and require a new trial, although the successful party may not have instigated the attempt or had knowledge of it.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 37, New Trial, § 96.]

At Law. On motion for new trial.

Wade, Dutcher & Davis and Crosby & Fordyce, for plaintiff.  
Cook, Crocker, Loomis & Tourtellot, for defendant.

REED, District Judge. This action is to recover damages for a personal injury alleged to have been sustained by plaintiff because of the neglect of an engineer of one of defendant's trains. There have been two trials of the case. The first resulted in a disagreement of the jury; the second in a verdict of \$100 for plaintiff, and he moves for a new trial upon various grounds, one of which is that such improper influences were exerted in the interests of the defendant upon some of the jurors during the trial as to vitiate the verdict. The case was closely contested upon both trials, and the evidence is such that different minds might fairly reach different

conclusions therefrom, both as to the negligence of the engineer and the extent of plaintiff's injury. The verdict should not therefore be disturbed upon the evidence if it was fairly reached.

The jury for the second trial was impaneled in the forenoon of Wednesday, April 3, 1907, the second day of the term; the cause was submitted to it April 8th, and the verdict returned April 9th. Shortly thereafter rumors were rife that the verdict was the result of improper influences exerted upon, and misconduct of, some of the jurors. In a motion for a new trial this was vaguely charged; whereupon the court called upon counsel for the plaintiff for a statement of the facts upon which the charge was based. They answered that rumors were current following the trial that one of the jurors had mysteriously received during the trial a letter containing money, or a check for money, for some improper purpose; that entertainment of some sort had been furnished to others of the jurors by the claim agents of the defendant, or others in its behalf; that these and other similar rumors had become so widespread that voluntary information could not then be obtained to substantiate such charges; but if certain of the jurors and other persons named could be brought before the court and examined, they believed the charges could be sustained. The court thereupon ordered that specific charges be put in writing and filed as a part of the motion for a new trial, and that several of the jurors and other named persons be summoned to appear for examination in regard to such charges. The jurors and persons so named and others have been summoned and examined, and the matter is now finally submitted for determination. From the evidence thus taken, the charge of the improper receipt of money, or a check for money, by one of the jurors is wholly without foundation, and that charge needs no further consideration. It may also be said that others of the rumors are but gross exaggerations of trivial facts occurring during the trial that could not in any event have influenced the verdict. Others of the charges, however, cannot be thus disposed of.

It appears that there was drawn upon the original panel of the trial jury three persons from Hardin county and two from Grundy county. On the first day of the term the panel had been reduced by excuses, or for other reasons, so that it became necessary to draw additional jurors. In this drawing three of those drawn were from Hardin county and three from Grundy county; so that of the trial jurors for that term six were from Hardin county and five from Grundy county. These counties adjoin each other—Grundy lying east of Hardin, in the northwestern part of this division of the district. This case was the first for trial, and upon the completion of the second drawing of jurors in the afternoon of the first day Mr. Earhart, one of defendant's claim agents, and whose duty it was to investigate and obtain information as to jurors summoned, to enable defendant's attorneys to properly exercise its challenges in cases it had for trial, requested, by telephone he says, J. W. Pepperman, of Grundy Center in Grundy county, to come to Cedar Rapids in order that he might get from him information as to the jurors drawn from that vicinity. He also communicated with



Charles E. Shaw of Iowa Falls in Hardin county for the same purpose; but just when, is left in some uncertainty by the testimony. It may have been at the same time that he communicated with Mr. Pepperman, or it may have been shortly before the term. The jury to try the case was composed wholly of jurors drawn upon the first or original panel; none of the second drawing having at the time it was impaneled appeared. William Weimer of Radcliffe, Hardin county, and Anson H. Miller of Grundy Center, Grundy county, were drawn and accepted as two of such jurors. This was the only case defendant had for trial at that term, and it had no occasion to obtain information as to the other jurors after this jury was impaneled. The next morning (Thursday) after the jury was impaneled, Charles E. Shaw of Iowa Falls appeared in Cedar Rapids, and remained there until Saturday night of that week, and during that time he was not in or about the courtroom where the trial was in progress. Mr. Shaw was the right of way agent of a railroad then in process of construction through Hardin county. He had been frequently applied to by claim agents of the defendant prior to this term for information regarding jurors drawn from that vicinity for the federal court, and had been applied to by Mr. Earhart for such information as to those drawn for this term. It is not suggested that there was anything wrong on improper in this, nor could it well be, for it is legitimate for either of the parties to obtain, in a proper manner, such information in order that they may properly exercise their challenges. The claim, however, is that this shows the intimacy between the claim agent and Mr. Shaw and Mr. Pepperman; and it is of their subsequent conduct in this case that complaint is made. Some time during the week before the term, Shaw called the juror Weimer at Radcliffe by telephone, and said to him, as he says, "I heard you are going to Cedar Rapids in a few days, and asked him which way he was going; he told me, and I said I am going to Cedar Rapids during that week, and I will see you there, and we will have a little visit." Radcliffe is some 20 miles southwest of Iowa Falls. No explanation whatever is given why Shaw desired to visit with Mr. Weimer in Cedar Rapids, while there as a juror. Shaw's memory is not very good, but he admits that he had been acquainted with Earhart for a number of years, and might have received a letter from him about jurors before this conversation by telephone with Mr. Weimer. He says that his only mission to Cedar Rapids at this time was to procure from Mr. Allen who lived there about half an acre of land owned by him, for the right of way for the new road for which he was agent; that he was in Hampton, north of Iowa Falls, on Wednesday, and was then informed by an agent of Allen at that place that Allen would be in Cedar Rapids on Thursday; that he then drove to Iowa Falls, and took a late train for Cedar Rapids that evening to meet Allen, without having made any appointment with him, though he knew Allen was a traveling man and away from home a good deal; that he arrived in Cedar Rapids early Thursday morning, and learned that Allen was not at home, and that he had to wait until Saturday to meet him, and

then failed to arrange for the right of way, and it had to be condemned. The conversation he had with Mr. Weimer over the telephone was some days before he received the information at Hampton that Allen was to be in Cedar Rapids on Thursday of that week. Shaw says he met the juror Weimer on the street in Cedar Rapids Thursday, in the evening he thinks, and again Friday evening at the Allison hotel where he (Shaw) was stopping; that Weimer then suggested that it would be a nice thing if they could have a glass of beer together; that Shaw then said he would get two or three bottles of beer and take them to his room in the hotel, and they could go there and drink it; that he did get some beer, crackers, and cheese and that he, Weimer, and Mr. Myers of Hardin county, another juror (but not engaged upon this trial) to whom Weimer then introduced him, went to Shaw's room about 9 o'clock, drank the beer, ate the lunch, and stayed there from one to two hours; that at that time he knew nothing about this case, and says positively that he did not know that Weimer was then a juror in any case, and said nothing to him about the Callahan case at any time. Mr. Weimer denies that he suggested to Shaw that it would be a nice thing if they could get some beer and drink it together; and says that Shaw invited him twice to come to his room at the hotel in the evening; that he accepted the second time, and he and Meyers then went to Shaw's room one evening where Shaw had previously provided beer and a lunch for them; that Shaw at one time met him (Weimer) on the street during a recess of court, and said to him that the Callahan case was "a hold-up case." Weimer says that he paid no attention to this; and that Shaw at another time met him in a billiard room and commenced talking about the case; said it had been once tried, and the "jury hung"; and that it was a "hold-up case." Weimer then told him that he was a juror, and that he must not talk about the case. Shaw then said "I know you are a juror and can't talk about it, but we will talk it over more fully after the trial." This was after Shaw had invited him to his room, and after this conversation Shaw said nothing more to him about the case. Mr. Meyers corroborates Mr. Weimer that the lunch and beer were in Shaw's room when they went there.

J. W. Pepperman of Grundy Center, Grundy county, also came to Cedar Rapids that week, but the date he is unable to state, and it does not appear, but it was at least a day or two after the jury was impaneled. He arrived about midnight or later, saw Mr. Earhart shortly after he arrived and had a few minutes conversation with him about jurors. About noon the next day Pepperman left Cedar Rapids with a Mr. Thompson, went to North Liberty, and returned to Cedar Rapids about 6 o'clock in the evening. He is not certain that he saw the juror Miller before he left that day; but on his return in the evening he again saw and conversed with Earhart, but what passed between them is not stated. He then met the juror Miller of Grundy Center, with whom he was well acquainted, in a billiard room and played billiards with him until about 8 o'clock, and then they went to a show of some kind—he is unable to state what. Either on the street, or at the hotel

where Mr. Meyers and Mr. Weimer stopped, they met or found these jurors, and Mr. Pepperman invited them to go to the show with him and Miller. Pepperman had procured tickets for the four and all started for the show, Meyers and Weimer walking together, and Miller and Pepperman together. On the way they met another of the Grundy county jurors (who was not on this trial), and Pepperman invited him to go with them to the show. Pepperman says that he knew Weimer and Miller were jurors on a case on trial, but that nothing was said about it while he was with them, and that he did not know what the case was. It does not appear where Pepperman and Miller went, or what they did, immediately after the show; but Pepperman left for home on a train leaving Cedar Rapids about midnight, the first train after he returned from North Liberty. Pepperman is county treasurer of Grundy county, was formerly sheriff and deputy sheriff of that county for a number of years, and was frequently applied to by claim agents of defendant, including Earhart, with whom he had been acquainted for many years, for information about persons drawn as jurors from that vicinity for this court. He says that he received a telephone message from Earhart to come to Cedar Rapids shortly before he came, that he was intending to come soon, and then concluded to come to consult Mr. Thompson, who was agent for a safe company, about purchasing a safe for the county of which he was treasurer; that he had no previous negotiations with him about the matter, and had no appointment to meet him; that he was acquainted with Thompson, knew that he was a traveling man and absent from home a good deal, but that he had been informed by some others of the county officers that he would be at home about that time; and it was to look at a safe or a safe door that he went with Thompson at his request to North Liberty. The county subsequently bought a safe from another company. Grundy Center is about 70 miles from Cedar Rapids, and Iowa Falls some 30 miles farther. Earhart says that he offered to reimburse Pepperman for his expenses in coming to Cedar Rapids, but that he declined to accept anything. It also appears that one Youell, a former sheriff of Benton county, was in Cedar Rapids during the second trial of the case, and was seen around the federal building at different times. One of the jurors drawn for the term at which the case was first tried testifies that at that time Youell approached him and said, "If you are drawn on this coming case of Calhahan against the railroad company, if you can do anything for the Milwaukee Railroad Co., I will see that your expenses are paid. I was not drawn on the jury, but I saw him around the courthouse, and I thought he was more or less acquainted with all of the jurymen." There is no evidence that Youell approached or said anything to any of the jurors at the term of the second trial. It appears that the jury stood 9 for plaintiff and 3 for defendant for about 20 hours before the verdict was agreed upon. They at one time reported their inability to agree, but were required to return and make a further effort to do so. Mr. Weimer was one of the nine who stood for the plaintiff, and Mr. Miller one of the three who stood for the defendant. The foregoing is in substance the testimony showing the conduct of Shaw and Pepperman with members of the jury.

The theory of defendant is that inasmuch as the juror Weimer stood consistently for the plaintiff to the last, he was not influenced in the least by the conduct of Shaw, whatever that conduct may have been, therefore that conduct was not prejudicial; and, as nothing was said about the case by Pepperman to either of the jurors Weimer or Miller, they could not have been influenced in any way by Pepperman's conduct. It is also said that Pepperman was a politician and office holder in Grundy county, a member of the minority party in that county and "a good mixer," whatever that may mean, and was always elected by large majorities over his opponents of the majority party (all of which the defendant developed by its examination of Pepperman), and that what he did at Cedar Rapids at this time was, as he says, only "mixing a little bit," presumably to make himself popular with these jurors; and therefore the verdict should not be disturbed because of his conduct. It would seem that much reliance was placed upon the credulity of the court in advancing the latter as a reason for excusing the conduct of Pepperman with these jurors. A more plausible theory for the presence of Pepperman in Cedar Rapids at that time might be that his qualities as "a mixer" was known to the claim agent of the defendant, and that he thought "a little mixing" by Pepperman among the jurors from his neighborhood who were upon this trial might at least prevent any substantial verdict against this defendant. Be this as it may, that Shaw and Pepperman came to Cedar Rapids at this time for the sole purpose as stated by them, respectively, of negotiating for a half acre of right of way, and to see about a safe for Grundy county, is inconsistent with the established facts. Earhart admits that he requested them to come; and that they came at this time solely in response to that request is the only reasonable inference that can be drawn from the whole testimony. Earhart's motive in so requesting them may have been for the purpose of obtaining, in a proper manner, information as to the jurors from these counties that were summoned upon the second drawing; and he may be entitled to the benefit of such a presumption; but after the jury in this case was impaneled he then had, and he so says, no occasion for such information. But the conduct of Shaw with the juror Weimer was reprehensible in the highest degree, and it cannot be successfully defended. That he intended to poison the mind of Weimer against the plaintiff is not a matter of doubt. If the attempt failed it was not his fault.

Mr. Weimer is, or had been, a member of the board of supervisors of Hardin county, and is a man of good character and standing; but his acceptance of the invitation of, and entertainment from, Shaw, instead of reporting his conduct to the court, after he had attempted to poison his mind against the plaintiff, subjects him to criticism, though doubtless he did not realize that he was doing anything improper. That Pepperman's conduct was also pernicious, and but little less reprehensible than that of Shaw, is also clear, though he and Miller both say that no word was spoken between them with reference to the case. But the very absence of such words in view of their relations, and the kindly treatment of the juror, may have exerted a far more insidious, and therefore dangerous influence than any words that

could have been spoken. Their conduct brings suspicion upon and discredit of this verdict; and a verdict tainted with suspicion that it is the result of improper influences exerted upon the jurors tends to destroy all confidence in, and respect for, the trial by jury, and should be set aside as a matter of public policy.

It is strongly urged in behalf of defendant that it knew nothing of the influences exerted upon these jurors, and it should not therefore be deprived of its verdict, which it claims the evidence is amply sufficient to sustain. Some authorities may support this contention. But premitting the question of the knowledge of the claim agent of the conduct of Shaw and Pepperman, and admitting, without deciding, that he did not instigate such conduct, it is clear that the conduct of Shaw, at least, was exerted in the interest of this defendant; and the weight of authority and the better reason is that that is sufficient to condemn the verdict where the improper conduct is such that it might have influenced it in favor of the party for whom it is returned. *Welch v. Taverner*, 78 Iowa, 207, 42 N. W. 650; *Stafford v. Oskaloosa*, 57 Iowa, 748, 11 N. W. 668; *Johnson v. Root*, 2 Cliff. 108, Fed. Cas. No. 7,409; *McDaniels v. McDaniels*, 40 Vt. 363; *Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449. Neither of the jurors would admit that he was influenced by anything that was done by either Shaw or Pepperman, and it was hardly to be expected that they would; but they are not permitted to say this. They may testify to any facts showing attempts to influence them, and it is then for the court to determine whether or not what had been done was of such character that it might have influenced the verdict. *Mattox v. United States*, 146 U. S. 140-148, 149, 13 Sup. Ct. 50, 36 L. Ed. 917. Who can say that the poisonous suggestion of Shaw that "this is a hold-up case, it has been tried once and the jury hung; I know you are a juror, and can't talk about it, but we will talk it over more fully after the trial," may not have unconsciously influenced the juror Weimer to yield his convictions to those of Miller, the friend and fellow townsman of Pepperman who had furnished entertainment to them both, and that prejudices thus resulted to the plaintiff?

In *Johnson v. Root*, above, Mr. Justice Clifford says:

"Any improper influence with jurors may afford sufficient ground for granting a new trial, and it is not necessary that the attempt to influence the jurors should be made by one of the parties nor even by his agent. It is sufficient that it clearly appears that it was done in his behalf, and it is never necessary to show that misconduct controlled or determined the verdict, providing it was of a character that might have had undue influence."

Jurors must be kept free from all possible influences. When exposed thereto it will not do to inquire into the probability of the extent of the influences, and their effect upon the verdict. There is no safety except in setting aside the verdict in a case where acts and conduct are such that could have influenced the verdict. *Welch v. Taverner*, 78 Iowa, 207, 42 N. W. 650.

In *McDaniels v. McDaniels*, 40 Vt. 363, it is said:

"The friends of the plaintiff who thus approached the jury were guilty of a flagrant violation of the law, and the jurors who suffered themselves to be

so approached, though they may not have meant any wrong, were also guilty. \* \* \* The plaintiff was unaware of these transactions; \* \* \* but it does not follow that he could hold a verdict which is the result of a trial corrupted, though without his fault, by a shameful disregard of familiar rules, which are necessary to a decent administration of the law."

In *Bradbury v. Cony*, 62 Me. 223, 16 Am. Rep. 449, above, it is said.

"The effect on the jury is the same when the tampering is by the party or by his friends or relatives, whether with or without his knowledge."

For other instances where the misconduct was held to vitiate the verdict, see *Stafford v. Oskaloosa*, 57 Iowa, 748, 11 N. W. 668—where one of the attorneys of the successful party participated in celebrating the anniversary of the birth of one of the jurors, though the case on trial was not mentioned; *Veneman v. McCurtain*, 33 Neb. 643, 50 N. W. 955—where a third party furnished cigars to the jury while deliberating, saying they were from defendant, but jury might consider them from either party; *Poole v. C. B. & Q. R. Co.* (C. C.) 6 Fed. 844—where some of the jurors used the room of one of the counsel of the successful party at a hotel, in which to play cards evenings, counsel not present; *Ensign v. Harney*, 15 Neb. 330, 18 N. W. 73, 48 Am. Rep. 344—where two of the jurors used the team of one of the attorneys, with his permission, to go home during recess of court for Sunday. See, also, *Morse v. Montana Purchasing Co.* (C. C.) 105 Fed. 337. The rule deducible from these and other authorities is: That where an improper attempt is made to influence jurors in favor of one of the parties, which might have had that effect, a verdict in favor of such party will be set aside, though the attempt was made without his knowledge or authority.

That the improper influence exerted upon these jurors was in the interest of the defendant is not a matter of doubt; and the court will not stop to weigh with exactness the effect of such influence upon this verdict. It is sufficient to know that it was exerted, and that the verdict might have been influenced thereby. It must be understood that no verdict should be permitted to stand, against which, from established facts, the slightest inference rests that it bears the taint of improper influence exerted by or in behalf of the party in whose favor it is returned. *Mattox v. United States*, 146 U. S. 140-149, 13 Sup. Ct. 50, 36 L. Ed. 917. To uphold this verdict would be, impliedly at least, to approve of the conduct of both Shaw and Pepperman with these jurors; and that would be to cast a most serious imputation upon the trial by jury in this district. Whether or not the evidence is sufficient beyond doubt to convict either of these parties of contempt, or that the evidence given by either could be used against him for that purpose, need not be determined, for that question does not now arise. It does not follow, however, if it is not, and could not be so used, that this verdict should be permitted to stand; and it will be set aside because of their misconduct. Other grounds of the motion are deemed to be untenable, and each thereof will be overruled.

It is not contended that any of the counsel for defendant are responsible for this misconduct, and there is no evidence that in any way

connects any of them therewith, or that unfavorably reflects upon them in the least.

The verdict will be set aside for the reasons above stated, at defendant's costs of the motion for a new trial, and a new trial granted. It is ordered accordingly.

# UNITED STATES v. ANDEM.

(District Court, D. New Jersey. January 17, 1908.)

## 1. COURTS—FEDERAL COURTS—FOLLOWING DECISIONS OF STATE COURTS.

The rule established by decision of the courts of New Jersey that an engrossed act of the Legislature duly approved, signed, and filed is conclusive evidence of its contents, and cannot be contradicted by any evidence whatever, is one relating to the construction of the state statutes and is binding on the federal courts.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 13, Courts, § 957.

Conclusiveness of judgment between federal and state courts, see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478; *Union & Planters' Bank v. City of Memphis*, 49 C. C. A. 468.]

## 2. FORGERY—SUBJECTS OF FORGERY—"CHARACTER"—CORPORATE SEAL.

The seal of a corporation is a "character" within the meaning of section 197 of the New Jersey crimes act (P. L. 1898, p. 848), and the forgery of such seal with intent to injure any person or corporation constitutes a crime thereunder.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 18.]

## 3. INDICTMENT—DEMURRER—GROUNDS.

Under the practice of the federal courts, the defense of limitation cannot be raised by demurrer to an indictment.

## 4. CRIMINAL LAW—LIMITATION OF PROSECUTION—FEDERAL STATUTE—ADOPTION OF STATE LAW.

Act July 7, 1898, c. 576, § 2, 30 Stat. 717 [U. S. Comp. St. 1901, p. 3652], providing that when any offense is committed in any place, jurisdiction over which has been retained by, or ceded to, the United States the punishment for which is not provided for by any law of the United States, the offender shall receive the same punishment as the laws of the state provide for the like offense, does not incorporate into the federal law the general statute of limitations of the state relating to crimes, but a prosecution thereunder is governed as to limitation by the federal statute.

[Ed. Note.—State laws as rules of decision in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 533.]

## 5. SAME—FEDERAL JURISDICTION—CRIME COMMITTED IN POST OFFICE BUILDING.

Under such statute a federal court has jurisdiction to prosecute and punish for a crime denounced by the state law committed in a post office building owned and occupied by the United States within a state over which legislative jurisdiction has been ceded by the state.

[Ed. Note.—Jurisdiction as affected by state laws, see note to *Barling v. Bank of British North America*, 1 C. C. A. 513.]

## 6. FORGERY—INDICTMENT—SUFFICIENCY.

An indictment under section 197 of the New Jersey crimes act (P. L. 1898, p. 848), making it an offense to forge any instrument, etc., or any character, with intent to injure any person or corporation, which charges the forgery of a character meant to represent the seal of a corporation with intent to injure the corporation, is not insufficient because it fails to allege facts showing in what manner the corporation could have been injured thereby.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 23, Forgery, § 78.]

On Demurrer to Indictment.

John B. Vreeland, U. S. Dist. Atty.

J. Merritt Lane, for defendant.

LANNING, District Judge. The indictment charges that the defendant, James L. Andem, "on the nineteenth day of May, in the year one thousand nine hundred and five, at Trenton, in said (this) district, in the office of the clerk of the Circuit Court of the United States in and for said district, in the United States government building erected on lands ceded by the state of New Jersey to the United States of America, and over which the United States has jurisdiction, and within the jurisdiction of this court, feloniously did forge and counterfeit a certain 'character' meant to represent the seal of the New England Phonograph Company, a corporation duly organized and existing under and by virtue of the laws of the state of Maine, which said 'character,' so meant to represent the corporate seal of the said company, was affixed to a bill of complaint purporting to be filed in said United States Circuit Court by said New England Phonograph Company, complainant, against Thomas A. Edison and others, defendants, on the day and year last aforesaid." The indictment then sets forth a copy of the alleged bill of complaint, which appears to have a seal annexed thereto, to be signed by the president of the New England Phonograph Company, and to be attested by the defendant as secretary. The indictment also charges that the defendant committed the alleged forgery "with intent to prejudice, injure and damage the said New England Phonograph Company, he, the said James L. Andem, at the time he so forged and counterfeited the said false, forged and counterfeited 'character,' then and there well knowing the same to be false, forged and counterfeited against the statute of New Jersey in such case made and provided, to wit, section 197 of the Crimes Act, P. L. 1898, p. 848 (which, by force of section 5391 of the Revised Statutes of the United States, and the act of July 7, 1898, c. 576, 30 Stat. 717, volume 3 of the United States Compiled Statutes, page 3652, section 2, is made an offense), contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States." There is also a second count for uttering and publishing the alleged "character," and a third count for procuring the forgery of the "character."

Section 2 of the Congressional Act of July 7, 1898, c. 576, 30 Stat. 717 [U. S. Comp. St. 1901, p. 3652], is as follows:

"That when any offense is committed in any place, jurisdiction over which has been retained by the United States or ceded to it by a state, or which has been purchased with the consent of a state for the erection of a fort, magazine, arsenal, dock-yard or other needful building or structure, the punishment for which offense is not provided for by any law of the United States, the person committing such offense shall, upon conviction in a Circuit or District Court of the United States for the district in which the offense was committed, be liable to and receive the same punishment as the laws of the state in which such place is situated now provide for the like offense when committed within the jurisdiction of such state, and the said courts are hereby vested with jurisdiction for such purpose; and no subsequent repeal of any such state law shall affect any such prosecution."



It was admitted on the argument that there is no provision in any congressional act prescribing a punishment for the alleged offense. The indictment therefore rests upon the theory that the section of the congressional act above quoted incorporates the provisions of section 197 of the crimes act of the state of New Jersey. That section (P. L. 1898, p. 848) is as follows:

"Any person who shall falsely make, alter, forge or counterfeit, or cause, counsel, hire, command or procure to be falsely made, altered, forged or counterfeited, or willingly act or assist in the false making, altering, forging or counterfeiting, any record or other authentic matter of a public nature, character, letters-patent, deed, lease, writing sealed, will, testament, annuity, bond, bill, writing obligatory, bank bill or note, United States treasury note, check, draft, bill of exchange, promissory note for the payment of money, indorsement or assignment of any check, draft, bill of exchange, or promissory note for the payment of money, or any acceptance of a bill of exchange, or the number (or) principal sum of any accountable receipt for any note, bill or other security for the payment of money, or any warrant, order or request for the payment of money, or delivery of goods or chattels of any kind, or any acquittance or receipt, either for money or goods, or any acquittance, release or discharge of any debt, account, action, suit, demand or other thing, real or personal, or any transfer or assurance of money, stock, goods, chattels or other property whatsoever, or any letter of attorney, or other power to receive money, or to receive or transfer stock or annuities, or to let, lease, sell, dispose of, alien or convey any goods or chattels, lands or tenements, or other estate, real and personal, with intent to prejudice, injure, damage or defraud any person or persons, body politic or corporate, or who shall utter or publish, or cause, counsel, hire, command or procure to be uttered or published, as true, any of the above false, altered, forged or counterfeited matters as above specified and described, knowing the same to be false, altered, forged or counterfeited, with intent to prejudice, injure, damage or defraud any person or persons, body politic or corporate, shall be guilty of a high misdemeanor."

The defendant alleges 12 causes of demurrer. They may be embraced in these four points: First, that the seal of a corporation is not a thing the forging of which may be punished under section 197 of the New Jersey crimes act; second, that the alleged offense is barred by the statute of limitations; third, that this court has no jurisdiction of the alleged crime; and, fourth, that the indictment does not set forth any crime under section 197 of the New Jersey crimes act.

In considering the first question, it will be observed that the name "character," in the 197th section of the New Jersey crimes act, seems to be incongruously associated with the names of the other things the forgery of which is denounced. All the other names in the section, relate to written or printed instruments or papers. From 1796 to 1882 (see Patterson's Laws, 215, § 42; Revision of 1847, p. 271, § 48; and Revision of 1877, p. 257, § 173) the law prescribed a penalty for the forgery of any "charter." In 1882 (P. L. N. J. 1882, p. 95) the word "character" was substituted for the word "charter." The same substitution was carried into the Revision of 1898, as shown in section 197, above quoted. That the substitution of the word "character" for the word "charter" in 1882 was a clerical error on the part of some one is altogether probable. But I have examined the engrossed act of 1882, on file in the office of the Secretary of State of the state of New Jersey, and find that the word "character" is also there substituted for the word "charter." The rule of practice in the courts of the state of New Jersey does not permit an engrossed act of the Legislature,

duly passed, signed, approved, and filed, to be contradicted by any evidence whatever. It is conclusive evidence both of its existence and its contents. *Pangborn v. Young*, 32 N. J. Law, 29; *Freeholders of Passaic v. Stevenson*, 46 N. J. Law, 173, 184; *Mason v. Cranbury*, 68 N. J. Law, 149, 160, 52 Atl. 568; *Standard Underground Cable Co. v. Attorney General*, 46 N. J. Eq. 270, 276, 19 Atl. 733, 19 Am. St. Rep. 394. Such being the rule of the New Jersey state courts concerning the construction of the statutes of that state, it is binding upon the federal courts. *Town of South Ottawa v. Perkins*, 94 U. S. 260, 24 L. Ed. 154; *Post v. Supervisors*, 105 U. S. 667, 26 L. Ed. 1204. Besides, the same rule concerning the conclusiveness of an enrolled copy of a congressional act obtains in the federal courts. *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *Harwood v. Wentworth*, 162 U. S. 547, 16 Sup. Ct. 890, 40 L. Ed. 1069. The court cannot, in view of this rule, consider the word "character" as meaning "charter," and I think the seal of a corporation must be regarded as a "character" within the meaning of the law.

Second. Is the alleged offense barred by the statute of limitations? Although cases may be cited where such a defense has been supported on a demurrer, the weight of opinion is against that practice. For the federal courts at least, the practice is not permissible. It was decided in *United States v. Cook*, 17 Wall. 168, 21 L. Ed. 538, that the statute of limitations cannot be taken advantage of by demurrer. See, also, *United States v. Brace* (D. C.) 143 Fed. 703, and *Greene v. United States* (C. C. A.) 154 Fed. 401, 411. These cases show that the defendant may have the advantage of the statute of limitations at the trial, if he be entitled thereto. Inasmuch, however, as the question whether the statute of limitations furnishes a good defense in this case has been fully argued by counsel, it may not be inappropriate to make some further observations. The indictment alleges that the offense was committed May 19, 1905. The bill of indictment was returned at the September term, 1907. If the limitation of three years prescribed in section 1044 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 725] is applicable, it furnishes no defense for the reason that the indictment was found within that period; but if the limitation prescribed by the law of the state of New Jersey is applicable, the defendant may have a good defense, for that limitation (see New Jersey Criminal Procedure Act, P. L. 1898, p. 919, § 152) is as follows:

"No person or persons shall be prosecuted tried or punished for treason unless the indictment for the same shall be found within three years next after the treason shall be done or committed; nor shall any person be prosecuted, tried or punished for any offense, not punishable with death, unless the indictment shall be found within two years from the time of committing the offense or incurring the fine or forfeiture; provided \* \* \* nothing herein contained shall extend to any person fleeing from justice."

This section, so far as it affects the question now under consideration, has long stood without change. The section of the federal statute, on which the indictment is founded, as already quoted, provides that if punishment "is not provided for by any law of the United States" the person committing the offense shall, on conviction, "be liable to and receive the same punishment as the laws of the state in

which such place is situated now provide for the like offense when committed within the jurisdiction of such state." The material question therefore is, what punishment could be imposed on the defendant under the laws of the state of New Jersey if a like offense had been committed within the jurisdiction of the state? The element of time has nothing to do with the nature of the offense, for, as was said by the Supreme Court in *United States v. Cook*, *supra*, "time is not of the essence of the offense." True, if the alleged offense had been committed within the jurisdiction of the state of New Jersey on May 19, 1905, and an indictment had been found in a state court against the defendant in September, 1907, the New Jersey limitation might furnish to the defendant a good defense. But, as time is not of the essence of the offense, as the limitation prescribed by the New Jersey law is in a different statute from that which defines the offense, and as the section of the congressional act above quoted provides that the punishment to be imposed shall be the same as that which may be imposed by the state of New Jersey for a like offense, it seems that the provision of the New Jersey state law which has been incorporated in the congressional act is not that part of the New Jersey criminal procedure law which provides that no person shall be punished for any offense, not punishable with death, unless the indictment be found within two years from the time of committing the offense, but that, so far as the present case is concerned, it incorporates only that part of section 197 of the New Jersey crimes act which defines the offense concerning the forgery of a "character." If this be the true construction of the federal statute, the case must be controlled by the provision concerning limitations contained in section 1044 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 725] and not by the provision of section 152 of the criminal procedure act of the state of New Jersey.

Third. Has this court jurisdiction of the alleged crime? The defendant insists that the post office building, in which it is charged the crime was committed, is not a "place" within the meaning of the section of the federal law on which the indictment is based. Clause 17 of section 8 of article 1 of the federal Constitution provides that the Congress shall have power "to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may by cession of particular states and the acceptance of Congress become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the state in which the same shall be for the erection of forts, magazines, arsenals, dock-yards and other needful buildings." The argument is that as the post office building at Trenton is neither a fort, magazine, arsenal, or dock-yard, it cannot, by any proper application of the maxim "*noscitur a sociis*," be included in the words "other needful buildings." But in *Fort Leavenworth Railroad Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. 995, 29 L. Ed. 264, Mr. Justice Field, after declaring that a state is incompetent to cede her political jurisdiction and legislative authority over any part of her territory to a foreign government without the concurrence of the general government, at page 541 of 114 U. S., page 1004 of 5 Sup. Ct. (29 L. Ed. 264) said:

"In their relation to the general government, the states of the Union stand in a very different position from that which they hold to foreign governments. Though the jurisdiction and authority of the general government are essentially different from those of the state, they are not those of a different country; and the two, the state and general government, may deal with each other in any way they may deem best to carry out the purposes of the Constitution. It is for the protection and interests of the states, their people and property, as well as for the protection and interests of the people generally of the United States, that forts, arsenals and other buildings for public uses are constructed within the states. As instrumentalities for the execution of the powers of the general government, they are, as already said, exempt from such control of the states as would defeat or impair their use for those purposes; and if, to their more effective use, a cession of legislative authority and political jurisdiction by the state would be desirable, we do not perceive any objection to its grant by the Legislature of the state. Such cession is really as much for the benefit of the state as it is for the benefit of the United States. It is necessarily temporary, to be exercised only so long as the places continue to be used for the public purposes for which the property was acquired or reserved from sale. When they cease to be thus used, the jurisdiction reverts to the state."

And in *Chicago & Pacific Railway Co. v. McGlinn*, 114 U. S. 542, 5 Sup. Ct. 1005, 29 L. Ed. 270, Mr. Justice Field, referring to the case of *Fort Leavenworth R. R. Co. v. Lowe*, said, at page 545 of 114 U. S., page 1006 of 5 Sup. Ct. (29 L. Ed. 270):

"We there held that a building on a tract of land owned by the United States used as a fort, or for other public purposes of the federal government, is exempted, as an instrumentality of the government, from any such control or interference by the state as will defeat or embarrass its effective use for those purposes. But in order that the United States may possess exclusive legislative power over the tract, except as may be necessary to the use of the building thereon as such instrumentality, they must have acquired the tract by purchase, with the consent of the state. This is the only mode prescribed by the federal Constitution for their acquisition of exclusive legislative power over it. When such legislative power is acquired in any other way, as by an express act ceding it, its cession may be accompanied with any conditions not inconsistent with the effective use of the property for the public purposes intended. We also held that it is competent for the Legislature of a state to cede exclusive jurisdiction over places needed by the general government in the execution of its powers, the use of the places being, in fact, as much for the people of the state as for the people of the United States generally, and such jurisdiction necessarily ending when the places cease to be used for those purposes."

The same doctrine was reannounced in *Benson v. United States*, 146 U. S., at page 330, 13 Sup. Ct., at page 62 (36 L. Ed. 991); in *Martin v. House (C. C.)* 39 Fed. 694, in which case it was applied to lands purchased for a post office building; and in *United States v. Tucker (D. C.)* 122 Fed. 518, in which case it was applied to land on which a lock in Green river, Ky., was constructed.

Turning now to the case in hand, we find that by an act approved April 3, 1872, entitled "An act granting the consent of the state of New Jersey to the purchase by the United States of certain lands for the purpose of the erection of a government building at Trenton, New Jersey, and ceding jurisdiction over the same," the state of New Jersey declared, by the first section of the act, that the consent of the state was given to the purchase by the United States of the land on which the post office building in Trenton is situated, and that the United States should "have, hold, use, occupy and own the said land or lands when

purchased and exercise jurisdiction and control over the same and every part thereof, subject to the restrictions hereinafter mentioned." The second section is as follows:

"That the jurisdiction of the state of New Jersey in and over the said land or lands mentioned in the foregoing section, when purchased by the United States, shall be and the same hereby is ceded to the United States, but the jurisdiction hereby ceded shall continue no longer than the said United States shall own the said land or lands."

By the third section it was provided:

"That the said consent is given and the said jurisdiction ceded upon the express condition that the state of New Jersey shall retain concurrent jurisdiction with the United States in and over the said land or lands, so far as that all civil process in all cases and such criminal or other process as may issue under the laws or authority of the state of New Jersey against any person or persons charged with crimes or misdemeanors committed within said state may be executed therein in the same way and manner as if such consent had not been given or jurisdiction ceded, except so far as such process may affect the real or personal property of the United States."

By the fourth section it was provided that the jurisdiction ceded by the act should not vest in the United States until it should have acquired title to the lands by purchase or grant, and that it should continue only while the land or lands should remain the property of the United States, and that during such period the land should be and continue to be exonerated from all taxes, assessments, and other charges which might be levied or imposed under the authority of the state. The fifth section provided that "Any malicious, willful, reckless or voluntary injury to or mutilation of the grounds, buildings or appurtenances shall subject the offender or offenders to a fine of not less than twenty dollars, to which may be added, for an aggravated offense, imprisonment not exceeding six months in the county jail or workhouse, to be prosecuted before any court of competent jurisdiction." The sixth and last section provided that the act should take effect immediately. Laws 1872, p. 63, c. 489.

Applying to this act the doctrine of the cases above cited, it seems clear that the legislative and political jurisdiction of the United States over the land on which the post office at Trenton stands is exclusive, except that civil process in all cases and criminal process in the case of crimes or misdemeanors committed within the state may be executed on the post office property, and that the state shall have criminal jurisdiction in any case of malicious, willful, or reckless injury to or mutilation of the grounds or buildings. It is true that there may be difficulty in construing the words "other needful buildings" contained in clause 17, § 8, art. 1, of the Constitution, so as to include a post office building without departing from the usual rule in applying the maxim "*noscitur a sociis*" or "*eiusdem generis*." However that may be, the cases show, as we have seen, that the federal government may acquire exclusive legislative and political jurisdiction over buildings not used as forts, magazines, arsenals or dockyards, or for any other naval or military purpose. It is reasonable that it should be so. The security of the public records preserved in the post office building where the federal courts also carry on their business, and the conduct of the business of the federal government in that building, demand that

the building shall be under the protection and authority of the federal government, and where the state has voluntarily ceded to the federal government its jurisdiction, or any part of its jurisdiction over property purchased by the United States and used only for governmental purposes of the United States, there can be no valid constitutional objection thereto. The reservation by the state of the right to serve civil and criminal process issued out of the courts of the state does not interfere in any respect with the governmental functions of the United States. It simply prevents any one from using the property of the United States as a sanctuary in which he may escape from justice. Nor does the provision of the fifth section of the New Jersey act show any intention to withhold from the federal government general legislative and political jurisdiction over the post office building. It is competent for the state to reserve such authority over the property as it and the federal government may agree upon. By the first section of the act of April 3, 1872, the state not only consented to the purchase of the land by the United States, but also consented that the United States should "exercise jurisdiction and control over the same and every part thereof, subject to the restrictions" in the act thereafter mentioned. There are no restrictions mentioned in the subsequent parts of the act except the right to serve on the property civil and criminal process issuing out of the courts of the state, and the right to prosecute any one who shall injure or mutilate the grounds or buildings. The conclusion, therefore, is that this court has jurisdiction over the crime alleged in the indictment.

Fourth. It is further insisted by the defendant that the indictment does not set forth a crime under section 197 of the New Jersey crimes act. It is argued that it is impossible that the New England Phonograph Company could be prejudiced, injured, or damaged by the alleged forgery. It is said that neither the general practice in equity nor any rule of the Circuit Court of the United States for the district of New Jersey requires the seal of a corporation to be affixed to a bill of complaint filed by it. And this is true. The answer of a corporation should be under its seal, but it is not necessary that a bill of complaint filed by a corporation shall be under its seal. But, though this be the rule of practice, the charge of the indictment is that the defendant forged and counterfeited a certain character, meant to represent the seal of the New England Phonograph Company, which character was affixed to that company's bill of complaint, with intent to prejudice, injure, and damage that company. How the complainant in the cause could be prejudiced, injured, or damaged by forging the seal affixed to its bill of complaint, which purported to seek relief for the complainant only, the indictment does not disclose. The question raised, therefore, is whether the indictment is defective because it fails to aver any extrinsic circumstances tending to show how the complainant could be prejudiced, injured, or damaged by the alleged forgery. If there be a crime charged in the indictment, it consists of two elements, namely, forgery of the seal of the New England Phonograph Company, and intent to prejudice, injure, or damage that company. It is a general rule of law that a writing invalid on its face cannot be the subject of forgery, for the reason that

it has no legal tendency to effect a fraud. But in the present case the charge is that the seal of the corporation was forged. It is possible to counterfeit or forge a seal. It cannot therefore be said that this is a case in which it was necessary to aver extrinsic circumstances to show the pernicious character of the act charged to have been a forgery. Inasmuch as the seal of a corporation may be forged, the forgery may be with intent to injure the corporation. Whether, in the present case, that intent existed will be a question of proof on the trial of the case. "The means of effecting the criminal intent or the circumstances evincive of the design with which the act was done are considered to be matters of evidence to go to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment." *United States v. Simmons*, 96 U. S. 364, 24 L. Ed. 819.

The conclusion reached is that the demurrer must be overruled, and the defendant required to plead to the indictment.

**WESTERN UNION TELEGRAPH CO. v. WRIGHT, Comptroller General.**

(Circuit Court, N. D. Georgia. January 15, 1908.)

**1. TAXATION—STATE TAXATION OF FOREIGN TELEGRAPH COMPANY—EFFECT OF FEDERAL STATUTE.**

A telegraph company by its acceptance of Act July 24, 1866, c. 230, 14 Stat. 221 [U. S. Comp. St. 1901, p. 3579], permitting such companies to construct and operate their lines over any portion of the public domain and any military or post roads of the United States, derives no rights therefrom which exempts it from taxation by a state other than that in which it is incorporated in the same manner in which other foreign corporations doing business in the state are taxed, and it is immaterial that the tax imposed is designated by the state statute as a franchise tax.

[Ed. Note.—Of foreign corporations, see note to *McCanna & Fraser Co. v. Citizens' Trust & Surety Co.*, 24 C. C. A. 13.]

**2. SAME—INJUNCTION AGAINST ENFORCEMENT OF TAX—METHOD OF ASSESSMENT.**

A federal court will not grant injunctive relief against the collection of taxes imposed by a state on a foreign corporation because of the methods adopted by a state board in arriving at the valuation of the property of the corporation unless in case of fraud or clearly shown adoption of a wrong principle.

In Equity. On motion for preliminary injunction.

Dorsey, Brewster, Howell & Heyman, for plaintiff.

John C. Hart, Atty. Gen., for defendant.

NEWMAN, District Judge. This bill is brought by the complainant against the defendant to enjoin the collection of a certain franchise tax which has been assessed against it, and which, as alleged in the bill, the Comptroller General is endeavoring to enforce against it for the year 1907.

The Legislature of Georgia, in 1907, passed an act to provide for and require the payment of taxes on franchises, and prescribed the method of return and payment of said taxes, which act was approved December 17, 1902. Acts Leg. Ga. 1902, p. 37. In 1903 the Comptroller General demanded of the complainant company the return of

its franchise for taxation, to which the complainant replied that it owned no franchise of value which was taxable under the laws of Georgia, and that the only franchise owned, used, or enjoyed by it in the state of Georgia was the franchise conferred by the terms of the act of Congress of July 24, 1866, c. 230, 14 Stat. 221 [U. S. Comp. St. 1901, p. 3579]. That act is as follows:

"An Act to Aid in the Construction of Telegraph Lines, and to Secure to the Government the Use of the Same for Postal, Military, and Other Purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any telegraph company now organized, or which may hereafter be organized, under the laws of any state of this Union, shall have the right to construct, maintain and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of Congress, and over, under, or across the navigable streams or waters of the United States: Provided, that such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads. And any of said companies shall have the right to take and use from such public lands the necessary stone, timber, and other materials for its posts, piers, stations, and other needful uses in the construction, maintenance and operation of said lines of telegraph, and may pre-empt and use such portion of the unoccupied public lands subject to pre-emption through which its said lines of telegraph may be located as may be necessary for its stations, not exceeding forty acres for each station; but such stations shall not be within fifteen miles of each other."

"Sec. 2. And be it further enacted, that telegraph communications between the several departments of the government of the United States and their officers and agents shall, in their transmission over the lines of any of said companies, have priority over all other business, and shall be sent at rates to be annually fixed by the Postmaster-General.

"Sec. 3. And be it further enacted that the rights and privileges hereby granted shall not be transferred by any company acting under this act to any other corporation, association, or person: Provided, however, that the United States may at any time after the expiration of five years from the date of the passage of this act, for postal, military, or other purposes, purchase all the telegraph lines, property, and effects of any and all of said companies at an appraised value, to be ascertained by five competent disinterested persons, two of whom shall be selected by the Postmaster-General of the United States, two by the company interested, and one by the four so previously selected.

"Sec. 4. And be it further enacted, that before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Postmaster-General, of the restrictions and obligations required by this act." 14 Stat. 221, Rev. St. § 5263 et seq. [U. S. Comp. St. 1901, p. 3579].

The complainant filed its written acceptance of this act in the manner required on June 12, 1867.

Notwithstanding this claim of exemption by the complainant from taxation of its franchise, the Comptroller General persisted in his demand, and the matter was submitted to arbitration in 1903. The arbitrators found the value of the physical property of the complainant, and also of the franchise, but attached to their finding the following:

"In fixing the value of the franchise under which the Western Union Telegraph Company constructed and maintains and operates its lines of telegraph in Georgia, we have been unable to designate or set apart the value of the federal franchise under which the testimony shows the company operates in Georgia, and our finding is therefore based upon and includes the value of the franchise conferred by the act of Congress of June, 1866. Whether the com-



pany is or is not liable to taxation upon the value of the federal franchise is not a matter for the determination of this board, its function being merely to find the value of such franchise."

The complainant company appears to have paid the tax both on its tangible property and on its franchise for the year 1903, and the question of its liability for taxes on its franchise seems to have been a matter at issue all along since that time down to the year 1907 between it and the Comptroller General.

In the year 1907 the Comptroller General assessed the value of the complainant's tangible property in Georgia at \$1,018,140, and, in addition thereto, assessed the value of complainant's franchise at \$1,404,820. The complainant alleges that this assessment was greatly in excess of the value of all of its property in Georgia, and more than double the fair market value thereof. Within 20 days from the date of this assessment complainant requested an arbitration, and designated an arbitrator to act in its behalf. The Comptroller General designated a member of the Railroad Commission of Georgia as arbitrator on behalf of the state. An umpire seems to have been agreed upon over the protest of the complainant, and an award finally made, finding the value of the complainant's tangible property in Georgia to be \$796,000, and the value of its franchise \$950,000, and attaching to the award the same statement as was attached to the award in 1903, to the effect that the value of the franchise conferred by the act of Congress of June, 1866, was included in the award. It seems evident that the act of Congress of July 24, 1866, is referred to.

The complainant, before the filing of the bill, tendered to the state the taxes on the \$796,000 of its tangible property, which it appears from statements made in argument has since been paid, but declined to pay the tax on its franchise and filed this bill. The complainant company is a corporation organized under the laws of the state of New York in the year 1856. The Comptroller General demurred to the bill, and on this demurrer argument has been heard, and the matter taken under consideration.

The main reason for complainant's contention that it is not liable to a franchise tax is based upon the act of Congress of July 24, 1866, set out above. The complainant has relied in argument mainly upon the case of *California v. Railroad Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, 32 L. Ed. 150, in which it is determined that a franchise granted by Congress is not taxable by the states. The Supreme Court of the United States has had before it in several cases the question as to how far the act of Congress of July, 1866, operated to prevent taxation of the Western Union Company by the states. The first case directly in point is that of the *Western Union Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790. The tax assessed by the state of Massachusetts against the complainant company was assessed, as appears from the opinion by Mr. Justice Miller, in this way:

"The tax assessed by the treasurer of the commonwealth of Massachusetts was based upon an estimate of \$750,952 as the taxable value of the shares of the corporation apportioned to that state, the rate of taxation having been determined for that year—1885—at \$14.14 for and upon each \$1,000 of valuation.

The mode by which this taxable valuation was arrived at was this: The treasurer ascertained from the officers of the telegraph company that the valuation of its entire capital stock was \$47,500,000, from which were deducted the credits proper to be allowed in determining the assessable value, leaving \$38,723,924 as the total valuation of said stock liable to taxation. It was then ascertained that the total number of miles of line of said corporation in all the states and territories of this country was 146,052.60, of which 143,219.55 were without the limits of the commonwealth of Massachusetts, leaving 2,833.05 miles within its boundaries. Taking these figures, the treasurer of the state assessed the value of that portion of the capital stock of this company, which, under this calculation, would fall within the commonwealth of Massachusetts, at the sum of \$750,952. The amount thus arrived at, at the rate of \$14.14 upon each \$1,000 of valuation, produced the sum of \$10,618.46 as the amount of the tax claimed to be due and payable to the treasurer of said commonwealth by that corporation. This sum was demanded of the telegraph company, but it refused to pay the same. The answer of the defendant corporation set up that of its 2,833.05 miles of line within the state of Massachusetts more than 2,334.55 miles were over, under, or across post roads, made such by the United States, leaving only 498.50 miles not over or along such post roads, on which the company offered to pay the proportion of the tax assessed according to the mileage by the state authorities."

It is then stated that the main ground upon which the telegraph company resisted the payment of the tax was the act of July 24, 1866, referred to above—the same contention that is made here. Mr. Justice Miller then proceeds in the opinion:

"It is urged that this section, upon its acceptance by this corporation or any of like character, confers a right to do the business of telegraphing which is transacted over the lines so constructed over or along such post roads, without liability to taxation by the state. The argument is very much pressed that it is a tax upon the franchise of the company, which franchise being derived from the United States by virtue of the statute above recited cannot be taxed by a state, and counsel for appellant occasionally speak of the tax authorized by the law of Massachusetts upon this as well as all other corporations doing business within its territory, whether organized under its laws or not, as a tax upon their franchises. But by whatever name it may be called, as described in the laws of Massachusetts, it is essentially an excise upon the capital of the corporation. The laws of that commonwealth attempt to ascertain the just amount which any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein. The telegraph company, which is the defendant here, derived its franchise to be a corporation and to exercise the function of telegraphing from the state of New York. It owes its existence, its capacity to contract, its right to sue and be sued, and to exercise the business of telegraphy, to the laws of the state under which it is organized. But the privilege of running the lines of wires 'through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, \* \* \* and over, under, or across the navigable streams or waters of the United States,' is granted to it by the act of Congress. This, however, is merely a permissive statute, and there is no expression in it which implies that this permission to extend its lines along roads not built or owned by the United States, or over and under navigable streams, or over bridges not built or owned by the federal government, carries with it any exemption from the ordinary burdens of taxation."

The opinion then proceeds further, as follows:

"While the state could not interfere by any specific statute to prevent a corporation from placing its lines along these post roads, or stop the use of them after they were placed there, nevertheless the company receiving the benefit of the laws of the state for the protection of its property and its rights is liable to be taxed upon its real or personal property as any other person

would be. It never could have been intended by the Congress of the United States, in conferring upon a corporation of one state the authority to enter the territory of any other state and erect its poles and lines therein, to establish the proposition that such a company owed no obedience to the laws of the state into which it thus entered, and was under no obligation to pay its fair proportion of the taxes necessary to its support."

After some further discussion and citation of authorities, this language is used:

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the state of Massachusetts, and the proportion of the length of its lines in that state to their entire length throughout the whole country is made the basis for ascertaining the value of that property. We do not think that such a tax is forbidden by the acceptance on the part of the telegraph company of the rights conferred by section 5263 of the Revised Statutes, or by the commerce clause of the Constitution."

It seems clear from the foregoing opinion that it would have been immaterial if the tax imposed by the state of Massachusetts had been in direct terms a tax upon the franchise of the company, so far as any rights it could set up under the act of July, 1866. The company's franchise, says the opinion, "to be a corporation, and to exercise the function of telegraphing," was derived from the state of New York. That which was conferred by the act of Congress of July, 1866, was permissive merely, and does not carry with it any exemption from the ordinary burdens of taxation. This question was next before the Supreme Court in the case of *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628, in which the case in 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790, was referred to, the opinion quoted from, and the decision reaffirmed. In *Postal Telegraph Co. v. Adams*, 155 U. S. 688, 15 Sup. Ct. 360, 39 L. Ed. 311, the case of *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790, and the case of *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889, 35 L. Ed. 628, are considered and again reaffirmed. In *Western Union Tel. Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, 41 L. Ed. 49, in the opinion by Mr. Justice Gray, the Massachusetts cases are again referred to, and this language is used in reference thereto:

"These decisions clearly establish that a statute of a state requiring a telegraph company to pay a tax upon its property within the state, valued at such a proportion of the whole value of its capital stock as the length of its lines within the state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state, is constitutional and valid, notwithstanding that nothing is in terms directed to be deducted from the valuation, either for the value of its franchises from the United States, or for the value of its real estate and machinery situated and taxed in other states; unless there is something more showing that the system of taxation adopted is oppressive and unconstitutional."

This case is cited with approval in *Adams Express Co. v. Ohio*, 166 U. S. 194-221, 17 Sup. Ct. 604, 41 L. Ed. 965.

In *Western Union Tel. Co. v. Gottlieb*, 190 U. S. 412, 23 Sup. Ct. 730, 47 L. Ed. 1116, the Supreme Court again, speaking through Mr.

Justice McKenna, refers to the Massachusetts case in 125 U. S. 530, 8 Sup. Ct. 961, 31 L. Ed. 790, stating:

"The laws of Massachusetts imposed a tax upon the Western Union Telegraph Company on account of the property owned and used by it within that state, the value of which was ascertained by comparing the length of its lines within the state with the length of its entire lines. The tax was sustained. The act of July, 1866, was urged against the tax as it is urged here. That the contention of the company in that case was, as it is in this, that it did not derive its existence from the taxing state but from the state of New York; that it did not do business in the taxing state by permission of that state, but by virtue of being an instrument of interstate commerce; that its rights and privileges and franchises were conferred by the United States and constituted it an agent of the United States, and as such agent it was exempt from the tax imposed. The contentions were rejected. The court did not test or measure the power of the state by the name which its laws gave the tax."

He then quotes the language of Mr. Justice Miller in the Massachusetts case, which has been quoted above.

Mr. Justice McKenna closes the discussion of that branch of the case as follows:

"These cases establish that in estimating the value of the property of a telegraph company situate within a state it may be regarded not abstractly or strictly locally, but as a part of a system operated in other states, and that the state was not precluded from taxing the property because the state had not created the company or conferred franchise upon it, or because it derived rights or privileges under the act of July, 1866, or was engaged in interstate commerce."

From the foregoing it would seem that the Supreme Court has clearly determined that the Western Union Telegraph Company derived no rights by virtue of the act of July, 1866, which prevent it from being subject to taxation in the various states, just as other foreign corporations would be; that this company derives its right to do business and to collect tolls (its most important right) from its charter granted by the state of New York; that its right to erect poles, etc., by virtue of the act of Congress of July, 1866, is permissive merely, and that in this act there is nothing which gives it an exemption from state taxation. Therefore the tax assessed against the company by the state of Georgia must be otherwise objectionable to entitle it to any relief here.

The only other ground stressed in the bill and in argument to entitle the complainant to relief in this case is this: It is alleged that the Railroad Commissioner named by the Comptroller General to act as arbitrator for the state threatened, if the arbitrator appointed by the Western Union Company did not agree to a particular individual as umpire, that no other would be agreed upon, and that it would be left for the Governor of the state, under the statute, to select an umpire, after 30 days. The bill leaves the matter in doubt just here, as to precisely what was done as to this, but the bill indicates that the company's arbitrator agreed to the umpire suggested by the state's arbitrator, as there is no statement that the Governor made an appointment. The matter suggested does not seem to justify any action here. The board proceeded to make an award. The award reduced very considerably the amount assessed by the Comptroller General against the company. It reduced the assessment on tangible property from

\$1,018,140 to \$796,000, and the assessment on the company's franchise from \$1,404,820 to \$950,000. Upon what basis, or by what process, these amounts were reached by the arbitrators is not shown in the bill. If it was intended to reach the value of the property of the company in Georgia by taking the proportion of the mileage of the company in Georgia to the entire mileage, and thus reaching a basis for the valuation of that part of the company's capital properly taxable in Georgia, the rule would be followed so frequently approved by the Supreme Court of the United States. Whether the fact was taken into consideration that the tangible property of the company and its intangible property were being taxed separately does not appear from the bill, but the inference must be, in the absence of some statement to the contrary, that the arbitrators followed the law, and made proper allowances and deductions in this respect. In the absence of clear allegation showing fraud, matters of this kind, however, would not justify interference by the court.

In *Railway Co. v. Babcock*, 204 U. S. 585, 27 Sup. Ct. 326, 51 L. Ed. 636, it appears that bills had been filed to declare void the assessment of taxes made by the State Board of Equalization and Assessment of the state of Nebraska for the year 1904 against the Chicago, Burlington & Quincy and Union Pacific Railroads. In delivering the opinion of the court, Mr. Justice Holmes said:

"The dominant purport of the bills is to charge political duress, so to speak, and a consequent scheme of fraud, illustrated by the specific wrongs alleged, and in this way to make out that the taxes were void."

After discussing the case, the opinion sustaining the dismissal of the bills in the Circuit Court concludes with this reference to the State Board of Equalization and Assessment:

"Within its jurisdiction, except as we have said, in the case of fraud or a clearly shown adoption of wrong principles, it is the ultimate guardian of certain rights. The state has confided those rights to its protection, and has trusted to its honor and capacity as it confides the protection of other social relations to the courts of law. Somewhere there must be an end. We are of opinion that, whatever grounds for uneasiness may be perceived, nothing has been proved so clearly and palpably as it should be proved, on the principle laid down in *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 754, 19 Sup. Ct. 804, 43 L. Ed. 1154, in order to warrant these appeals to the extraordinary jurisdiction of the Circuit Court."

Upon the whole I am satisfied that there is nothing in this bill to justify the interposition of this court, and entitle the complainant to the writ of injunction. The matter mainly pressed, as has been stated, was the right of the complainant under the act of Congress of July, 1866. This claim has been thoroughly disposed of by the decisions of the Supreme Court referred to adversely to the claim, and any other grounds of equitable relief set up in the bill are insufficient for the reasons hereinbefore stated.

The prayer for an injunction pendente lite must be denied, and the temporary restraining order heretofore granted dissolved.

## HITCHNER WALL PAPER CO. v. PENNSYLVANIA R. CO.

(Circuit Court, E. D. Pennsylvania. February 8, 1908.)

No. 46.

## 1. WITNESSES—CROSS-EXAMINATION—EVIDENCE.

Where, in an action against a railroad company for the alleged destruction of plaintiff's mill by fire from sparks, plaintiff sought to establish by a process of exclusion that there was no possible way by which the fire could have been communicated except from a spark negligently emitted from a passing engine, and nearly all of plaintiff's employes testified that smoking was not permitted in the building, and that none of them smoked in violation of the order, defendant was entitled to show on cross-examination of a witness interested in plaintiff company that there had been a fire in the building within a year prior to its destruction, which was reported to witness as having been caused by a lighted cigarette, in order to show that plaintiff's rule against smoking was not observed.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 931-936.]

## 2. EVIDENCE—EXPERTS—QUESTIONS CALLING FOR OPINION.

In an action against a railroad company for the destruction of plaintiff's mill by fire from sparks, a question "how far would a spark on a windy day going through the mesh of the size used by the railroad company carry and be capable of setting fire to paper or other objects of that character" was objectionable for failure to embody the conditions existing at the time of the fire.

## 3. RAILROADS—FIRES—EVIDENCE.

In an action for damages from fire alleged to have been set by sparks from defendant's engines, evidence of a witness that engineers sometimes punch holes in the spark arresters to make the engine steam better was inadmissible, there being no evidence that such practice existed on defendant's road.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1718.]

## 4. WITNESSES—COMPETENCY—KNOWLEDGE.

Where a witness had only been on two of the engines of defendant company for a short time, he was incompetent to testify as to the practice of defendant's engineers with reference to punching holes in spark arresters to make their engines steam better.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 80, 81.]

## 5. RAILROADS—FIRES—EVIDENCE.

Where plaintiff proved that a number of defendant's engines had passed plaintiff's mill between certain hours on the morning the mill was burned, as the alleged result of sparks thrown from such engines, it was proper for defendant to identify the engines passing at that time and show that the spark arresters on each were of the most approved kind, and in good condition at the time.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 41, Railroads, § 1727.]

## 6. EVIDENCE—TRAIN SHEETS.

A train dispatcher's train sheet, though made up from telegraphic information received from operators along his division, was admissible to identify trains passing plaintiff's mill during a specified period of time, in an action for destruction of the mill by fire from sparks alleged to have been emitted from defendant's engines.

## 7. RAILROADS—FIRES—ACTION—INSTRUCTIONS.

An instruction that, in ascertaining the cause of the fire, the jury might, under the evidence that sparks may be emitted from locomotives without negligence, consider the evidence of the way in which plaintiff used its

property, and peculiarly the evidence of a cellar door being open just prior to the fire, and the existence of waste in and about a bin and baling press near the door at the point where the fire was claimed to have been started, was properly given, because, if the railroad company was not negligent, it was proper for the jury to consider the condition of the property burned to ascertain whether it was not possible for it to have been ignited by an accidental spark from a locomotive having proper spark arresters.

At Law. On motion for new trial.

Henry F. Stockwell, Horace M. Rumsey, and Alex. Simpson, Jr., for plaintiff.

John Hampton Barnes, for defendant.

HOLLAND, District Judge. This is a suit to recover damages for the alleged negligent burning of the plaintiff's paper mill by sparks emitted from defendant's passing engines. The plaintiff company occupied a mill at Holmesburg, Pa., along the New York division of the Pennsylvania Railroad. It was situate on the west side of the right of way, about 41 feet from the west rail of the west track, with a frontage of about 200 feet. There are four tracks on the New York division; the two middle being used for freight trains, and the other two for passenger trains; the west track used for passenger trains west bound, and the easternmost track used for trains running to New York. The fire occurred on Saturday, May 5, 1906, about 11:20 a. m. A number of trains passed the mill about that time and witnesses observed them emitting large volumes of smoke and making a great puffing noise. No one saw a spark emitted from any of these engines and communicate the fire to the mill, but the plaintiff sought to establish that the fire had been communicated to the establishment by a spark emitted from one of the passing engines by proof of such facts and circumstances as would enable the jury to conclude that fire had been caused in that way. Witnesses were called to prove numerous fires along the tracks of the New York division from Frankford to Holmesburg, on both sides of the track, which had occurred for six months prior. It was shown that sparks, varying in size, were emitted by passing engines for a considerable time prior to the fire, and much evidence was adduced to show it did not and could not have occurred from any other cause. The defense, under a plea of not guilty, offered evidence to show that the spark arresters of the engines passing the mill on this day were of the most approved kind used and were in good condition at the time. The jury rendered a verdict in favor of the defendant. Motion and reasons for a new trial were filed, and those necessary to be considered will be taken up in their order.

1 and 2. Frank G. Hitchner, on cross-examination, was asked by counsel for the defendant this question:

"As a matter of fact, was there not a fire in your building within a year prior to this time, which was reported to you to have been caused by a lighted cigarette?"

Both an objection to this question by the plaintiff at the time and subsequently a motion to strike it out were overruled. They are the first and second reasons for a new trial. The plaintiff, in proving

its case, sought to establish, by a process of exclusion, that there was no possible way by which the fire could have been communicated to the factory except from a spark negligently emitted from a passing engine, and nearly all of the employes testified that smoking was not permitted by them in the building, and that none of them did smoke in violation of this order. It was, therefore, entirely proper for the defendant to contradict this evidence by showing that this rule was not observed by the employes, but had been violated by them, and the evidence was competent for that purpose.

3 and 4. A witness was asked by the plaintiff how far, if you can tell me, would a spark on a windy day, going through the mesh of the size used on the Pennsylvania Railroad, carry and be capable of setting fire to paper or other objects of that character? The defendant's objection to this question was sustained. The plaintiff had been permitted to prove by other witnesses the direction and strength of the wind at the time of the fire, and it would have been its right to prove all the conditions existing on the morning of the fire, and argue to the jury the probable distance a live spark, under the circumstances, might be thrown, but if it is claimed that it is a question upon which expert evidence can be produced the question asked of the expert should embody the conditions existing at the time of the fire. I am unable to see what aid the jury could have received from permitting the witness to answer a question so general and indefinite as "how far would a spark on a windy day, going through the mesh of the size used on the Pennsylvania Railroad, carry and be capable of setting fire to paper." It would depend entirely upon how strong the wind was blowing. A windy day is a very indefinite expression. A witness should state facts rather than conclusions, especially in matters of ordinary and general information such as involved in the question objected to. The following are cases which illustrate the rule: Witnesses were not permitted to give an opinion on the burning of a roof of a building in *Kiesel & Co. v. Ins. Co.*, 88 Fed. 243, 31 C. C. A. 515. Opinion was not allowed to be expressed by the witnesses as to whether a particular method of coupling cars is dangerous in *R. R. Co. v. Myers*, 63 Fed. 793, 11 C. C. A. 439. It was required that facts should be stated instead of an opinion as to the safety of an apparatus in *Hunt v. Kile*, 98 Fed. 49, 38 C. C. A. 641. An opinion as to what the result would have been if a wagon had made a sharp turn was not permitted in *Brewing Co. v. Ort*, 113 Fed. 482, 51 C. C. A. 317. And whether it was safe to stand at a certain place on a pier could not be determined by the opinion of witnesses was held in *Coasting Co. v. Tolson*, 139 U. S. 555, 11 Sup. Ct. 653, 35 L. Ed. 270.

5. A witness volunteered the information that engineers sometimes will punch holes in the spark arresters to make the engine steam up. This, upon the motion of the defendant, was stricken out over the objection of the plaintiff, and is the fifth reason for a new trial. What the witness knew to be done on other roads was not competent to show for the purpose of establishing that practice prevailed on the defendant's road. He obviously was incompetent to testify as to the defendant company's engineers in this particular as he had only been on two of the engines of the defendant company, and then for a short time.

6. John F. Holl, the train dispatcher at Jersey City, in charge of that



portion of the New York division lying in front of the building where the fire occurred, was permitted to testify what time certain trains passed the Cornwall and Holmesburg Junction and Frankford on the day of the fire, from his train sheet which was kept by him. After the plaintiff had proven that a number of engines had passed the plaintiff's building between 10:45 and 11:25 on the morning of May 5, 1906, the defendant company, of course, as a matter of defense, sought to identify the engines passing at this time, and to show that the spark arresters on each engine was of the most approved kind and in good condition at the time, for the purpose of avoiding their responsibility for the fire. This was entirely proper, and in order to show what engines passed at this time, Mr. Holl, the train dispatcher, testified from his train sheet made by him at the time from information received by telegram from the various points, and recorded by him at the time received. The objection is that the evidence is not competent because the information which he recorded on his train sheet was supplied to him by somebody else, and it was not written there by reason of any knowledge which he had in regard to it other than the reported information from others. The train dispatcher in the modern conduct of a railroad has a certain division of track over which he has a certain supervision, and from various points of which he receives telegraphic communication as to the whereabouts of every train running on his section. Upon the accuracy of this information depends the safe conduct of the road, and the lives of hundreds of people depend upon the care with which this information is communicated, received, and utilized by the dispatcher in charge of the division. There is every inducement for each person taking part in the accumulation of this information to be sure of its accuracy, and the dispatcher recording it has every incentive to be certain that he is receiving correct information and making an accurate record of that received. He has telegraphic communication along his whole section, and receives dispatches from different persons at different points as to the exact whereabouts of each train to or from his central point. This, to some extent, provides him with a method of checking up the accuracy of the information received, and, as has been said, this information received from these train experts along the line of a well-conducted railroad is certainly as reliable as reports made of salesmen, draymen, porters, and wharfingers, to bookkeepers who make original entries, which are afterward introduced in evidence as books of original entries, and admitted as competent evidence. *Louisville & Nashville R. R. Co. v. Daniel*, 91 S. W. 691, 28 Ky. Law Rep. 1146, 3 L. R. A. (N. S.) 1190; *Insurance Co. v. Railroad*, 138 N. C. 42, 50 S. E. 452.

Seventh, eighth, ninth, tenth, eleventh, and twelfth reasons for a new trial are exceptions taken to the charge of the court. Reference to the charge as a whole we think will show that there was no error committed in any of the portions quoted.

We do not think there was any error committed in qualifying the third point submitted by the plaintiff for the court to charge, and which is now made the thirteenth reason for a new trial. Neither do we think there was any error in affirming the defendant's seventh and eighth points, which are the fourteenth and fifteenth reasons for a new trial.

16. The court affirmed the ninth point submitted by the defendant, and charged the jury that "in ascertaining the cause of the fire, the jury may, under the evidence that sparks may be emitted from locomotives without negligence of the defendant, consider the evidence of the way in which the plaintiff used its property, and particularly the evidence of the cellar door having been open just prior to the fire, and of the existence of the waste in and about the bin and baling press near the door at the point where the fire is said to have started." This was affirmed, because if the railroad company was not negligent, then it was entirely proper for the jury to consider the condition of the property set on fire, for the purpose of ascertaining whether or not it was not possible for it to have been ignited by the accidental falling of a spark from a locomotive having spark arresters of the most approved kind in good condition; in other words, it was competent for the jury to consider the ease with which the fire could have been actually caused without negligence on the part of the railroad company.

For the reasons given, a new trial is refused.

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GUARANTY TRUST CO. OF NEW YORK v. CHICAGO UNION TRACTION CO. et al. SAME v. NORTH CHICAGO ST. R. CO. et al. SAME v. WEST CHICAGO ST. R. CO. et al. (three cases).

(Circuit Court, N. D. Illinois, E. D. December 26, 1907.)

Nos. 26,727-26,729.

STREET RAILROADS—SUIT TO FORECLOSE MORTGAGES—REORGANIZATION SCHEME.

Suits were brought to foreclose mortgages on the properties of various street railroad companies in Chicago whose lines had passed by a succession of leases into the possession of a lessee which operated them as a single system. Such suits were consolidated, and receivers were appointed for all of the property. The franchises granted to the mortgagors under which the streets were occupied by most of the lines had expired, and the city passed an ordinance granting a franchise for their use to a reorganized company representing the greater part of the bondholders and stockholders of the mortgagor companies, and in which all were entitled to join, on condition that such company obtained possession of the existing property and accepted its terms by a certain date, but if not, granting such franchise to another company. *Held*, that the court, as the only means of preserving the property as a going concern and thus maintaining its value until foreclosure and sale, had power to authorize its receivers to turn the same over to the reorganized company pending its sale.

On Petition of Chicago Railways Company.

Gilbert E. Porter, for Guaranty Trust Co. of N. Y. William Burry, for Fidelity Trust Co. of Philadelphia. James C. Hutchins and Frank H. Scott, for Illinois Trust & Savings Bank et al. Frank H. McCulloch, for Merchants' Loan & Trust Co. William J. Calhoun, for North & West Chicago St. R. Co. W. W. Gurley and Arthur Dyrenforth, for Chicago Union Traction Co. Brainard Tolles, for Guaranty Trust Co. of N. Y. Noble B. Judah, for Northern Trust Co. et al. Colin C. H. Fyffe, for Central Trust Co. of N. Y. et al. John R. Montgomery and Louis E. Hart, for Equitable Trust Co. et al. Schuyler, Jamieson & Ettelson, for certain stock and bond holders. Newman, Northrup, Levinson & Becker, for A. G. Becker & Co. et al. Pam & Hurd, for Central Trust Co. of Ill. John A. Rose, for Chicago West Division Ry. Co. et al. Henry Crawford and Charles R. Aldrich, for certain holders of certificates of indebtedness.

GROSSCUP, Circuit Judge. Upon the coming down of the decision of the Circuit Court of Appeals, reversing the former order of this court, that turned over to the Chicago Railways Company the properties now in the hands of the court (158 Fed. 923), an ordinance was passed by the City Council of the City of Chicago, extending until February 1, 1908, the privilege of the Chicago Railways Company to accept the ordinance of February 11, 1907; it being provided, however, in such extension ordinance, that in the event that said ordinance of February 11, 1907, as extended by the ordinance of September 12, 1907, was not accepted within the time fixed, the Chicago City Railway Company and the Chicago City Railroad Company were required to comply with the obligations imposed upon them by the companion ordinance of February 11, 1907, to the Chicago City Railway Company, with respect to the streets covered by said ordinance of the same date to the Chicago Railways Company; that is that the Chicago City Railway Company would have the right and would be obligated to construct, maintain and operate a system of street railways in and upon the streets that otherwise would have been granted to the Chicago Railways Company.

Following this, the Chicago Railways Company presented to Judge Peter S. Grosscup, and Hon. John C. Gray, for their approval, a modified plan of reorganization and readjustment, which plan has been approved; the changes from the old plan being confined chiefly to the raising of the rate of interest of the new bonds to be issued for the old, from four and one-half to five per cent, and the issuing, to the holders of certificates of general indebtedness, of bonds of the new company, instead of the new company notes secured by collateral.

Concurrently with the adoption of this modified plan, suits have been begun, by the trustees under the mortgages, to foreclose the mortgages—both by original bill and cross bill—all now consolidated however, in the original cause. And, upon a showing that the several street car companies which own the lines leased to, and composing the system of Union Traction Company, and which are the mortgagors in the several mortgages, are insolvent, receivers have been appointed—the original receivership having been extended, for that purpose, over such lessor and mortgagor companies; in which foreclosure suits decrees for sale have now been entered.

The ordinance of February 11, 1907, embodied a purpose upon the part of the City of Chicago that the grant therein contained, to use the streets therein named, should go, not to any one of the old companies owning lines comprised in the Union Traction Company system, nor to a new company having no connection with the Union Traction Company, but to the Chicago Railways Company as a medium through which the interests now concerned in the Union Traction Company's system, might be given the opportunity, upon reorganization and readjustment in accordance with the conditions stated, to continue their street railway relations to the city. The relation, therefore, of the Chicago Railways Company to the several interests composing the Union Traction Company system, is not that of competitor or rival, but that of intermediary, through which

existing interests may continue to live. And this completely distinguishes the matter raised by the petition before the court, from the many cases arising between rival companies that have been brought to my attention.

Stripped of mere form, and reduced to its substance, the matter now before the court are these suits to foreclose the several mortgages upon the Union Traction system, and the decrees therein, the mortgagors being insolvent; and the petition before the court is a petition, pending such foreclosure, to turn over the existing property of such mortgagors, to the Chicago Railways Company, the medium through which alone the bondholders, the stockholders, the creditors, and all the interests of the Union Traction system can obtain a continued right to the use of the streets, so that the foreclosure, when it comes, will not be confined to a sale of the property as it exists, bereft of any right of the purchaser, to continue in the streets, but a sale of such property plus a right to the continued use of the streets, if such purchaser be the Chicago Railways Company. The petition, therefore, is clearly in the interest of the mortgagees and creditors in the foreclosure proceedings; giving, if granted, to the corpus of the mortgaged property a value that it would not have if the petition were denied. Indeed, unless the ordinance of February 11, 1907, be accepted, through the medium of the Chicago Railways Company, but in the real interest of all the interests embraced in the Union Traction system, so that the mortgaged property may be sold as a going concern, the foreclosure sale would result in very severe losses to the mortgagees.

That the granting of this petition may impair in some degree the mortgagors' present right to the use of the streets, and, in that way, affect to some extent some of the abstract legal rights of the mortgagees may be admitted. But all this is overbalanced, by the infinitely greater counter objection, that unless the petition is granted, the mortgagees' rights and advantages will be almost wholly destroyed; so that the question is not one of avoiding a stated disadvantage, but of choosing between two courses both of which have their disadvantages; and in such situation, where the disadvantage on the one hand is so clearly and distinctively greater than would be the disadvantage on the other, neither the power, nor the duty of the court to exercise fair business sense ought to be open to question.

It ought to be said in passing that the case made by this petition is legally different from the case made by the former petition, and the order thereon, reversed by the Circuit Court of Appeals. In that case the danger apprehended, that the property would be lost unless the ordinance of February 11, 1907, was accepted, however conclusive the reasons therefor were, rested in inference only; in this case the City Council, by the extension ordinance of September last, has made certain that event. In the former case, the proceeding before the court was that of a creditor only—the trustees of the bondholders and other lien holders being in, in invitum; in the present case the trustees of the bondholders have come into court, themselves invoking the jurisdiction of the court to foreclose their security. In the former case the order asked for was in the nature of an order preservative of the corpus of the property to be sold, but no sale had yet been asked by those who had a right to foreclose. In this case foreclosure is asked;

is asked by those who have the right to ask it; and is ordered by the decree of the court. The order prayed for, therefore, is not only preservative of the corpus, but strictly pertinent to the foreclosure proceedings now pending.

To sum up the matter in a sentence, the ordinance of February 11, 1907, is a grant, by the city, in the interest of the bondholders, creditors, and stockholders of the old companies, as their interests are re-adjusted, of a settled "right of way" for the future; and this petition, as an adjunct to the suit to foreclose, is to so unite such right of way with existing tangible property that the whole will constitute a going street railway property, immensely more valuable as the corpus on which to rest the bonds and debts, and a foreclosure sale, than if these different elements remained apart. But whether any bondholder or creditor shall accept this plan of union is here, as it was in the August order, his own question; for he remains at liberty either to accept his aliquot part in the elements thus united, or to reject it, and look for his return in that separate element on which his security otherwise rests.

The order prayed for will be entered.

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KALLAS v. WORTH BROS. CO.

(Circuit Court, E. D. Pennsylvania. January 29, 1908.)

No. 65.

TRIAL—TAKING CASE FROM JURY—QUESTIONS OF FACT.

Where a case is close upon the facts, it should ordinarily not be determined by the court, but by the jury under appropriate instructions.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 46, Trial, §§ 318-345.]

At Law. On motion by defendant for judgment on reserved point notwithstanding the verdict.

Goodman & Mitchell, for plaintiff.

Thomas Leaming, for defendant.

J. B. McPHERSON, District Judge. It may be conceded that this is a close case, but the concession does not necessarily involve the conclusion that the plaintiff should not recover. On the contrary, a close case upon the facts—that is, a dispute which causes the mind to doubt concerning the inferences that should be drawn—must ordinarily be determined, not by the court but by the jury under appropriate instructions. No complaint is made by either party about the legal rules that were laid down in the charge, and the sole question now is, whether the plaintiff's claim to recover should have been submitted at all. Upon this question I can only say that, while a reconsideration of the testimony has not removed the hesitation that I felt at the trial concerning the proper course to be taken, I cannot see my way to the ruling that a binding instruction in favor of the defendant would have been justified. Of course, if such an instruction should have been given, the pending motion should prevail.

Accordingly judgment notwithstanding the verdict cannot be entered, and to this refusal of the motion an exception is sealed at the defendant's request.

MEMORANDUM DECISIONS.

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ALABAMA NAT. BANK OF BIRMINGHAM et al. v. MASSASSOIT-POCASSET NAT. BANK. (Circuit Court of Appeals, Fifth Circuit. March 10, 1908. On Rehearing, April 2, 1908.) No. 1,726. Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Alabama. Paul Speake, Lawrence Cooper, and Joseph W. Carroll, for appellants. R. W. Walker, for appellee. Before McCORMICK, Circuit Judge, and NEWMAN and BURNS, District Judges.

PER CURIAM. The facts in this case are fully set out, and the conclusion reached by the Circuit Court, as well as the reasons therefor, fully stated, in the opinion filed by Circuit Judge Shelby in disposing of the case, and reported in the case of Farmers' Loan & Trust Co. v. Madison Manufacturing Co., 153 Fed. 310. We concur in the conclusion there reached, as well as in the reasons upon which the conclusion is based. Therefore the judgment of the court below will be affirmed.

On Application for Rehearing.

The judges before whom this case was heard, have considered the application for rehearing; and being of the opinion that they decided the case correctly, the motion for rehearing is denied.

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C. B. RICHARD & CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. December 4, 1907.) No. 80 (4,267). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see 151 Fed. 954, affirming a decision by the Board of United States General Appraisers. Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers. D. Frank Lloyd, Asst. U. S. Atty. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decision of Circuit Court affirmed.

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THE CZARINA. (Circuit Court of Appeals, Second Circuit. February 11, 1908.) No. 152. Appeal from the District Court of the United States for the Southern District of New York. Nicoll, Anable & Lindsay (A. R. Watson, of counsel), for appellant. Hyland & Zabriskie, for appellee. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Decree of District Court (152 Fed. 297) affirmed, with interest and costs.

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GARTNER, SONS & CO. v. UNITED STATES. (Circuit Court of Appeals, Second Circuit. March 10, 1908.) No. 169 (4,457). Appeal from the Circuit Court of the United States for the Southern District of New York. For decision below, see 154 Fed. 957, affirming a decision by the Board of United States General Appraisers. Hatch & Clute (Walter F. Welch, of counsel), for importers. J. Osgood Nichols, Asst. U. S. Atty. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decision of Circuit Court affirmed, on opinion of Judge Martin.

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GORDON v. DILLINGHAM. (Circuit Court of Appeals, Fifth Circuit. February 25, 1908.) No. 1,672. Appeal from the Circuit Court of the United

States for the Southern District of Texas. W. D. Gordon, for appellant. Floyd McGown, L. G. Denman, and Thos. H. Franklin, for appellee. Before PARDEE, Circuit Judge, and NEWMAN, District Judge.

PER CURIAM. The decree appealed from is affirmed, on the authority of *White v. Ewing*, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67. See, also, *Bottom v. Ry. B. & L. Ass'n (C. C.)* 123 Fed. 745.

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In re IROQUOIS HOTEL & APARTMENT CO. (Circuit Court of Appeals, Second Circuit. January 20, 1908.) Appeal from the District Court of the United States for the Southern District of New York. Motion to dismiss appeal. Walter Large (Frank P. Prichard, of counsel), for complainant. Edmund Wetmore (William B. Hale, of counsel), for appellee. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. This cause is distinguished from *Elliott v. Toepfner*, 187 U. S. 327, 23 Sup. Ct. 133, 47 L. Ed. 200, where the jury found upon issues of fact which the act provides might be sent to them. Here the court decided issues which could not under the act be sent to the jury. The proper course would have been to dispose of the jury trial by drawing a juror (or otherwise) and then to decide the motion; but we think that the disposition made of the cause was substantially equivalent. The only question reviewable here by appeal is whether or not the bankrupt was engaged principally in mercantile pursuits. Motion denied.

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J. A. SCRIVEN CO. v. MORRIS et al. (Circuit Court of Appeals, Fourth Circuit. February 15, 1908.) No. 761. Appeal from the Circuit Court of the United States for the District of Maryland, at Baltimore. Arthur v. Briesen (George W. Case, Jr., on the brief), for appellant. W. Calvin Chesnut (Gans & Haman, on the brief), for appellees. Before PRITCHARD, Circuit Judge, and McDOWELL and DAYTON, District Judges.

PER CURIAM. We have carefully considered the questions raised by the appellant on appeal in this cause, and are of opinion that the same are without merit. The learned judge who tried the cause below wrote a carefully considered opinion, reported in 154 Fed. 914, in which we fully concur. The judgment of the lower court is therefore affirmed.

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KUHN v. FAIRMONT COAL CO. (Circuit Court of Appeals, Fourth Circuit. December 20, 1907.) No. 747. In Error to the Circuit Court of the United States for the Northern District of West Virginia, at Clarksburg. For opinion below, see 152 Fed. 1013. Homer W. Williams and Harvey W. Harmer, for plaintiff in error. Z. T. Vinson, Reese Blizzard, John Bassel, and E. A. Brannon, for defendant in error. No opinion. Certified copy of certificate of questions and propositions of law transmitted to the Supreme Court of the United States.

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LEEDS v. HILLS. (Circuit Court of Appeals, First Circuit. January 14, 1908.) No. 743. Appeal from the District Court of the United States for the District of Maine. Henry M. Earle, for appellant. Grosvenor Calkins (George E. Hills, on the brief), for appellee. Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PER CURIAM. We are all satisfied with the conclusion of the District Court (149 Fed. 878), and with the reasons given therefor by the learned judge of that court; and we think we need add nothing thereto. The decree of the District Court is affirmed, with interest, and the appellee recovers his costs of appeal.

LOWDON et al. v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. February 25, 1908.) No. 1,715. In Error to the District Court of the United States for the Northern District of Texas. See 149 Fed. 673, 79 C. C. A. 361. J. C. Muse, S. P. Hardwicke, W. L. Crawford, Geo. E. Miller, and H. B. Birmingham, for plaintiffs in error. Wm. H. Atwell, U. S. Atty. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. A majority of the judges are of opinion that there is no reversible error in the record. The judgment of the District Court is therefore affirmed.

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MANKIN et al. v. UNITED STATES, for Use of LUDOWICI-CALADON CO. et al. (Circuit Court of Appeals, Fifth Circuit. March 31, 1908.) No. 1,762. In Error to the Circuit Court of the United States for the Southern District of Mississippi. O. W. Catchings and T. C. Catchings, for plaintiffs in error. Gerard Brandon, for defendants in error. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. The judgment of the Circuit Court is affirmed, on authority of *Hill v. American Surety Company of New York*, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437.

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STEEL PROTECTED CONCRETE CO. et al. v. CENTRAL IMPROVEMENT & CONTRACTING CO. (Circuit Court of Appeals, Fifth Circuit. March 31, 1908.) No. 1,757. Appeal from the Circuit Court of the United States for the Eastern District of Louisiana. J. D. Rouse, Wm. Grant, W. B. Grant, and D. Walter Brown, for appellants. J. R. Beckwith, for appellee. Before PARDEE, McCORMICK, and SHELBY, Circuit Judges.

PER CURIAM. Our examination of the evidence brings us to the same conclusion as that reached by the trial court (155 Fed. 279) and, for the reasons given by Judge Saunders, the decree dismissing the bill is affirmed.

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THE MARTHA E. WALLACE. (Circuit Court of Appeals, Second Circuit. March 10, 1908.) No. 156. Appeal from the District Court of the United States for the Southern District of New York. Carl Schurz Petrasch (W. S. Montgomery, Carl Schurz Petrasch, and Charles E. Travis, of counsel), for appellant. Alexander & Ash (Mark Ash and William Ash, of counsel), for appellee. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decree of District Court (151 Fed. 353) affirmed, with interest and costs.

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MORSE DRY DOCK & REPAIR CO. v. MUNSON S. S. CO. (Circuit Court of Appeals, Second Circuit. February 17, 1908.) No. 186. Appeal from the District Court of the United States for the Southern District of New York. Wheeler, Cortis & Haight, for appellant. Armstrong, Brown & Boland, for appellee. Before LACOMBE, COXE, and WARD, Circuit Judges.

PER CURIAM. We think the district judge was correct in holding that the action was upon an account stated; his reasons for so holding being fully set out in the opinion. 155 Fed. 150. As the appeal has deprived the appellee of the use of a large sum of money, a great part of which was concededly due to it, we think the decree should be affirmed, with interest and costs, and 5 per cent. damages.

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OLD NICK WILLIAMS CO. v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. January 2, 1908.) No. 709. In Error to the District Court of the United States for the Western District of North Carolina, at Greensboro. Charles A. Moore, E. T. Cansler, William P. Bynum, Jr., and J.



E. Alexander, for plaintiff in error. A. E. Holton, U. S. Atty. No opinion. Writ of certiorari of Supreme Court of the United States produced, and cause transmitted to the Supreme Court. See 152 Fed. 925, 82 C. C. A. 73.

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UNITED STATES v. LA MANNA, AZEMA & FARNAN. SAME v. AUSTIN, NICHOLS & CO. (Circuit Court of Appeals, Second Circuit. March 10, 1908.) Nos. 167, 168 (4622, 4681). Appeals from the Circuit Court of the United States for the Southern District of New York. For decision below in the La Manna Case, see 154 Fed. 927. There was no opinion below in the Austin Case. D. Frank Lloyd, Asst. U. S. Atty. Hatch & Clute (Walter F. Welch, of counsel), for Austin, Nichols & Co. Brooks & Brooks (Frederick W. Brooks, of counsel), for La Manna, Azema & Farnan. Before LACOMBE, WARD, and NOYES, Circuit Judges.

PER CURIAM. Decisions of Circuit Court affirmed.

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UNITED STATES FIDELITY & GUARANTY CO. v. UNITED STATES. (Circuit Court of Appeals, Fourth Circuit. December 28, 1907.) No. 778. In Error to the Circuit Court of the United States for the District of Maryland, at Baltimore. For opinion below, see 151 Fed. 534. J. Kemp Bartlett and L. B. Keene Claggett, for plaintiff in error. John C. Rose, U. S. Atty. No opinion. Writ of error dismissed under rule 20 (150 Fed. xxxi, 79 C. C. A. xxxi); costs to be paid by plaintiff in error.

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VACCARO BROS. & CO. et al. v. WATERS et al. (Circuit Court of Appeals, Fifth Circuit. January 28, 1908.) No. 1,676. Appeal from the District Court of the United States for the Eastern District of Louisiana. J. L. Warren Woodville, W. W. Howe, and Charles P. Cocke, for appellants. H. E. Upton and John R. Upton, for appellees. Before PARDEE and McCORMICK, Circuit Judges.

PER CURIAM. Under the circumstances shown by the record it seems that Waters and his co-libelants had a right to negotiate for, if not absolutely demand, their discharge. The judgment of the District Court is affirmed.

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VAN EMON et al. v. VEAL. (Circuit Court of Appeals, Ninth Circuit. March 7, 1908.) No. 1,524. Petition for Revision of Proceedings of the District Court of the United States for the District of Oregon, in Bankruptcy. For opinion below, see 157 Fed. 243. Richard W. Montague and Johnson & Beckwith, for petitioners. Snook & Church, W. H. Fowler, and George Clark, for respondent. Before GILBERT, ROSS, and MORROW, Circuit Judges.

PER CURIAM. This is an appeal from an order of the District Court sustaining a demurrer to a petition in bankruptcy and dismissing the same. We have carefully considered the question involved, and find no error in the judgment. Our views are fully expressed in the opinion of the District Court filed in the court below on November 18, 1907, and we adopt the same as the opinion of this court. The judgment is affirmed.

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VINDICATOR CONSOL. GOLD MINING CO. v. FRANKFORT MARINE ACCIDENT & PLATE GLASS INS. CO. FRANKFORT MARINE ACCIDENT & PLATE GLASS INS. CO. v. VINDICATOR CONSOL. GOLD MINING CO. (Circuit Court of Appeals, Eighth Circuit. January 28, 1908.) Nos. 2,682, 2,696. In Error to the Circuit Court of the United States for the Dis-

trict of Colorado. James J. Banks (Charles F. Potter, on the brief), for Vindicator Consol. Gold Mining Co. Charles R. Brock (Milton Smith, on the brief), for Frankfort Marine Accident & Plate Glass Ins. Co. Before SANBORN and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PER CURIAM. The facts in these cases present the same questions of law which were decided by this court in the case of Maryland Casualty Company of Baltimore, Maryland, v. Omaha Electric Light & Power Company (November 6, 1907) 157 Fed. 514; and the judgment herein is affirmed, upon the authority of that case.

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WEEMS STEAMBOAT CO. OF BALTIMORE CITY v. PEOPLE'S STEAMBOAT CO. et al. (Circuit Court of Appeals, Fourth Circuit. October 29, 1907.) No. 662. Appeal from the Circuit Court of the United States for the Eastern District of Virginia, at Richmond. George Weems Williams and St. George R. Fitzhugh, for appellant. Williams D. Carter, for appellees. No opinion. Writ of certiorari of the Supreme Court of the United States produced, and cause transmitted to the Supreme Court. See (C. C.) 141 Fed. 454; 152 Fed. 1022, 82 C. C. A. 276.

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THE WERDENFELS. THE TRANSFER NO. 11. (Circuit Court of Appeals, Second Circuit. March 10, 1908.) Nos. 188, 189. Appeals from the District Court of the United States for the Southern District of New York. James J. Macklin, William Greenough, and La Roy S. Gove, for appellant. Wing, Putnam & Burlingham, and Charles C. Burlingham, for appellee. Before LACOMBE, COXE, and NOYES, Circuit Judges.

PER CURIAM. Decree of District Court (150 Fed. 400) affirmed, with interest and costs.

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JONES v. BUSH et al. (Circuit Court, E. D. Pennsylvania. March 24, 1908.) No. 71. Motion for New Trial. John Kent Kane and Charles S. Wesley, for plaintiff. J. Claude Bedford, for defendants.

J. B. McPHERSON, District Judge. If I could see any proper way to mitigate the hardship of this verdict, I should be glad to adopt it; but, as the questions were purely of fact and the evidence was fairly conflicting, the decision of the jury, especially after three trials, must now be accepted. It was certainly true that in strictness of logic the plaintiff was entitled either to his full claim or to nothing at all, and the amount of the verdict was, therefore, justified; but I may say frankly that I should have been better satisfied if the jury had cast logic aside, and had awarded, say, half the claim, instead of the whole. They did not choose to do this, however, and after a good deal of hesitation I cannot discover a sufficient reason for disregarding their finding and enforcing my individual view of what would have been a fair settlement of this prolonged controversy. The motion for a new trial is refused.